

1961

Proceedings of the Nebraska State Bar Association House of Delegates Meeting, 1961

Hale McCown

Nebraska State Bar Association, president

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PRESIDENT HALE McCOWN

1961 OFFICERS OF THE
NEBRASKA STATE BAR ASSOCIATION

President

HALE McCOWN
Beatrice

President Elect

RALPH E. SVOBODA
Omaha

Chairman of the House of Delegates

HERMAN GINSBURG
Lincoln

Secretary-Treasurer

GEORGE H. TURNER
Lincoln

EXECUTIVE COUNCIL

Hale McCown	Beatrice
Ralph E. Svoboda	Omaha
Herman Ginsburg	Lincoln
Charles F. Adams	Aurora
James F. Begley	Plattsmouth
Thomas F. Colfer	McCook
Alfred G. Ellick	Omaha
John R. Fike	Omaha
Clarence E. Haley	Hartington
Carl G. Humphrey	Mullen
Villiam H. Lamme	Fremont
L. Russell Mattson	Lincoln
Wavel A. Wright	Lincoln

HOUSE OF DELEGATES

Herman Ginsburg, *Chairman* Lincoln

EXECUTIVE COUNCIL MEMBERS

Hale McCown	Beatrice
Ralph E. Svoboda	Omaha
Charles F. Adams	Aurora
James F. Begley	Plattsmouth
Thomas F. Colfer	McCook

Alfred G. Ellick	Omaha
John R. Fike	Omaha
Clarence E. Haley	Hartington
Carl G. Humphrey	Mullen
William H. Lamme	Fremont
C. Russell Mattson	Lincoln
Flavel A. Wright	Lincoln

SECTION DELEGATES

F. L. Pierce	Grand Island
James A. Lane	Ogallala
Warren K. Dalton	Lincoln
M. M. Maupin	North Platte
Bert L. Overcash	Lincoln
Robert D. Moodie	West Point

EX OFFICIO MEMBER

John J. Wilson	Lincoln
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ELECTED DELEGATES

FIRST DISTRICT:

Dwight Griffiths	Auburn
------------------------	--------

SECOND DISTRICT:

James F. Begley	Plattsmouth
-----------------------	-------------

THIRD DISTRICT:

James N. Ackerman	Lincoln
Chauncey E. Barney	Lincoln
Thomas M. Davies	Lincoln
Charles E. Oldfather	Lincoln

FOURTH DISTRICT:

Milton A. Abrahams	Omaha
Robert K. Adams	Omaha
R. M. Crossman, Jr.	Omaha
John W. Delehant, Jr.	Omaha
James J. Fitzgerald, Jr.	Omaha
Peter E. Marchetti	Omaha
Alexander McKie, Jr.	Omaha
Edson Smith	Omaha
Rudolph Tesar	Omaha

FIFTH DISTRICT:

Ivan BlevensSeward
Alex MillsOsceola

SIXTH DISTRICT:

John M. Brower Fullerton
Vance E. LeiningerColumbus

SEVENTH DISTRICT:

Robert H. Downing Superior

EIGHTH DISTRICT:

Mark J. RyanSouth Sioux City

NINTH DISTRICT:

P. M. MoodieWest Point
Elmer C. RakowNeligh

TENTH DISTRICT:

Frederic R. IronsHastings
William H. MeierMinden

ELEVENTH DISTRICT:

Kenneth H. ElsonGrand Island
E. L. VogeltanzOrd

TWELFTH DISTRICT:

Ward W. Minor Kearney

THIRTEENTH DISTRICT:

Bernard B. Smith Lexington
Ivan Van Steenberg Kimball

FOURTEENTH DISTRICT:

Hugh W. EisenhartCambridge

FIFTEENTH DISTRICT:

Samuel C. Ely Ainsworth

SIXTEENTH DISTRICT:

Daniel Stubbs Alliance

SEVENTEENTH DISTRICT:

Floyd E. WrightScottsbluff

EIGHTEENTH DISTRICT:

Dean R. SackettBeatrice

NEBRASKA STATE BAR ASSOCIATION

HOUSE OF DELEGATES

WEDNESDAY MORNING SESSION

November 1, 1961

The first session of the House of Delegates at the sixty-second annual meeting of the Nebraska State Bar Association was called to order at 9:45 o'clock by the Chairman of the House, Herman Ginsburg.

CHAIRMAN GINSBURG: The 1961 session of the House of Delegates of the Nebraska State Bar Association will please come to order. I will have the Secretary call the roll.

[Roll call by the Secretary.]

SECRETARY TURNER: There is a quorum present.

CHAIRMAN GINSBURG: A quorum being present this House is declared duly convened and opened for the transaction of business. You have all received a copy of the printed program which sets out the calendar as the order of business. There has been a request that several changes be made, namely, that No. 18 be the first committee report; and that No. 14 be the second report; and the other committees be changed accordingly.

The Chair will at this time entertain a motion to approve the calendar as the order of business with the changes I have just announced. May I hear such a motion?

C. RUSSELL MATTSON, Lincoln: I so move.

[The motion was duly seconded.]

CHAIRMAN GINSBURG: It has been moved and seconded that the calendar be approved as the order of business. Carried.

The first order of business shown by our calendar, then, is the statement by the President of the Association, and I present to you Mr. Hale McCown.

STATEMENT OF PRESIDENT

Hale McCown

The report of the Executive Council, while it is scheduled for presentation to the convention tomorrow morning, I felt

should be presented to this House of Delegates in order that you will have a brief thumbnail review of some of the things that have been done by the Executive Council which, as you know, acts during the year in your place, so to speak.

The Council met seven times during the past year, which I think perhaps is somewhat of a record for the Executive Council. They authorized, and there was created, a special committee on Judicial Selection and the Merit Plan for the selection of judges which, as you know, was successful in finally getting a bill through the Legislature, which I think has probably been the greatest accomplishment of this year.

The continuation of the Legislative Bill Digest Service was authorized and carried out through George Turner's office again during the legislative session.

The Council has approved some minor changes in the health and accident coverage of the group accident and health policy, and also approved a new group major medical policy. Incidentally, Diers & Company informed me yesterday that the major medical group is still approximately twenty-five members short of having the minimum number for initial coverage. They are anxious, and I think all of you ought to review the major medical policy which has been presented. I think it is a very fine one. I think you will be satisfied with it.

The Council during the year devoted considerable time to some research and review in connection with the case of *Lathrop v. Donohue*, which most of you probably saw decided by the Supreme Court of the United States in January, which upheld the validity of integrated bar associations. It involved the Wisconsin State Bar but it upheld the validity of all integrated bar associations such as our own.

Incidentally, in January of this year Judge Spencer resigned from the Council and was replaced by James F. Begley of Plattsmouth.

One thing which will perhaps require action by this House was the action taken by the Executive Council last year in authorizing a midyear meeting of the Association, which was held in Lincoln, as you recall, on June 2. The reason for it was that, under our old practice, at the time of the annual convention each section had programs, elected its own officers, etc. Commencing last year, the program at the annual convention has been presented by only one section. As a result, the other sections do not have an opportunity in many instances to meet, do not have an opportunity for a program, and in some instances

do not have a real opportunity to transact the business of the section.

The Council therefore authorized this midyear meeting on a trial basis. If it is to be continued on a permanent basis, it will, I think, require a change in the bylaws of this Association, which this House is charged with the responsibility for changing if it feels it appropriate that they be changed. If that plan is to be continued, I suggest that it be added as one of the items of the order of business of this session. It does provide an opportunity for the sections and committees to organize and get the business of the sections and committees transacted when they do not have a thorough opportunity to do so at the annual convention.

Your Council approved a new formal welcoming ceremony for the new lawyers admitted to the bar, and this year the ceremony was held immediately following their admission. At that time the President of the Association welcomed each individual new lawyer, presented each of them with a copy of the *Nebraska Lawyers' Desk Book*. We think it is a very good policy and we hope that it will be continued.

Also, the Council has approved a proposal of the Junior Bar Section to publish some 4,000 pamphlets describing the career of the lawyer for use in high school Career Day programs. As you know these Career Day programs have become rather extensive over the State of Nebraska, and each profession or occupation has an opportunity to present the picture of its own profession. The Council has authorized this publication of about 4,000 copies. We are joining with the law schools and with a couple of other organizations in helping with the financing of that publication.

The continuation of the law school student placement service, for graduating students of both Nebraska and Creighton Law Schools, in our *State Bar Journal* in the spring has been authorized and approved by the Council.

Those are things I think you ought to know about the action taken by your Executive Council during the past year.

May I welcome all of you, thank you for your presence here, and assure you that the affairs and the functions of this Association are carried on by this House. It is your responsibility now to proceed with the essential business of this organization.

I want to suggest, in order that Herman will not have to chastise you individually, that each of you please be prompt in your attendance, and may I suggest also that you recall particularly that this House reconvenes Friday at 4:00 o'clock for the completion of your sessions here. It is essential, I think, that a

quorum be present at that time and I suggest that all of you keep that in mind on your schedules for Friday. Thank you very much.

CHAIRMAN GINSBURG: The statement by the President of the Association, requiring no action by the House at this time, will be ordered received and placed on file.

The next order of business is the report of the Secretary-Treasurer, Mr. George Turner.

REPORT OF SECRETARY-TREASURER

George H. Turner

Mr. Chairman, Gentlemen of the House: The Secretary-Treasurer's report usually consists only of a report as to the finances of the Association. You may recall that a year ago the Executive Council provided that the fiscal year of the Association should end August 31, the reason for that being that, when we closed it the first of the month ahead of an annual meeting, it put the auditors under great stress in getting the report out. At the auditor's request it was changed to close August 31, giving them at least a month to complete their audit.

Their audit has been completed. Peat, Marwick, Mitchell & Company of Lincoln report that they have examined the statement of cash receipts and disbursements of the Nebraska State Bar Association for the year ended August 31, 1961. "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.

"The accounts of the association reported on herein are maintained on the cash receipts and disbursements basis of accounting; i.e., accounts are not maintained for assets (other than cash) or liabilities to reflect the financial position of the Nebraska State Bar Association.

"In our opinion, the accompanying statement of cash receipts and disbursements of the Nebraska State Bar Association presents fairly the recorded cash transactions for the year ended August 31, 1961, and the cash balance at that date, applied on a cash basis consistent with that of the preceding period. Also the accompanying schedule of cash receipts and disbursements of the Daniel J. Gross Nebraska State Bar Association Welfare

and Assistance Fund for the year ended August 31, 1961, is presented for analysis purposes only, as such funds, managed by a board of trustees appointed by the president of the Nebraska State Bar Association, have not been audited by us."

Then they follow with a detailed breakdown of all cash receipts. The only one I personally differ with, and I don't know why they listed it as such, but during the interim between annual meetings, whenever a sufficient amount of money accumulates that doesn't seem to be needed for current operations, by direction of the Executive Council I invest it in ninety-day Treasury bills which produce some revenue, and of course as those bills come due, if the money is needed it is placed back in the bank account. The auditors, for some reason that I don't understand, treat the revenue or proceeds from the repayment of those Treasury bills as an item of income. Of course they show a corresponding item of expense to balance it off, but to me at least it makes the report of receipts of the Association out of proportion, and figuring on that basis they show receipts of \$56,672.38.

Then they very carefully itemize all disbursements. The major ones are salaries, \$6,850; postage and express \$1,619; officers expenses, \$1,253; expense of Executive Council meetings, \$2,389.10; publishing the *Nebraska Law Review*, which of course includes the publication of the proceedings of each annual meeting—I think most of you are aware that the Bar Association pays one-third of the cost of three issues and the full cost of the January issue which contains the proceedings and contains nothing with relation to the law school—that runs \$4,823.62; the cost of the 1961 Bill Digest, \$3,037.19; the net cost of publishing the *Nebraska State Bar Association Journal*, after crediting revenue from advertising, \$1,180.75; the public service program, \$4,895.19; meetings of the House of Delegates, the American Bar, \$7,660.31—bear in mind, of course, that that includes two years, August of last year and August of this year—the cost of our annual meeting, less reimbursements and the revenue from exhibit space, \$4,564.35; the cost of the annual Tax Institute last year, \$2,109.49; the expense of auditing, \$225.

I have omitted a lot of the very minor items but it shows a balance at the end of the audit period of \$4,738.82. Of course, the September operating expenses and those thus far into October have been paid out of that, but the dues for 1962 are being received. We have as of today a bank account of about \$16,000.

This report, of course, is submitted to the Executive Council for detailed examination and they either approve or reject it.

I want to call your particular attention to the apples that are at the rear of this room. There is a very fine lawyer by the name of Elias Wright who graduated from the University of Nebraska Law School in the class of 1903. He has practiced very successfully in Seattle for a great many years, and he was perfectly intrigued back in 1937 and '38, when this Bar was integrated, that he could enroll as an inactive member and thus preserve his relationship with the bar of Nebraska. I have about two or three nice letters from him every year. He is very proud of being a Nebraska lawyer.

He wrote me about two weeks ago asking the approximate attendance at our annual meeting. He hoped to be here, as he was about ten years ago. He found he couldn't, so much to my surprise I received a letter from him saying that he was sending ten boxes of Delicious apples for the lawyers attending this meeting. There is one box at the rear of this room, which I hope you will all avail yourselves of, and they will also be on the mezzanine tomorrow at the opening of the annual meeting.

CHAIRMAN GINSBURG: Are there any questions concerning the Secretary-Treasurer's report? If not, the same will be ordered received and placed on file.

The next order of business is the introduction of resolutions. Are there any resolutions? The Chair sees none.

May I interpolate at this point since there are no resolutions apparently to be introduced? Would the House care, at this time, to consider the recommendation made by President McCown concerning the advisability of the amendment of the by-laws relating to the creation of a midyear meeting? Does anyone care to be heard on that?

I see no one and I hear no one so we will pass on to the next order of business, which will be the report of the Committee on Revision of Corporation Law.

[The report of the Committee on Revision of Corporation Law follows.]

Report of the Special Committee on Revision of Corporation Law

This Committee is pleased to report that progress has been made this year in carrying out its announced program.

The legislative recommendations of this Committee included in the 1960 report to this Association were accomplished at the

last session of the Legislature. This new legislation comprises three categories:

First. There was enacted permanent type legislation designed to provide automatic savings clauses continuing the existence of corporations whose charter statutes are repealed. In the case of corporations for profit, L. B. 74 will serve this purpose. In the case of corporations not for profit, L. B. 64 will be applicable. The enactment of these statutes will eliminate the necessity for repeated amendment of Section 21-1156 (profit corporations) or 21-1990 (non-profit corporations), whenever in the future any corporate statutes are repealed.

As suggested in the 1960 annual report of this Committee, the enactment in 1959 of a comprehensive non-profit corporation act has rendered obsolete and useless many special acts in this field. The reports of this Committee have indicated general satisfaction with the use of this new non-profit act.

Second. The Legislature repealed the following special statutes as to corporations:

Sections 21-1601 to 21-1605 relating to Union Depot Companies (L. B. 63)

Sections 21-901 to 21-914 relating to professional and similar associations (L. B. 64)

Sections 21-816 to 21-830 relating to Protestant Episcopal churches (L. B. 66)

Sections 21-701 to 21-731 relating to educational institutions (L. B. 67)

Sections 21-601 to 21-607 relating to charitable societies (L. B. 68)

Sections 21-501 to 21-504 relating to real estate corporations (L. B. 69)

Sections 21-401 to 21-408 relating to bridge companies (L. B. 70)

Third. The Legislature clarified certain corporation statutes as recommended by this Committee, including:

Amendment of existing religious society Section 21-834 to make it certain that organizations electing to come under the new non-profit act will not have to comply in the future with requirements of the old law (L. B. 65).

Amendment of Section 21-1209 relating to change of address of an agent of a foreign corporation by providing an alternate method covering multiple companies in one filing, similar to that previously available in the domestic corporation statute (L. B. 72).

Amendment of Section 21-1903 of the 1959 non-profit act to make it clear that "fraternal" and "charitable" corporations are subject thereto (L. B. 61).

In addition to the legislation recommended by this Committee, there was also some corrective legislation proposed by the Revisor of Statutes to harmonize existing legislation. See L. B. 13 and L. B. 72.

Pursuant to the recommendation of this Committee in 1960, approved by the Association, this Committee has begun the task of revising the business corporation act of Nebraska upon the pattern of the Model Business Corporation Act proposed by the Committee. This model act was prepared by the Committee on Corporation Laws (Section of Corporation, Banking and Business Law) of the American Bar Association. A number of states have followed this model act in revising their corporation laws. The most recent of such states include Wyoming and Utah. Since 1951 Alaska, Colorado, the District of Columbia, Iowa, North Dakota, Oregon, Texas, Virginia and Wisconsin have adopted new corporation laws based substantially on the provisions of the model act. Other states have also adopted new statutes which reflect, to a greater or lesser extent, the influence of the model act.

In carrying out this assignment, a number of subcommittees were created within the general committee dealing with portions of the model act. Each of these subcommittees has now made a report to the full committee, and the full committee will proceed to consider and determine what should be recommended for a new act. It is contemplated that the first report of the Committee in this regard will be submitted to the bar and the public for comment and suggestions. The Committee will make every effort to complete its work so that the next legislative session may consider the adoption of a revised business corporation act.

It is recommended that this Association continue this Committee until the program outlined herein can be completed.

Bert L. Overcash, Chairman
William J. Baird
Robert G. Fraser
Warren G. Johnson
Roland A. Luedtke
Fred H. Richards, Jr.
Francis V. Robinson

[The report of the Committee was adopted.]

CHAIRMAN GINSBURG: The next order of business is the report of the Committee on Legal Aid by Mr. William D. Blue.

[The report of the Committee on Legal Aid follows.]

Report of the Committee on Legal Aid

Your Committee on Legal Aid respectfully submits the following report:

During the past year the Legal Aid Clinic has been functioning in Lincoln at offices donated by the University of Nebraska College of Law. The procedure has been the same as it has been in the past; the practicing attorney operates the clinic two days a week and a senior law student assists him in the office. When warranted, a case will be assigned to an attorney in Lincoln who is a member of the Barristers Club. This attorney will be assisted by the senior law student. During the past school year, the Legal Aid Clinic held interviews in 188 cases and accepted 65 of these for legal aid services. Attorneys of Lincoln were assigned 18 of these cases and 50 cases were handled by the attorney and the student in the office.

The Clinic is jointly financed by the Lincoln Bar Association and the Community Chest.

The Cheyenne County Legal Aid Bureau at Sidney is operated by the Cheyenne County Bar Association. During the past year there were six cases in Cheyenne County. In all these cases, the indigent clients were seeking advice on divorce matters. Petitions were filed in three of the cases, but only one divorce was granted.

The Legal Aid Clinic at Omaha was discontinued in September, 1960, primarily because it was found that a law school clinic, without full-time direction by a paid attorney, was incapable of meeting the needs of legal aid in a community of more than 300,000 people. After conferences with representatives of the National Legal Aid and Defenders Association, a study of the needs for legal aid in Omaha has been undertaken under the auspices of the Omaha Community Services and the Omaha Bar Association.

Your committee is of the opinion that the two legal aid clinics in Nebraska are operating satisfactorily; however, it is urged that local bar associations in areas with no legal aid facilities consider establishing some procedure for assisting indigents with their legal problems. It would seem that legal aid services would be of urgent necessity in a city of the size of Omaha, Nebraska.

William D. Blue, Chairman
Robert R. Camp

Kenneth H. Elson
Melvin K. Kammerlohr
Winsor C. Moore
John E. Wenstrand

[The report of the Committee was received and filed.]

CHAIRMAN GINSBURG: The next order of business is the report of the Committee on Administrative Agencies, Mr. Edson Smith, Chairman.

Report of the Committee on Administrative Agencies

Mr. Chairman, Gentlemen: On behalf of the Committee on Administrative Agencies I have not submitted any written report, primarily because, at the time the program went to print, I was not able to submit a report which was worth printing, and this is still true.

Our Committee, however, did meet once during this year and considered some suggestions that had been made by outsiders for our consideration, including one suggestion made by a member of the State Railway Commission that the Administrative Procedure Act be repealed as applied to the Railway Commission. We found no merit in the suggestions that were made to us and therefore we had no recommendations to make with reference to any of those suggestions.

We did have pending, left over from last year, the recommendation which we made in that report, which is as follows:

"This Committee recommends that legislation be prepared and supported by this Association to establish a Nebraska State Register comparable to the Federal Register and to require that all state administrative agencies publish therein notices of all proposed rule-making and of other proceedings where the number of persons who may be affected is such as to make personal notice impracticable."

Last year this House considered the report we made then to be not sufficiently complete or sufficiently implemented to enable this House to adopt that recommendation; and the recommendation was referred back to the Committee for further action.

The Committee has accumulated a substantial amount of data and reference matter from other states which we have been attempting to pass around among the members of the Committee, but we have not succeeded in working through the material we have or applying it to our Nebraska state situation sufficiently to be prepared to make a satisfactory report on the subject.

So the only recommendation I have to make at the present time is the recommendation that the Committee be continued, and I will move that the Special Committee on Administrative Agencies be continued.

Edson Smith, Chairman

[The report of the Committee was adopted.]

CHAIRMAN GINSBURG: The next order of business is the report of the Committee on American Citizenship, which will be presented by Mr. James Begley.

[The report of the Committee on American Citizenship follows.]

Report of the Committee on American Citizenship

During 1960, the Committee on American Citizenship prepared sample statements of facts and pleadings to serve as the foundation for approved trial demonstrations throughout Nebraska.

This year, over fifty per cent of our counties participated in trial demonstrations for their high school youth. Additional demonstrations are scheduled for presentation during the remaining months of 1961. Many are in connection with County Government Day—others are strictly local bar association projects. Lawyers throughout Nebraska have volunteered their time for these presentations.

The purpose of the program of this Committee is to help Nebraska lawyers present accurate and purposeful trial demonstrations to the young citizens of our state, proudly displaying the process of law and its protection of American citizens.

The Committee recommends that the program be continued and encouraged, and suggests that the new Committee for 1962 include one member from each judicial district of the state.

Dewayne Wolf, Kearney, Chairman
Charles F. Adams, Aurora
James T. Begley, Plattsmouth
Lawrence S. Dunmire, Hastings
Robert C. Guenzel, Lincoln
Robert M. Harris, Scottsbluff
Fred R. Irons, Hastings
Clarence C. Kunc, Wilber
Vance E. Leininger, Columbus
Charles E. McCarl, McCook

Frank J. Mattoon, Sidney
Melvin Moss, Fairbury (deceased)
W. E. Mumby, Harrison
L. F. Otradovsky, Schuyler
James I. Shamberg, Grand Island
Rodney R. Smith, South Sioux City

[The report of the Committee was adopted.]

CHAIRMAN GINSBURG: The next report is the report of the Committee on Atomic Energy Law, by Mr. Robert Berkshire.

[The report of the Committee on Atomic Energy Law follows.]

Report of the Committee on Atomic Energy Law

The Atomic Energy Law Committee, during the past year, was principally concerned with the drafting, formulation and presentation to the 1961 session of the Legislature of a bill designed to regulate the use of atomic energy and encourage the development of atomic energy in the State of Nebraska. The passage of this legislation would enable the state to assume functions that are now being exercised by the Atomic Energy Commission of the United States Government.

Late in 1960, Dr. E. A. Rogers, Director of the Department of Health, was appointed Coordinator of Atomic Development Activities. He selected a group of advisers from various professions interested in these activities to advise him as to the recommendations he should make to the Legislature. The Bar Association was represented on this committee and assisted in the preparation of a comprehensive bill designed to provide for control and development of atomic energy within the State of Nebraska. The bill, L. B. 478, was referred to the Committee on Public Health and Miscellaneous subjects.

Some opposition appeared at the committee hearing. Apparently the opponents' primary objection was that they were not consulted on the bill. They did not have any specific objection to the form of the legislation. However, the bill was killed in the committee.

The next two years will give all groups additional time to study this legislation and the effect of similar legislation in other states, and present their suggestions as to the form that this legislation should take.

Therefore, in view of the fact that additional legislation will be formulated in this area, your Committee recommends that it be continued for another year and that it cooperate with the Coordinator of Atomic Development Activities to secure passage of acceptable legislation which will place control of nuclear activity on a state level.

A bill has been introduced in the United States Congress transferring jurisdiction of workmen's compensation injuries resulting from use of atomic materials to the Federal Government, the argument being that the states, through their local workmen's compensation statutes, have failed to provide adequately for this type of injury. *In view of this movement it is recommended that this Committee investigate the applicability of Nebraska's workmen's compensation statutes to injury or disability resulting from atomic energy radiation and determine if our workmen's compensation law adequately covers this problem.*

Robert H. Berkshire, Chairman
Wilber S. Aten
Robert E. Johnson, Jr.
Vance E. Leininger
G. H. Seig
Richard D. Wilson

[The report of the Committee was adopted.]

CHAIRMAN GINSBURG: The next order of business is the report of the Committee on Cooperation with the American Law Institute, Dean James A. Doyle.

[The report of the Committee on Cooperation with the American Law Institute follows.]

Report of the Committee on Cooperation with the American Law Institute

During the year, the American Law Institute published the second edition of the *Restatement of Agency* and the *Restatement of Trusts*. Studies are continuing in the areas of federal court jurisdiction, the model penal code and the uniform commercial code. The Committee is of the opinion that the annotation of the *Restatement Seconds* would be useful to the members of the bar and the judiciary, and that consideration should be given to the means of accomplishing such a project.

The contributions of the American Law Institute in the improvement and development of the law are well known and merit

the continuing cooperation of the Nebraska State Bar Association and every lawyer.

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

James A. Doyle, Chairman
Richard L. Berkheimer
Henry M. Grether, Jr.
Fred T. Hanson
Barton H. Kuhns
Daniel Stubbs

[The report of the Committee was adopted.]

CHAIRMAN GINSBURG: The next report is the report of the Committee on County Law Libraries, Mr. William Meier.

[The report of the Committee on County Law Libraries follows.]

Report of the Committee on County Law Libraries

Surveys conducted by the Committee indicate that the awareness of the need for county law libraries, as a necessary tool of the courts and court officers, is being recognized more and more throughout the state. Eight county law libraries have been established since the last previous survey, which was made in 1958.

Progress is being made in this respect in counties of all sizes—from the largest to the smallest, as will be noted from the tabulations hereinafter set forth.

There are wide variations in the quality of the county law libraries of the state. One is maintained entirely from funds contributed by the local lawyers. However, in 33 counties the cost of maintaining the county law library is born entirely from tax funds allocated by the county boards. County budgets for maintaining the libraries vary from nothing at all to \$9,000.00 per year. Generally speaking, the larger the county the greater the expenditure for maintenance, although it is well recognized that the smaller the county the greater is the need for a good basic library if the courts and court officers are to render adequate justice for the residents and property owners of the county.

The adoption by the 1961 Legislature of amendments recommended by this Committee and sponsored by the Bar Association to Sec. 50-220, R. R. S. 1943, so as to officially authorize the use

of county funds for establishment and maintenance of county law libraries, should encourage the development of satisfactory law libraries in each of the counties.

Your Committee feels that appropriate amendments should be made to the statutes relating to state publications so that one of the sets of each publication which is a needed legal tool would be placed in each county law library, for example:

Sec. 49-617, R. R. S. 1943 - Revised Statutes of Nebraska

Sec. 49-502, R. R. S. 1943 - Session Laws of Nebraska

Sec. 24-209, R. R. S. 1943 - Supreme Court Reports.

Your Committee is unanimously of the opinion that good county law libraries for every county in the state are essential to the proper functioning of the courts, that such libraries should be provided primarily from public funds for the use of the judges and other officers of the court and public officers. The Committee further feels that the primary responsibility for the establishment and maintenance of the county law libraries rests with the members of the local bar of each county—that they must impress upon the county boards of their respective counties the need for such libraries and the statutory authority for establishment and maintenance of such libraries.

Our Committee will be glad to furnish any help and advice which it can to encourage the establishment and improvement of county law libraries and herewith submits the following summary of the results of surveys made during the current year.

Survey of Judicial Districts

Inquiries were submitted to the district judges of the state with reference to the county law libraries in their districts.

Judges of 17 of the 18 judicial districts reported to the Committee. They reported that there are 36 counties in which there are satisfactory county law libraries. Counties of varying sizes have qualified for a "satisfactory" rating by the judges as follows:

<i>Population</i>	<i>No. Satisfactory - Out of Total</i>		<i>Per Cent</i>
Under 4,000	2	17	11.76
4 to 8,000	5	22	22.72
8 to 10,000	5	15	33.33
10 to 14,000	6	17	35.29
14 to 24,000	9	12	75.00
24 to 50,000	7	8	87.50
Over 50,000	2	2	100.00
Total	36	93	38.71%

It appears that the larger the county, the more likely it is to have a "satisfactory" county law library, although all of the judges recognized that a different standard must be applied to determine what is satisfactory for a small county and for a large one.

Nearly unanimously the judges noted that the state statutes and reports, a digest, citator and an encyclopedia are basic tools which should be available in a county library in order for a court to function properly in even the smallest county, and that such a library should be available to the courts when in session and to the lawyers and officials in attendance. Almost without exception the judges have noted that this basic library should be provided by funds supplied by the county, and that it would be proper for the local lawyers to contribute to the maintenance of the library in the court house in a modest way.

The judges also noted that county boards should be made aware of their responsibility to supply these tools for the courts and that it is the responsibility of the members of the local bar to point out the need to their own county boards and exert the needed pressure to see that the need is met. They believe the local bar should have a leading part in the supervision and management of the county law library once it is established.

It is encouraging to the Committee to note the increasing number of counties which are establishing county law libraries and to find that in more than one-third of the counties the district judges can approve the county law libraries as "satisfactory."

Reports from the Counties

The county attorney of each county was asked to report on the status of the county law library in his own county, the size of the library, annual cost of maintenance, source of the funds and the portion paid from county tax funds and by the local lawyers.

The county attorneys were surveyed to ascertain the size of their county law libraries and how they are maintained, with the following results:

Population	No. Re- plies	No. Volumes	Budget	County Share	Lawyers Share	Estab- lished Since
Under 4,000	16	180- 800	\$ 50-\$ 500	100% (7)	None	'58
4,000- 8,000	20	250- 1,500	300- 3,500	50-100% (8)	0- 50% (1)	1
8,000-10,000	14	750- 1,200	200- 700	0-100% (6)	0-100% (1)	0
10,000-14,000	14	300- 3,600	300- 3,600	50-100% (6)	0- 50% (1)	2
14,000-24,000	10	200- 4,000	400- 1,000	50-100% (3)	0- 50% (3)	2
24,000-50,000	6	2,000-10,000	1,000- 1,850	50-100% (2)	0- 50% (2)	1
Over 50,000	2	23,000- (?)	9,000- (?)	100% (1)	0-\$12ea.(1)	0
				33		8

As noted above, in 33 counties the entire budget for the county law library is paid by the county board from tax funds. In only one county is the law library supported entirely by the local lawyers. In eight counties the lawyers pay half (50%) of the cost of maintaining the library. In those counties where the lawyers contribute, their contribution is \$10 to \$12 each per year. There are more county law libraries represented in this tabulation than in the report by the district judges since we showed in the first table only the libraries which the district judges deemed "satisfactory."

We recommend that the Committee be continued for the purpose of encouraging and assisting local bar associations in the establishment and building of satisfactory county law libraries in their respective counties, and in order to continue to publicize progress in the development of publicly supported and maintained county law libraries as necessary tools of the courts of each county in the proper functioning of the judicial system of the state.

We further recommend that copies of this report be furnished to the Committee on Legislation of the State Bar Association for consideration in proposing appropriate legislation relating to the supplying of state statutes, session laws, supreme court reports, rules of administrative agencies and other material useful in the proper administration of justice to county law libraries in each of the counties of the state.

William H. Meier, Chairman
Leo M. Bayer
Alfred W. Blessing
Frederic Coufal
Kenneth H. Elson
Robert D. Flory
Russell E. Lovell
Robert R. Moran
Harvey M. Wilson

[The report of the Committee was adopted.]

SECRETARY TURNER: Mr. Chairman, may I make a statement on that? There is one portion of that report that disturbs me a little bit, and I hate to see the Association go on record too firmly for enlarging the free distribution of the statutes, session laws and Nebraska Reports.

As a matter of fact, if even half of the counties of Nebraska organized county law libraries and an act were passed requiring

free distribution of Nebraska Reports, we just don't have them. On some of the earlier volumes we are down as low as a dozen copies, and two or three of the volumes we have withdrawn from sale entirely, and those remaining copies will be used to replace worn out and defective copies in the State Library. So a part of that is just going to be a physical impossibility, gentlemen.

CHAIRMAN GINSBURG: The next report is the report of the Committee on Crime and Delinquency Prevention, Mr. Vitamvas.

[The report of the Committee on Crime and Juvenile Delinquency follows.]

Report of the Committee on Crime and Delinquency Prevention

This Committee held one meeting during the year. At such time it was determined the Committee should concern itself with studies in the areas of criminal procedure; a study of the question of whether or not a system of district prosecuting attorneys should be established in the state; a study of the question of conflict of interest statutes as applied to governmental officers; and the study of an educational program concerning the criminal laws of the state.

During the recent session of the Legislature a legislative resolution was adopted which proposed that a study committee be appointed by the Legislature with the purpose of studying the criminal laws of the state and means whereby any possible increase in criminal activity in the state might be curbed. The chairman of this committee met with the various officials of the Legislature and other interested individuals at the invitation of the Director of Research of the Legislative Council. The Legislature, prior to adjournment, failed to make any appropriation for the purpose of the study so the proposed committee never organized nor operated.

The establishment of juvenile courts under the provisions of the Juvenile Court Act was presented to the voters of Douglas and Lancaster Counties in the 1960 general election. These counties voted to adopt the provisions of the Act and juvenile judges have been appointed in both counties. Inasmuch as these courts have been in operation but a short time, no specific problems have been presented to this Committee. At the committee meeting it was proposed, however, that a study be made with a view

to adopting an educational program directed primarily at the young people of the state for the purpose of advising them of the criminal laws of the state and the possible penalties which could result through the commission of a criminal offense in a moment of thoughtlessness. It is felt that further study is needed on this question.

The Committee further felt that it should concern itself with the question of conflict of interest involving governmental officers. It has, however, come to the attention of the Committee that the National Association of Attorneys General is studying a proposal for a uniform law covering this subject. In view of this, it is deemed advisable to await the results of that study.

In the area of criminal law and procedure, it is felt that several areas should be studied with a view to presenting corrective legislation at the next session of the Legislature. Of most immediate concern are a number of criminal statutes which provide, in addition to the criminal penalties, that the injured party may recover double or treble damages. In view of the case of *Able v. Conover*, 170 Neb. 926, 104 N.W.2nd 684, it is felt that a compilation should be made of similar statutes so that recommendations may be made to the next Legislature. A study was also instituted upon the question of whether or not the state should consider a system of district prosecuting officers to take over the present duties of prosecution devolving upon the various county attorneys. It is recommended that this study be continued. A study of criminal trial procedures with a view to giving added tools to prosecutors, such as strengthening the rights of courts to hold material witnesses, and requiring defendants to give notice of their intention to offer evidence of alibi, is being conducted. *It is recommended that this study be continued.*

Gerald S. Vitamvas, Chairman
James F. Brogan
Domenico Caporale
Alfred G. Ellick
Dale E. Fahrnbruch
Walter G. Huber
Tedd Huston
Robert A. Nelson
Betty Peterson Sharp
Kenneth P. Weiner

[The report of the Committee was adopted.]

CHAIRMAN GINSBURG: We will go on to the next report, that of the Committee on Judiciary, Mr. Tracy J. Peycke.

[The report of the Committee on Judiciary follows.]

Report of the Committee on Judiciary

The principal interest of the Committee on Judiciary in the past year, as indeed it was of the Association, has been the securing of legislative approval of a proposed constitutional amendment for the Merit Plan for the Selection of Judges.

A special committee was set up to deal with this matter, with several members of the Committee on Judiciary serving on it. The concern with this project went beyond any single committee and represented a major Association undertaking. The favorable result is a source of satisfaction to all concerned, and particularly to members of the Committee on Judiciary, who in this and previous years have struggled with this endeavor.

All concerned realize the dimensions of the efforts which will be required to secure a favorable vote at the 1962 general election. This will necessarily involve organization on the part of the Association outside and beyond the usual committee structure and responsibility.

Our Committee has not undertaken any other major projects in view of our preoccupation with the Merit Plan. The chairman appeared before the legislative committee considering LB 401 to increase the salaries of district and supreme court judges and supported the measure on behalf of the Committee. Efforts in this regard were unsuccessful. Activity in this direction should be continued in the next session of the Legislature.

We believe that the Committee in the coming year should stand ready to assist in any way which may be requested to secure approval of the constitutional amendment for the Merit Plan. We do not suggest embarking on other projects which might distract from this major concern.

Tracy J. Peycke, Chairman
Milton R. Abrahams
James N. Ackerman
Wilber S. Aten
Paul P. Chaney
Thomas F. Colfer
Robert B. Crosby
Robert V. Denney

George W. Haessler
 Virgil J. Haggart
 Hans J. Holtorf
 James M. Knapp
 Alexander McKie, Jr.
 Robert D. Moodie
 Farley Young

[The report of the Committee was received and filed.]

CHAIRMAN GINSBURG: We will take, at this time, the report of the Advisory Committee, Mr. Raymond Young.

RAYMOND G. YOUNG, Omaha: I think, Mr. Chairman, I will ask Mr. Adams to read this report for me, if he will please.

CHAIRMAN GINSBURG: Mr. Adams, will you step forward please and present the report.

Report of Advisory Committee

ROBERT K. ADAMS: Mr. Chairman and members of the House of Delegates—On behalf of Mr. Ray Young of Omaha, I submit the report of the Advisory Committee for the year 1961.

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

Reviews

Five cases came to the Advisory Committee for review of proceedings before committees on inquiry:

1. From the Third District: The Advisory Committee considered that the issue had been determined by the Supreme Court. The complaint was dismissed.

2. From the Eighth District: There was no specific charge of misconduct or of violation of any Canon. The dismissal by the Committee on Inquiry was affirmed.

3 and 4. Two from the Thirteenth District: In both cases the Complaints were dismissed, no misconduct being shown.

5. In the Sixteenth District: The lawyer pleaded nolo contendere to charges of income tax evasion. While charges were pending, he waived further proceedings and filed his petition in the Supreme Court, which entered an order suspending him for one year.

Supreme Court

In the Supreme Court there was one judgment of suspension for one year. There was one reinstatement. One application for reinstatement was denied. Two applications for reinstatement are pending.

Advisory Opinions

1. The use of the device of a corporate structure to place the names of practicing lawyers before the public as tax experts with a view to their ultimate employment is improper and violates the Canons relating to indirect advertising and the use of lay intermediaries.

2. Under the facts stated, the publication of a feature article on the civic activities of many members of the community, including a lawyer, was deemed not to be a violation of Canon 27. However, the Canon condemns the inspiring of newspaper comment and all other forms of self-laudation.

3. Upon the suggestion of the Committee, an inquirer submitted his request for an opinion to the American Bar Association Committee on Professional Ethics. That Committee submitted its report and held that a lawyer may properly become a member of a Chamber of Commerce speakers panel and permit his name, profession, and the title of his talks to be printed in a brochure containing similar information about the other members of the panel, the brochure being published and distributed by the Chamber of Commerce at its expense, and the talks being on subjects of general interest to the community and deemed to be a public service of and for the Chamber of Commerce.

4. The Committee declined to express its opinion as to whether certain activities would be in violation of the order of the Supreme Court suspending the lawyer from practice.

5. The Committee expressed the opinion that, nothing more appearing, it is not unethical for a county attorney to represent a party in a divorce suit in which minor children are concerned, unless the ground asserted for the divorce is adultery or some other crime which would involve the duties of the county attorney.

6. The Committee declined to express its opinion as to whether acceptance of an appointment as acting county judge would disqualify the appointee from practicing in the county court. The Committee deemed the question to be one of law.

7. The Committee prepared a detailed report and statistics for use of the committee of the Association which had under

consideration the question of the desirability of establishing a fund for client security.

8. The publication in a county atlas of a lawyer's professional card violates Canon 27.

9. The Committee rendered an opinion that an election contest and recounting of votes in a county court is a judicial proceeding and that Canon 35 applies.

Pending Requests for Opinions

Several requests for opinions as to the extent to which lawyers who are public officials are restricted in their private practice have been placed upon the agenda for consideration by the Committee at its next meeting.

I might say parenthetically that that applies particularly to county attorneys and city and village attorneys, by election as well as by appointment.

Pending Review

The Advisory Committee has under consideration a record for review of proceedings in the Seventeenth District. Action has been deferred awaiting disposition of appeals in the Supreme Court.

Committees on Inquiry

No matters have required action by Committees on Inquiry in Districts 1, 6 and 14.

In District 4 (Omaha) hearings have been held in four cases, all of them resulting in dismissal. In five cases, charges await hearing.

In District 5, one matter of minor importance is under investigation.

In District 7, one hearing was held. The attorney was absolved.

In District 15, one hearing was held, and the controversy was satisfactorily adjusted.

A case originating in District 16 was disposed of by order of suspension by the Supreme Court without committee action.

In District 17 the Committee made findings and recommendations regarding an application for reinstatement, which was denied.

In all other districts all matters which engaged the attention of the committees were dismissed for lack of merit after informal investigation, or were disposed of by amicable adjust-

ment without the necessity of formal action, and no charges are now pending.

Canon 27

The members of the profession should be mindful 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 is a violation of the Canon.

Our report contains citations to the A.B.A. Decisions, to Drinker on *Legal Ethics* and our N.L.R. Report of last year.

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 and decisions of the American Bar Association Committee.

Respectfully submitted,

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

Mr. Chairman, I take it that this requires no action on the part of the House. I shall merely move that it be received and filed.

CHAIRMAN GINSBURG: The report of the Advisory Committee, containing no recommendation requiring action by this House, will be ordered received and placed on file.

CHAIRMAN GINSBURG: According to our calender the next order of business is the report of the Committee on Legislation, which I will present.

[The report of the Committee on Legislation follows.]

Report of the Committee on Legislation

This Committee is pleased to report that, on the whole, the tasks confided to it have been successfully completed. This Committee was successful in the sponsorship of all legislation proposed by this Association with but few exceptions.

The only legislation of major importance sponsored by this Association, which was rejected by the Legislature, was a bill to

govern instruction procedure in the district court and to make the same conform, in general, with the provisions relating to instructions as set forth in the Federal Rules of Civil Procedure. This bill was killed by the Judiciary Committee after a lengthy hearing. Considerable opposition was expressed by a number of Omaha lawyers and by representatives of the Barristers Club of Omaha. The Judiciary Committee felt that the objections to this bill were so vehement on the part of a considerable segment of the Bar that the bill ought not to be reported out of the Legislature until the sentiment of the Bar generally was more firmly established.

The experience of this Committee with reference to the above-mentioned bill calls for some comment. While the right of individual members of the Bar to object to legislation sponsored by the Association must be recognized and conceded, the Committee cannot refrain from expressing its views with reference to the right of such opponents to attack the authority of this Committee.

With reference to the bill above referred to, it was asserted by some of the opponents before the Judiciary Committee of the Legislature that this Committee was not representative of the Bar generally in sponsoring this legislation, and that this Committee had no authority to speak on behalf of the Bar. This Committee cannot successfully function before the Legislature if its standing is to be impugned. There is no better way to demoralize the standing of this Association before the Legislature than to have such charges made. Not only the reputation of this Committee before the Legislature, but also the entire legislative program of this Association are greatly weakened when it is made to appear that a bill, proposed by action of the House of Delegates and presented to the Legislature by the Committee on Legislation, is not representative of the wishes of the Bar generally. If such occurrences are to be repeated it would be best for this Committee to be abolished; and any further attempt by the Association as such to present a legislative program to the Legislature might just as well be abandoned.

While no particular comment is made in this report relative to specific legislation which this Committee was successful in urging before the Legislature, we cannot refrain from calling attention to the fact that the Merit Plan for Judicial Selection, known as L. B. 315, was successfully presented to the Legislature by both this Committee and the special committee appointed for that purpose. The two committees, working in close harmony, were able to have the bill approved by the Judiciary Committee

and adopted by the Legislature. All who assisted in obtaining this result may well be proud of their efforts. However, the biggest labor now lies ahead. All of the time and energy expended in obtaining enactment of this bill by the Legislature will be wholly wasted unless the members of the bar generally are now willing to devote the necessary time and effort to present said bill to the electorate and to obtain a favorable vote thereon. It is hoped that each member of the bar will do all in his power to assist in submitting this measure for favorable approval by the electorate.

A problem plaguing the work of this Committee in the past still remains unsolved. This relates to the time given to the Association within which to study proposed legislation. During the past session of the Legislature the Section on Taxation made a diligent effort to evaluate bills on the subject of revenue and taxation and to report to this Committee thereon. However, the legislative action was so speedy that at no time was there sufficient time for that Section and this Committee to make a study and to act. This situation is applicable to any attempt by any segment of our Association to study legislation. Sufficient time simply is not allowed to make any sort of competent study of proposed legislation before it is heard by the committees of the Legislature. Some solution to this difficulty should still be sought.

We again call attention to the fact that many individual lawyers persist in submitting proposed legislation to individual senators without clearing with this Committee or any other committee of the Bar Association. Although this Committee has repeatedly requested that members of the bar having legislation in mind should submit the same to this Committee for study so that the same can be properly presented, numerous lawyers still persist in bypassing this Committee and in dealing directly with individual senators. The difficulties thus created are well illustrated by the history of L. B. 660 at the last legislative session. After the bill had been heard and was on the floor for enactment the sponsor of the bill asked leave to withdraw it and said, "The bill was introduced at the request of lawyers and others and sailed through the committee without opposition. Now it has been discovered the procedure could cloud titles to property and have other disturbing effects." The implication of this statement was certainly not favorable to the bar and would give the impression that the legislation introduced at the request of lawyers is not well thought out. This again is injurious to any attempt by this Association to sponsor a legislative program. This is but

an example of what happens when legislation is submitted by individuals without first having been studied by the Bar Association. On the other hand some worthwhile legislation failed of enactment simply because of the fact that it was not properly or adequately presented to the Legislature by the individual interested therein. We can only repeat that it would be most advisable for the individual lawyers to refrain from submitting legislation directly to the Legislature, and that all such proposed legislation should be submitted to this Committee or to some other appropriate committee of the Association for study and drafting in ample time before the Legislature convenes.

Some confusion still exists in the minds of some members of the bar as to the relationship between the Bar Association and the Judicial Council. The Judicial Council, during the last session, sponsored legislation dealing with judicial procedure; and this Committee was happy to cooperate with the Judicial Council in presenting such measures to the Legislature. However, the bills presented were the responsibility of the Judicial Council and not of this Association. It must be recognized that the Judicial Council is entirely independent of this Association; and that this Association, as such, has no control over it. Any legislation sponsored by the Judicial Council is the sole responsibility of that body.

It will be recalled that, at the last session of the House of Delegates, the Committee on Uniform Commercial Code was directed to report at this meeting on whether the Code should be offered for enactment to the 1963 Legislature. A recent article in the *Wall Street Journal* shows that, as of August 9, 1961, thirteen states had adopted the Code and that there was a likelihood that several more were about to adopt it. No doubt action will be taken on this subject at this present session of the House of Delegates.

Another matter deserving study is the legislation to permit professional people to form corporations, and thus gain the same income tax advantages available to business corporations and their executives. Legislation for this purpose has already been adopted in a number of states. This subject was called to the attention of this Committee too late during the past session of the Legislature to permit any action on it. This is a subject which deserves consideration and study in Nebraska. It is suggested that this Association consider and take action thereon.

The relationship between this Committee and the Judiciary Committee of the Legislature was at all times most cordial. It was a great pleasure for the members of this Committee to ap-

pear before the Legislature and its committees, where we were uniformly received with utmost courtesy and consideration. We believe we can say with all modesty that the reputation and standing of the Bar Association before the state Legislature was never better, and that any measures bearing the sponsorship of the Bar Association received, and will continue to receive, most careful and considerate hearing by the Legislature.

In closing this report, this Committee deems it appropriate to call the attention of the Bar to the decision of the United States Supreme Court in the case of *Lathrop v. Donohue*, — U. S. —, 6 L. Ed. (2) 1191. In that case two of the justices of the United States Supreme Court considered that the legislative activities sponsored by the state Bar of Wisconsin, also an integrated bar, was unconstitutional. Four of the justices declined to rule on the tendered constitutional issue of whether the legislative activity of the state bar violated the members' freedom of speech or other rights. In view of the uncertainty now created in this field it would perhaps be well for this Association to restudy its legislative program and the function of its committees in sponsoring legislation before the state Legislature. This Committee recommends:

- (a) *That the Committee be continued.*
- (b) *That the members of the bar of this state be again solicited to refer to this Committee subjects deemed appropriate for presentation to the Legislature; and that individual members be discouraged from privately submitting proposals for legislation to the Legislature.*
- (c) *That all committees sponsoring legislation and all legislation sponsored by this Association be coordinated with and through this Committee.*
- (d) *That this House determine the position which the Association is to take on the subject of proposed professional corporations; and on the proposed Uniform Commercial Code.*
- (e) *That the legislative program of this Association be restudied in the light of the decision of the United States Supreme Court in Lathrop v. Donohue, supra.*

Herman Ginsburg, Chairman
Chauncey E. Barney, Vice Chairman
Kenneth B. Holm
Richard E. Hunter
Walter P. Lauritsen
Raymond E. McGrath

R. Robert Perry
Lewis R. Ricketts
William A. Sawtell

CHAIRMAN GINSBURG: As Chairman of the Committee on Legislation, I move the adoption of the report of the committee. I shouldn't preside here at this point so I will ask Mr. Turner if he will take over.

SECRETARY TURNER (In the Chair): Is there a second to Chairman Ginsburg's motion?

[The motion was duly seconded.]

SECRETARY TURNER: Are there any comments or any discussion?

THOMAS M. DAVIES, Lincoln: Mr. Chairman, I would like to speak on one phase of lawyers practicing as a corporation. I think that all of us, in drafting profit-sharing trusts for clients, have been rather envious of our corporate clients who can put aside a part of their earnings each year into a plan. However, I fully agree with the committee report of the American Bar Association that we should go very slowly on this subject. I think one of our vital attributes as members of the bar is our freedom as individuals; and in the sight of our clients we are individuals; we are not corporations.

I would like to move, sir, to implement Mr. Ginsburg's No. (d), that this House go on record as being opposed to any legislation at this time that would authorize lawyers to practice as corporations and that we not be in favor until we know what the American Bar Association is going to do in this field. Of course we still would have our own right to take our position at that time.

SECRETARY TURNER: You are moving that as a substitute for (d) of the committee report?

MR. DAVIES: Not as a substitute. I think it implements No. (d).

SECRETARY TURNER: It should be treated as an amendment, then, to (d), not a substitute.

MR. DAVIES: Yes, sir, that will be fine.

SECRETARY TURNER: Is there a second to the motion to amend?

[The motion was duly seconded.]

RALPH E. SVOBODA, Omaha: I might comment that in correspondence and discussion with President McCown and with our House Chairman on that topic it is exciting wide attention, as the gentleman has just said, and Mr. Turner has already advised somebody who inquired about it that a new committee would be formed—I am going to try to get confirmation of that, Mr. Secretary, at the Executive Council meeting this noon—on the economics of law practice, and that will be one of the topics that will be fielded by that committee.

Now, as President McCown has pointed out, he is a member of the Ethics Committee of the American Bar Association, and there will probably be a ruling or a recommendation by that Committee, he thinks, in December at the very latest, and in any event he thinks it will be published by January. So in appointing that Committee and allocating that subject to the Committee, I have in mind that they would probably, so to speak, lay low until this ruling comes out so that ethical considerations can be given consideration.

President Satterfield of the American Bar Association will be with us, and this is a subject very close to his heart. He thinks lawyers are falling away behind the doctors and that something ought to be done about our presuming the driving of Cadillacs and the reading of the *Wall Street Journal*, so he is probably going to delve into that subject during this convention. I think that that may answer some of the topics that are in your mind, Mr. Davies.

MR. DAVIES: Well, I think it does, Mr. Svoboda, and I would be willing to amend my motion but I think this House of Delegates should take a stand, so we have it on record for the next session of the Legislature, so that somebody doesn't rush into the Legislature with a bill before the American Bar Association can act and say the lawyers are for this; in other words, in line with what Mr. Ginsburg has said.

MR. SVOBODA: Mr. Ginsburg is in agreement with that view. The letter I got from him just a couple of days ago advances the same thought, that we ought to go slowly.

MR. DAVIES: Then I will amend my motion to say that, until the American Bar Association actively approves this type of legislation, this House of Delegates should be on record as being opposed at this time—so we have an action that has been taken that we can present to the next Legislature.

SECRETARY TURNER: May I ask who seconded Mr. Davies' original amendment?

REPORTER: It was seconded but I was instructed not to ask for names of seconds.

SECRETARY TURNER: Whoever seconded it, will he accept Mr. Davies' amendment?

ALEXANDER McKIE, Omaha: May I point out, if there is to be a committee appointed, we have another session of the Bar before the next Legislature. I think it would be inadvisable for us here to say we are opposed to it until the American Bar speaks. I think it would be much better to refer it to a committee and charge the committee with bringing its recommendation to our next House of Delegates meeting, next year, which will then be in a position to determine what we can do in the Legislature the following year.

JAMES J. FITZGERALD, JR., Omaha: I fully agree with Alex's view of this. I think we have two things here; one is the matter we have discussed; the other is the very practical approach to this whole thing. It is wholly inequitable to deny to the lawyers the type of fringe benefits that corporate executives are getting. That is the thing that has to be adjusted. We were faced with that type of situation in 1947, at the time Nebraska adopted the community property law. We didn't want it any more than I think the lawyers here present want corporation, but the adoption by enough states solved the problem, got the joint arrangement in in April of 1958, joint return capacity for everyone, and I think the committee studying it has to take this practical phase of it into consideration. The very fact that several of the states are going to have statutes enabling the attorneys to go ahead and incorporate is going to be very persuasive, I believe, in getting the job done that we ultimately want done.

SECRETARY TURNER: Anyone else desiring to be heard?

FLAVEL A. WRIGHT, Lincoln: I wonder if we are not out of order on this motion at this time. The Committee has recommended that this House of Delegates take some action in this regard, but right now it seems to me we would first have to approve the committee report and then proceed from there with a motion like that of Mr. Davies that we take definite action in accordance with the Committee's recommendation.

Secondly, as I understand it, Section (d) also relates to the Uniform Commercial Code, which I don't understand to be in-

volved in the present controversy. It seems to me that the proper procedure would be to proceed with Mr. Ginsburg's motion and then proceed to see if we want to take definite action in accordance with the recommendation of the Committee.

CHAIRMAN GINSBURG: Mr. Turner, as chairman of the Committee I think I have the right, as I understand the rules, to take the floor again in behalf of the motion. I want to second what Mr. Wright has just said.

Frankly, at the time this report was made, we had not yet had, or been informed of, the report of the Committee on the Uniform Commercial Code. Those of you who have read your program will see that that Committee has recommended adoption. The decision on the report of that Committee will decide that issue.

This other matter on the proposed professional corporations—we merely said that the House should make some determination. The approval of the recommendation will simply mean that this House can go on from that point. It apparently is a subject that we are interested in; and we can go from that point on and decide whether it should be handled by a special committee, as Mr. Svoboda has suggested, or whether we should take action against or pro, or whatever the case may be, or defer it for another year. I think what Mr. Davies has brought up is not actually germane to the recommendation of the Committee.

SECRETARY TURNER: I am inclined to agree with Mr. Wright's objection. Would it answer your purpose, Tom, if this were either accepted or rejected without amendment, and then by a separate motion move that it be the consensus of the House that no definite action be taken until after, as I understand it, the A.B.A. committee reports. Under those ground rules would you like to withdraw your motion?

MR. DAVIES: Yes.

MR. SVOBODA: Mr. Turner, I think Tom's amendment said the American Bar Association. That would make us wait at least until the next annual convention of the Bar Association. I think what Mr. McCown had in mind is that we wait until the Ethics Committee of the American Bar Association decides the question of the ethics of this proposed professional corporation. I don't think we should make it that long.

SECRETARY TURNER: I understood that was what you meant, Tom, that you wanted a determination as to the ethical

propriety of it which would come through the committee of which Mr. McCown is a member. Am I correct on that, Tom?

MR. DAVIES: Yes.

SECRETARY TURNER: Does anyone else wish to speak?

WILLIAM H. MEIER, Minden: My point relates to Section (b) of the recommendations, the second part of that section, which says "that individual members be discouraged from privately submitting proposals for legislation to the Legislature."

The Chairman said something about muzzling the lawyers and so I think that must be what he really meant, but in the report it is noted that some of the justices of the Supreme Court have been concerned about the freedom of speech of individual members of the Association.

I am wondering if this second part of subdivision (b) isn't a little too broad, because there are many fields of legislation that our Association is not particularly concerned with, and if an individual is aware of a situation he might appropriately call it to the attention of a legislator instead of having to always clear it with the Committee on Legislation. It seems to me that this is too broad a statement, as drawn, for this Association or this House of Delegates to adopt as it stands.

CHAIRMAN GINSBURG: Now, Mr. Davies, returning to your motion, do you care to make a motion at this time?

MR. DAVIES: Yes, sir. I would like to renew my motion that this House of Delegates go on record as being opposed to lawyers practicing as corporations until the Ethics Committee of the American Bar Association has passed on this subject.

I just have one further thing to say. I feel strongly that any time we take a position of expediency on a subject like this, of practicing as a corporation just for our own income tax advantage, and I know it is a good one, I think we are on infirm ground.

CHAIRMAN GINSBURG: You have heard the motion. Is there any second?

[The motion was duly seconded.]

ALFRED G. ELLICK, Omaha: I don't see why we have to go on record now as opposing this type of professional corporation. We are going to have a study, apparently, by a committee of our own Association. The Ethics Committee of the American Bar Association is apparently considering the matter. Why now

should we say we oppose this when we don't know really all of the pros and cons. Wouldn't it be better at this time simply to defer action on this matter until the next meeting of the House of Delegates, because there will not be a regular legislative session until 1963, and the House will meet in the meantime. At that time we can receive the report of our own committee, and we will also know by then the action of the Ethics Committee of the American Bar Association. So I would be opposed to the motion as presented.

MILTON R. ABRAHAMSON, Omaha: Apparently some telepathy exists between Mr. Ellick and me. My thought likewise was this, that it is certainly premature for us to be adopting a position of opposition before we know the facts that are pertinent and before the kind of study that we contemplate being made has been made and made available to us.

Therefore, I move to amend the motion by substituting for the word "oppose" the words "defer action" until this report is available.

[The motion was duly seconded.]

CHAIRMAN GINSBURG: Mr. Dalton, did you want the floor?

WARREN K. DALTON, Lincoln: I was going to speak to the original motion rather than to the amendment.

CHAIRMAN GINSBURG: Mr. McKie, were you going to speak on the amendment?

ALEXANDER MCKIE, Omaha: I think we should recommend that the Executive Council appoint a committee to study this, taking into consideration the results of the Ethics Committee of the Bar Association, and be prepared to come to the House of Delegates next year with a firm recommendation one way or the other, because if we don't have something like that the House of Delegates will be up in the air next fall and we won't be able to get anything before the Legislature in the following January.

CHAIRMAN GINSBURG: Are you making that as a substitute motion, Mr. McKie?

MR. MCKIE: I will so make it as a substitute motion.

CHAIRMAN GINSBURG: Is there a second?

[The motion was duly seconded.]

CHAIRMAN GINSBURG: I want to confess to you that I think this is a frame-up. Somebody told me a few minutes ago that things had been going too smoothly and they were going to fix it so we had some parliamentary difficulties.

The Chair will rule that we will first discuss the substitute motion. Are there any discussions on the substitute motion? As I understand it, the substitute motion is that the matter of the position of this House on the subject of proposed professional corporations be submitted to the Executive Council of the Association for action. Is that correct?

MR. McKIE: With a recommendation that it appoint a committee to study and report.

CHAIRMAN GINSBURG: Now you have all heard the substitute motion. Is there any discussion on it?

MR. SVOBODA: Mr. Chairman, I speak in favor of the motion, for this reason: From a matter of taste I don't think we ought to take any action other than Mr. McKie's motion because I am sure President Satterfield of the American Bar Association, who is going to be our guest, is going to talk on the subject. I am sure he will mention it because I know it is close to his heart. I think it would be rather in poor taste if, in advance of his addressing us, we took some action such as the original motion.

Secondly, this subject is not merely involved with the state law bills; that is, state laws which would permit incorporation of professions. There is what they call a kindred type association which apparently is already available, at least to doctors, although it has been circumscribed by regulations of the Treasury Department with respect to the medical profession, as I recall it. There is also the question of whether or not the Keogh Bill, which has been sort of limping through Congress—it never seems to get by the Senate—whether it hasn't lost its savor because of the many conditions that have been put on it.

All those are topics that should be considered by a special study committee, as Mr. McKie has moved.

MR. DALTON: I seconded Mr. Davies' motion and I would like to speak—maybe I come a little late with all the adverse comment that has been made about it to date—but I would like to speak in favor of it and in opposition to the substitute and the amendment, for several reasons.

The first is the pendency of H.R. 10, the Keogh Bill, which may solve some of these problems for us in a way which will be

more satisfactory than departing from the traditional non-corporate practice of law and taking up the corporate form.

Second, from what I know of the usual position of the various committees on ethics, I have no reason to feel that we are going to get any opinion that corporate practice is acceptable. As a matter of fact, I would judge that at this point they are going to say that it is not. I would certainly hesitate to have any indication from this Association that we are in favor of it if later on we were going to find that we are in a minority of one.

And, last, I can remember, because I was just starting to practice law at the time, the confusion that resulted when we took in a community property law and then did away with it within a period of two years. I would also be rather opposed to having our Legislature, in ignorance of all these things we have talked about today, pass a bill permitting the corporate practice of law and then find that they repeal it immediately.

I would, for that reason, prefer to see this House of Delegates, at this time, go on record as opposing any such legislation, at least until we are a good deal more certain that it is appropriate.

CHAIRMAN GINSBURG: Now we have the substitute motion on the floor, and you have heard Mr. Dalton in opposition. Is there any further discussion? Does anyone care to be heard further on the substitute motion? If not, we will call for the question. All in favor of the substitute motion—I will paraphrase it again, to refer the matter to the Executive Council of the Association with the recommendation that it appoint a committee to study and report thereon—all in favor of the substitute motion say “aye”; contrary “nay.” Carried and so ordered.

[The report of the Committee on Legislation was adopted.]

SECRETARY TURNER: For the information of the Executive Council, which is meeting this noon, what you had in mind, Alex, if I am correct, is that the special committee should be this one on the economics of the bar.

CHAIRMAN GINSBURG: I note that Mr. Mason is in the room and I will call on him for the report of the Committee on Legal Education and Continuing Legal Education.

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

John C. Mason

Mr. Chairman: This is the report of the Committee on Continuing Legal Education.

The following is a list of the legal education activities in Nebraska since the last annual Association meeting:

Annual Tax Institute sponsored by Section on Taxation, December 12-17, 1960.

Meeting of the Nebraska Association of Trial Attorneys, held on April 22, 1961, at Love Library, University of Nebraska, co-sponsored by the University of Nebraska Law School, entitled "Seminar for General Practitioners in Practice and Procedure."

The Junior Bar Association and the Nebraska Law School sponsored the Annual Fall Institute on September 22 and 23. Subject: "Municipal Corporations and Governmental Subdivisions."

The annual Creighton University Law School Institute is being held on Wednesday evenings from October 18 through November 15. Subject: "Estate Planning."

The annual Fall Seminar of the Nebraska Association of Trial Attorneys is being held today.

The annual Institute, presented during the Nebraska State Bar Association annual meeting, November 2 and 3. Subject: "Appellate Practice and Procedure." Sponsored by the Section on Practice and Procedure and the Committee on Continuing Legal Education.

Following last year's annual Association meeting, the Committee met in December and determined that the program of presenting one integrated institute at the annual Association meeting seemed desirable and should be continued. The Committee therefore cooperated with the Section on Practice and Procedure to present the institute which will be held tomorrow and Friday. The subject was chosen because it seemed timely and important in view of recent decisions of the Supreme Court in which appeals were denied on procedural grounds.

Your chairman and Dean David Dow represented the Committee at a meeting in Denver on June 5 at which there were bar association representatives from Wyoming, South Dakota, and Colorado, and representatives from the Denver University Law School and the Colorado University Law School. The Director of the American Bar Association-American Law Institute

Joint Committee on Continuing Legal Education attended the meeting also. The subject of discussion was ways and means of cooperating on a regional basis in the presentation of legal education programs. The group considered the possibility of two or more states joining together in the employment of a professional director for their legal education programs, to handle the programs of the participating states.

The Nebraska Bar Association Committee has recommended consideration of the use of a professional administrator on a part-time or full-time basis; and at the Denver meeting the possibility was explored further on behalf of all of the represented Associations.

Discussion was held concerning the possibility of coordinating the legal education programs presented independently by the various state associations and extending invitations to the lawyers in the region to attend various institutes which are held in the individual states. No conclusions were reached, but each of the representatives agreed to take the information back to his own association for further study.

The Nebraska Committee recommends continued study of the ways and means of obtaining a professional administrator for this program, either on a one-state or on a regional basis.

I digress from my written report to say that the Committee has not yet considered a specific recommendation to the Association, but such specific recommendation I hope will be forthcoming within the next year. I might also comment that the idea of a regional arrangement in which two or more states participate in some, at least, of their educational activities is unique to this group which met in Denver and is one which is receiving a certain amount of attention nationally. It is based, of course, upon the problem which the less populated states have, where there are fewer lawyers to support the legal education programs and the expense of legal education programs. The basic thought behind this concept of a possible regional association is that by banding together two or three states, for example, it might be possible to present a better program for all of the lawyers in those states. We find, of course, in studying these matters that each of the states presents similar types of programs, so there is a certain amount of duplication which might be avoided by that program. However, we do not come to you at this time with a specific recommendation on that concept.

Two new programs have been recommended by the Committee and are being put into effect. The Junior Bar Section, in cooperation with the Nebraska Law School and the Committee

on Continuing Legal Education, is proposing an institute to be held at the Nebraska Center for Continuing Education on June 20, 21, and 22, 1962, which is between the date of the bar examination and the date of the swearing in of the newly-admitted lawyers. This institute will be for the benefit of new lawyers, to give them practical instruction to enable them to bridge the gap between academic studies and the practical experiences of the practice of law.

It is recommended by the Junior Bar Section that the state Bar Association approve this program and agree to underwrite its expense. It is estimated that the expense will be at least \$700, that a charge of \$15 per lawyer will be made, and that if 75 lawyers will attend the institute there should be no expense to the state Bar Association. However, the Junior Bar Section does not have sufficient funds to guarantee this program and they are requesting the Association to make it possible for them to put on the program. The program is one which the Committee on Continuing Legal Education has approved and recommended for adoption. It is being conducted in many other states and is deemed very valuable. It will be an annual institute, and the courses will be repeated for the most part each year.

The Section on Taxation, in cooperation with the special committee appointed by the Society of Certified Public Accountants of Nebraska, has made definite plans for holding an institute on taxation at the Nebraska Center for Continuing Education on May 8, 9, and 10, 1963. This will be an advanced institute and will be conducted on a regional basis. It will probably be called the Great Plains Tax Institute, and it is anticipated that it will be an annual institute. It is tentatively contemplated that invitations to attend the institute will be extended to lawyers and accountants in all of the surrounding states. The institute should be self-supporting.

The Committee on Continuing Legal Education wishes to commend the Tax Section for the development of this institute, which should prove of great value to lawyers interested in taxation matters.

At the midyear meeting in Lincoln on June 2, the Committee decided to abandon the institute on new legislation which had previously been given after each session of the Legislature. In view of the limited number of lawyers who attended the institute and the large number of lawyers who did not benefit from it, a new program was recommended by the Committee and put into effect. A senior law student was employed to make a

summary of the important new statutes, which was thereupon printed and mailed to all the lawyers, so that all of the lawyers would have this information handy in their offices. In addition, the index of the sections of the statutes which were amended by legislative bills in the last session of the Legislature, which is prepared by the Attorney General's office, was reproduced and mailed to all of the lawyers. The Committee felt that this was of broader interest and benefited more of the lawyers than the former practice of holding an institute.

The Committee recommends for future institutes consideration of two subject matters which would be appropriate for presentation and have not been presented in recent years: workmen's compensation and economics of the law practice.

CHAIRMAN GINSBURG: Mr. Mason, does your report contain any recommendations requiring action by the House?

MR. MASON: Mr. Chairman, there are, I think, some such recommendations. I believe without any action at all our Committee would continue to study the possibilities of professional administration of the Continuing Legal Education program; however, *this is a recommendation to the House that you approve a continued study of that subject.*

The backing of the Junior Bar Association's bridge-the-gap program, the underwriting of the institute which is proposed to be held next June at an estimated maximum expense of \$700, less whatever we can take in, we recommend the Association underwrite that. I presume that would be appropriate for action. Perhaps it isn't necessary, I'm not sure.

SECRETARY TURNER: Under our bylaws the expenditure of money can only be accomplished through the approval of the Executive Council, so if that were interpreted as a recommendation to the Council to consider it, I think it would be quite appropriate.

MR. MASON: In view of that, Mr. Chairman, I would think that perhaps approval of our report would be all that would be necessary.

CHAIRMAN GINSBURG: And you so move, Mr. Mason?

MR. MASON: I am not a member of the House.

CHAIRMAN GINSBURG: As chairman you have the right to move.

MR. MASON: I so move.

CHAIRMAN GINSBURG: Is there a second to the motion?

[The motion was duly seconded.]

CHAIRMAN GINSBURG: You have heard the report and the motion that the report be approved. Is there any discussion? Does anyone have any questions of Mr. Mason? If not, we will call for a vote. All in favor say "aye"; contrary same sign. Carried.

CHAIRMAN GINSBURG: The next item of business is the report of the Special Committee on Oil and Gas Law, by Mr. Paul L. Martin.

[The report of the Special Committee on Oil and Gas Law follows.]

Report of the Special Committee on Oil and Gas Law

The Special Committee on Oil and Gas Law submits the following report:

Since the last report of the Committee there has been a steady increase in the production of oil and gas in the State of Nebraska. Extensive exploration in the southwestern part of the state has to a measure eclipsed the activities in the Panhandle counties. A great deal of the effort of the industry in the Panhandle has been in the establishment of secondary recovery programs with the many problems resulting from this type of activity.

The Oil and Gas Commission of the State of Nebraska has been very active in the control of the industry, and from the small amount of litigation that has arisen, there is evidence of the careful planning of the laws which have been passed during the past few years affecting oil and gas production in Nebraska.

During the past year the members of the Committee on Oil and Gas Law of the Nebraska State Bar Association assisted with the preparation of bills approved at the last meeting of the Association and arranged for their presentation to the Legislature by the Legislative Committee.

The Legislature of 1961 enacted the following bills affecting the oil and gas industry.

LB 172—Commission Office. An act authorizing the Commission, with the approval of the Governor, to establish and maintain its principal office and its books, papers and records at such place in the state as it shall determine and to prohibit purchase of principal office quarters.

LB 244—Hearing Notice. An act relating to oil and gas conservation, amending Section 57-911 Reissue Revised Statutes of Nebraska, 1943, to eliminate the provisions therefrom which provide for application for an exception from established well spacing pattern. This bill relates to notice of the Commission hearings and eliminates the old requirement of personal service upon interested parties in the case of an application for an exception from an established spacing pattern.

LB 245—Resident Agent: This bill provides for service upon the Secretary of State as agent for nonresidents performing work or services for oil development in the State of Nebraska.

LB 247—Drilling Bond. This bill provides that the bond of any applicant for drilling should provide not only for plugging each dry or abandoned well but should in addition require compliance with all provisions of the laws of the State of Nebraska and the rules, regulations, orders and requirements of the Commission.

○ *LB 243—Service on Appeal.* An act to amend Section 57-913 Reissue Revised Statutes of Nebraska, 1943, to provide for service of notice by certified United States mail. This bill merely permits service by either registered or certified mail in those instances in which the service by registered mail was formerly permissible.

LB 241—School Land. This bill provided that forfeiture and cancellation of oil and gas leases by the board of educational lands and funds were final and conclusive but provided further for the filing of a copy of the order in the office of the county clerk where the land is located. The act clarifies and simplifies the procedure and is of assistance in the matter of title examination.

LB 242—Pooling Provision. This act provides for pooling of all state lands, that pooling of acreage under oil and gas leases by governing boards of all lands of the State of Nebraska could be on a proportionate acreage or other agreed equitable basis, so as to conform to pooling provisions applicable to state school land. The bill now extends to all state lands the pooling provisions which were applicable to state school lands.

LB 690—Royalty Assessment. This act added to the terms included in real property or real estate, overriding royalty and production payments with respect to oil and gas

leases and units of beneficial interest in trusts, enabling those interests to be reached for taxation purposes.

The Committee also wishes to report that the Western Nebraska Bar Association held a most worthwhile Institute on Oil and Gas Law at Alliance on June 8 and June 9, with Dr. Maurice H. Merrill, Professor of Law at the University of Oklahoma, as guest lecturer.

The law relative to oil and gas is still comparatively young in the State of Nebraska. New problems will continue to arise and members of the bar in the state interested in oil and gas law will have the responsibility of promoting legislation in the State of Nebraska to protect the interests of the public as well as of 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 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
J. H. McNish
R. L. Smith
Ivan Van Steenberg
Floyd E. Wright

[The report of the Committee was adopted.]

CHAIRMAN GINSBURG: Does anyone have anything special he would like to present at this time? If not, we will adjourn until 1:30 promptly, please.

[The Wednesday morning session of the House of Delegates adjourned at 12:00 o'clock noon.]

WEDNESDAY AFTERNOON SESSION**November 1, 1961**

[The Wednesday afternoon session of the House of Delegates was called to order by Chairman Ginsburg at 1:45 o'clock.]

CHAIRMAN GINSBURG: The first order of business this afternoon is the report of the Committee on Unauthorized Practice of Law, Mr. Albert T. Reddish, Chairman.

Report of Committee on Unauthorized Practice of Law**Albert T. Reddish**

Mr. Chairman, Members: This report was filed late so it wouldn't be printed in the program; it can't, therefore, be picked to pieces quite so easily.

The past year has seen broad developments on the unauthorized practice front. The American Bar Association Standing Committee on Unauthorized Practice of Law rendered an informative opinion on pension and profit-sharing planning. This is a companion to the informative opinion on estate planning issued in 1959. All of those interested in either field should obtain copies of these opinions. You can obtain copies from the A.B.A. headquarters Information Service in Chicago or from the Nebraska Committee on Unauthorized Practice.

In a number of states, courts handed down decisions on unauthorized practice matters. I might state, parenthetically, that several of these opinions and decisions held laymen liable for damages which ensued from unauthorized practice. For example, in the classic case in California where a notary public drew a will and notarized it rather than having it witnessed, the beneficiary in the will (I don't know whether she collected a judgment) got a judgment for the amount of expectancy that she was deprived of.

In a number of states, courts handed down decisions on unauthorized practice matters. Many helped strike at unauthorized practice activities and delineated further the damage the public can suffer through legal activities of the uninformed.

In June the committee chairman attended a meeting of the A.B.A. Unauthorized Practice Standing Committee at Colorado Springs. The meeting was informative and educational and gave all state bar members deeper insight into the national scope of unauthorized practice and the problems and methods of combating it.

On simulated process, which has been a problem for a number of years, the Committee recommended passage of a law. L.B. 79 was passed by the Legislature declaring the use of simulated process a misdemeanor. The Act, introduced and passed by the Legislature, was not as broad as recommended by this Committee and may not be nearly so effective in fighting simulated process as the bar generally would desire. It can be of benefit, however, to the public if aggressively applied.

The Committee recommends reporting any aggravated use of simulated process to the county attorney for investigation concerning violation of this new statute. An effective aid in combating simulated process is the action of the Federal Trade Commission in issuing a cease and desist order against publishers of simulated process forms on the basis of deceptive advertising. Under estate planning, ads offering will forms and instruction pamphlets have been prolific the past year. We have complained to the committees of other states and to the American Bar Committee. One complaint of an ad inserted by Adcock Company, which gave a post office box address in Omaha, came to our Committee. Adcock Company could not be located in Omaha, and the Post Office Department has not revealed the name or address of the box holder.

The FTC likewise has acted upon complaints submitted to it about will kit advertising as deceptive and has entered cease and desist orders in this field.

A corporation was recently formed in Nebraska "to engage generally in rendering services as consultants concerning the subjects of qualified and unqualified pension and profit-sharing plans, conscientious estate planning" and other matters. The Committee recommends action be brought to revoke the corporate charter on the basis that it seeks to authorize the practice of law by corporation.

Members of the corporation are also life underwriters. The committee has filed a complaint with the National Conference of Lawyers and Life Insurance Companies concerning the proposed activities of the corporation together with the activities of the underwriters themselves.

Many county officials continue to yield to the temptation to give advice concerning certain legal forms and to prepare them. Aside from court action in the extreme case, an informational program appears the best way to curtail these activities.

The Committee also has learned that certain non-lawyers have had a practice of filing papers and pleadings with inferior

courts, and such papers and pleadings have been accepted and acted upon by the courts. County judges, at times, have accepted papers relating to delayed birth registration from non-lawyers. The Committee is drafting a letter to all county judges pointing out that only lawyers are permitted to file pleadings on behalf of others in courts.

On coordination of activities, the Committee has previously recommended that a member of the UPL Committee be included on any conference, collaboration, or cooperation committee the Bar forms with any lay or other professional group. This procedure has proved effective in many states and in the American Bar Association and can protect against unwitting abdication of authority by the lawyer in conference dealings.

Under debt pooling—the Committee is presently investigating the practices of debt pooling or debt adjusting. These practices, aggressively applied, can involve practice of law and cause severe financial and personal damage to the unsuspecting prospect or client. They have been vigorously condemned by courts and lawyers. An Omaha individual with a firm in Kansas is presently involved in litigation concerning the constitutionality of a Kansas statute outlawing debt pooling, and a Kansas judge, in an earlier case, commented that the activities of the Omahan had aspects of the practice of law. Exhaustive investigation appears essential to determine the nature and scope of some debt adjusting firm practices and their relationship to the practice of law.

Under specimen forms—lay experts frequently employ specimen forms as an entree in promoting their services. Sometimes specimen forms are presented as conclusive and used, as adopted, by the prospect without further investigation. Other times the prospect is urged to submit them to his lawyer with the suggestion that the lawyer should adopt the proposed form with little revision. In either case, use of the forms can be damaging. Many such forms are ill conceived to meet the individual needs of the prospect. Others may be well prepared for general purposes but inappropriate for the individual. In either event, the lawyer frequently is reduced to the role of scrivener, and if he permits indiscriminate use of specimen forms he abdicates his responsibility as counsel and legal advisor to the client. Each lawyer should use specimen forms with skepticism and should refuse to abandon his professional integrity by permitting himself to be employed as a mere scrivener.

Education—this Committee constantly emphasizes the need for diligent education among both lawyers and laity about the

evils of unauthorized practice of law. As stated by the Wisconsin court, "the basic reason why this court should prohibit the practice of law by laymen is not to aid the legal profession but to safeguard the public from the disastrous results which have, and are bound to flow from the activities of individuals who practice a learned profession which entails years of preparation and who are not bound by the high standards of professional conduct which are imposed on the members of the Bar." That is from 109 N.W.2nd, page 693.

The A.B.A. Committee states, "The need for education, however, particularly on the part of lawyers themselves, eternally persists. Seldom is a case of unauthorized practice uncovered which has not had the participation or active assistance of a lawyer somewhere. Any activity by a lawyer in support of unauthorized practice violates the canons of ethics. Canon 35 provides 'the professional services of the lawyer should not be controlled or exploited by any lay agency, personal or corporate, which interferes between the client and lawyer.'"

Likewise Canon 47 provides: "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. Each lawyer must reflect upon his position as a professional man. The professional standing and attitude of lawyers must be revitalized. Lawyers should constantly strive to strike down unauthorized practice wherever seen, by whatever agency practiced. The standard is not the financial well being of the lawyer; the standard is the protection of the public. Actually lawyers nearly always gain more financially from unauthorized practice of law because of the litigation which nearly always ensues. The guide, however, must be the protection of the public from the damage which is caused by legal activities of uninformed and unauthorized persons."

The classic illustration of this is the famous "Ode to the Jolly Testator" who makes his own will.

In our opinion such an educational program must be at least three-pronged: First, organized and individual efforts among lawyers to learn what constitutes unauthorized practice of law, damages which follow, and need for its elimination.

Second, active education in the law schools on the professional status of the lawyer, the reasons for the existence of and adherence to the canons of ethics, and on what constitutes unauthorized practice of law and its evils.

Third, public education through talks by lawyers and a public service informational pamphlet describing what a lawyer is, what he does, the reasons for the prohibition against unauthorized practice of law, the damages which follow, and the need for having only a lawyer give legal advice and perform legal services.

Departing from the written report, I might state here that paramount in this always is the personal relationship and the privileged communication between a lawyer and his client.

In conclusion, your committee recommends:

First, aggressive opposition to activities of unauthorized persons in all aspects of the practice of law.

Second, aggressive opposition to activities of unauthorized persons in particular fields, especially estate planning, pension and profit-sharing, taxation, and related activities.

Third, adamant refusal of lawyers to encourage or assist laymen or corporations in unauthorized activities.

Fourth, an educational program among lawyers for more continued and constant vigilance regarding existing problems of unauthorized practice, and the elimination thereof.

Fifth, institution of appropriate educational programs in law schools to instill understanding of the professional character of the practice of law, the canons of ethics, and the dangers of unauthorized practice.

Sixth, preparation and distribution of a public service pamphlet describing the services of lawyers, the necessity for relying upon a lawyer in legal matters, and the dangers of unauthorized practice of law.

[The report of the committee was adopted.]

CHAIRMAN GINSBURG: We will now turn to the report of the Committee on Military Law, Mr. Vitamvas.

[The report of the Committee on Military Law follows.]

Report of the Special Committee on Military Law

This Committee was organized for the purpose of investigating and reporting to the Association on any matters concerning military law or military personnel stationed within the state which might merit action on the part of the Association. The primary areas in which this Committee determined that it could best act were (1) to establish better liaison between the local and state

bar associations on the one hand and the military legal officers stationed in Nebraska on the other, (2) the collection and dissemination of items or matters of interest on current developments in military law, and (3) to insure the availability of adequate civilian counsel for military personnel stationed in Nebraska. With that thought in mind the various military services were contacted and advised of the formation of the Committee and its objectives. Their cooperation has been assured.

The following matters have been called to the attention of the Committee. A proposed draft of a Uniform Code of Military Justice act, which is aimed at governing the National Guard of the state, has been handed to the Committee for its consideration. No action has been taken on this at this time. The Judge Advocate of the Navy has forwarded to the Committee copies of two bills pending before the Congress. These bills are proposed by the Defense Department, and the Judge Advocate General of the Navy has indicated that he would be willing to have his Assistant Judge Advocate General for Military Justice appear before the Committee for the purpose of discussing this legislation. The Committee is communicating with the Department of the Navy asking that the Assistant Judge Advocate meet with the Committee during the annual meeting to present these matters for the Committee's consideration. On September 15, 1961, a letter was referred to the Committee concerning Section 405(j), 42 U.S.C.A., which permits the payment of old age and survivors insurance to a person other than the legal guardian of an incompetent in certain situations. This matter was called to the attention of the Bar Association by the Director of the Department of Veterans Affairs of the State of Nebraska and has been referred to this Committee for consideration and to determine whether or not legislation should be sponsored to amend and correct this situation. This matter has not been acted on by the Committee.

Since the formation of this Committee and since the last annual meeting of the Association, numerous National Guard and Reserve organizations have been ordered to active duty in the armed forces of the United States. A possibility exists that even further calls of personnel may be made in the near future. If so, it may well be necessary that some planning be done to assure that citizens of this state who are serving their country are assisted in finding attorneys in their own localities as the need arises. *It is, therefore, the recommendation of the Committee that the Committee be continued until such time as its purposes are accomplished or the lack of need therefor is clearly determined.*

Gerald S. Vitamvas, Chairman
Frederick A. Brown
Robert V. Denney
Jack Knicely
James A. Nanfity
Charles E. Wright

[The report of the Committee was adopted.]

CHAIRMAN GINSBURG: Next is the report of the Committee on Medico-Legal Jurisprudence. Chairman Deutsch sent word that he could not be here, but since you have all received the code which is mentioned he asks that the report be received and filed.

Report of the Committee on Medico-Legal Jurisprudence

Pursuant to the report of the former Committee, which appears in Volume 40, pp. 208-211 of the *Nebraska Law Review* (January, 1961), the House of Delegates adopted the Inter-Professional Code for Physicians and Attorneys on October 5, 1960, and the House of Delegates of the Nebraska State Medical Association approved the code on May 4, 1961.

Through the joint effort of the two associations, the code is being printed for general distribution. Those for distribution by the Medical Association are being printed in pamphlet form, while those for the Bar Association are punched for use in the Lawyer's Desk Book.

Frederick M. Deutsch, Chairman
George B. Boland
George L. DeLacy
George Healey
M. M. Maupin
Harry L. Welch

[The report of the Committee was received and filed.]

CHAIRMAN GINSBURG: We will now proceed to the report of the Committee on Uniform Commercial Code, Mr. Daniel Stubbs.

[The report of the Committee on the Uniform Commercial Code follows.]

Report of the Special Committee on the Uniform Commercial Code

This Committee has met several times during the course of the past year and has subjected the Commercial Code to a critical examination. A comprehensive study of the various articles of the code has been made by the members of the Committee, with special emphasis placed on the changes it makes in the present laws of Nebraska.

The Nebraska Bankers Association is cooperating with us and a committee of that Association has been formed. Your Committee has met with this committee, and will receive the position of the Bankers Association in the latter part of October.

Five additional states have adopted the Commercial Code during the 1961 legislative session, making a total of eleven states which have enacted the law. They are:

Pennsylvania (1953)
Massachusetts (1957)
Kentucky (1958)
Connecticut (1959)
New Hampshire (1959)
Rhode Island (1960)
Wyoming (1961)
Arkansas (1961)
New Mexico (1961)
Ohio (1961)
Oregon (1961)

After mature deliberation, your committee recommends that the Nebraska State Bar Association adopt the following Resolution:

BE IT RESOLVED:

That the Nebraska State Bar Association endorse the Uniform Commercial Code as proposed by the Commissioners on Uniform State Laws and the American Law Institute and recommend its enactment into law by the Legislature of Nebraska.

The Committee further recommends that a special committee on this subject be continued for the purpose of promoting the enactment of the code in Nebraska.

Daniel Stubbs, Chairman
A. Lee Bloomingdale
John W. Delehant, Jr.
Robert G. Fraser
Robert C. Guenzel

Walter D. James
Barton H. Kuhns
Winthrop B. Lane
John C. Mason
Arthur C. Sidner
Frank D. Williams

[The report of the Committee was adopted.]

CHAIRMAN GINSBURG: I will report for the Committee to Collaborate with the Nebraska Real Estate Association. Mr. Ricketts called me yesterday afternoon to inform me that that Committee had no report, that they had done nothing during the year, and that they felt nothing should be done. The report that was made a year ago contained certain forms, if you will recall, which were considered, and they thought we had better let the matter jell and have actual experience in going on before anything further is done. Therefore, Mr. Ricketts reported to me that nothing was done by his Committee during the past year.

CHAIRMAN GINSBURG: The next item is the report of the Committee on Cooperation with Law Schools, Mr. Ivan Blevens.

[The report of the Committee on Cooperation with Law Schools follows.]

Report of the Special Committee on Cooperation With Law Schools

The above Committee respectfully reports as follows:

1. The Committee met and organized at a luncheon and afternoon meeting in Lincoln, a meeting attended by seven-eighths of the members of the Committee and by the deans of both law colleges.
2. Publication of photographs and biography sketches of law college seniors in the January 1961 issue of the *Bar Journal* was handled by the Committee and the law colleges. Continuation of this practice is recommended.
3. The Committee feels that the two law colleges in Nebraska are both turning out well-trained and well-educated graduate lawyers, fully prepared to discharge their responsibilities to the public in the practice of law.
4. The Committee on Cooperation with Law Schools was organized to establish, develop, maintain and protect professional

cooperation between the law colleges and the Bar Association, and the Committee must be so used if it is to serve its useful purpose.

5. The Committee wishes to call attention of the Bar Association to the current trend in the nation and in the State of Nebraska that will result in a shortage of qualified lawyers in the near future; to ask that the members of the Bar be requested to encourage capable young people to pursue the study and practice of law; to urge that starting salaries of graduate lawyers be raised, and that, in the interests of promoting the social and economic standing of the legal profession, the ancient concept of a starvation period for young lawyers be completely abrogated.

6. The Committee feels that in view of the fact that most law school graduates enter into associations with established law firms, there is presently no need for compulsory, student preceptorships in the state. A considerable number of law school students obtain part-time employment and vacation employment in established law firms, which the Committee feels is a helpful and desirable practice.

7. The Committee reports that full cooperation exists between both law colleges in Nebraska and the Bar Association.

Ivan A. Blevens, Chairman
Robert D. Baumfalk
David Dow
James A. Doyle
James J. Fitzgerald, Jr.
Walter P. Lauritsen
Wilfred W. Nuernberger
Charles E. Oldfather

[The report of the Committee was received and filed, and the motion of Chairman Blevens to continue the Committee was adopted.]

[The report of the Special Committee on Joint Conference of Lawyers and Accountants was presented by Thomas M. Davies. The report follows.]

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

Your Committee is pleased to report that no matters concerning conflicts between practitioners of law and accounting were presented during the year. A meeting with the counterpart committee of the Accounting Society was held on August 15, 1961, at the Blackstone Hotel, in Omaha. The Accounting Society

acted as hosts for the evening dinner meeting, which was very well attended. Warren Dalton presented a report on the status of the proposed joint federal income tax institute to be conducted. It was moved and carried that:

The Special Committee on Joint Conference of Lawyers and Accountants recommend to the Nebraska State Bar Association and its appropriate committees that a joint federal income tax institute be held commencing in early May of 1963.

Mr. Philip G. Johnson, a member of both the Society and the Bar Association, made a brief report on the activities of the National Study Committee on Internal Revenue Service matters. He requested that any thoughts or criticisms be directed to him in writing so that he might study them and bring them before the national committee.

Roger V. Dickeson, Chairman
Robert K. Adams
James W. R. Brown
Harry B. Cohen
Warren K. Dalton
Thomas M. Davies
Frank J. Mattoon
John E. North
John W. Stewart

CHAIRMAN GINSBURG: Mr. Davies, if you will pardon me I would like to bring up a matter here. Perhaps I am on the wrong track, but I do notice there is a recommendation "to the Nebraska State Bar Association and its appropriate committees that a joint federal income tax institute be held commencing in early May of 1963."

Those of you who were here this morning will remember that the Committee on Continuing Legal Education announced that that institute was going to be held. Just what commitment on the part of the Bar Association that imposes, I do not know. I do recall however that a year ago—and Mr. Davies, I think you may know about this—there was some opposition expressed on the floor of the House to such an institute because—and my recollection may be faulty—it was felt that it was going to be primarily from an accounting standpoint and wouldn't be of much help to the bar, or that it would be beyond the depth of the bar. Were those matters discussed at all, Mr. Davies?

MR. DAVIES: Yes, they were. I think I can give assurance to this House that it will be something all lawyers will be interested in and that it will not just be an accounting confer-

ence. I feel it will be a very fine tax institute on a fairly high level.

CHAIRMAN GINSBURG: Are there any other questions by anyone? Does anyone have any discussion on the report?

ALFRED G. ELLICK, Omaha: Does it really mean '63 or does it mean '62?

MR. DAVIES: It means '63. They felt they could not be ready, Mr. Ellick, by '62.

WARREN K. DALTON, Lincoln: I think the House of Delegates authorized one such institute last year with the thought that it would be in the spring of 1962. I don't think that is a part, however, of the authority, but it was not possible to have this institute in the spring of 1962 so it was put over until 1963. I think the authority has already been granted for it.

CHAIRMAN GINSBURG: May I ask one further question? Does this entail any expenditure on the part of the Bar Association?

MR. DAVIES: It is my understanding that it does not. Isn't that your understanding, Mr. Dalton?

MR. DALTON: In Mr. Mason's report of the Committee on Continuing Legal Education this morning he estimated that it would not involve any expense at all.

VANCE E. LEININGER, Columbus: May I inquire—does the motion imply the continuation of this special committee or is it to be handled by the Committee on Continuing Legal Education?

CHAIRMAN GINSBURG: If I may answer you, Mr. Leininger, you notice that this report of the special committee does not recommend any continuance. It is limited only to sponsorship of this one joint federal income tax institute to be held in early May of 1963. That is the limit of the recommendation and I think the only thing that is before the House at this time.

Mr. Dalton, do you have something further?

MR. DALTON: I just asked George about this and I think maybe he and I differ. About 1954 or '53, or maybe earlier, this Joint Conference of Lawyers and Accountants was established.

Two or three years ago, when I was Chairman of this committee, half of this thing I checked back through the minutes, and it was my understanding at that time that this was set up as a permanent conference between the lawyers and accountants.

I raised the question because of the fact that this is headed "Report of the Special Committee." I think the Nebraska Bar Joint Conference of Lawyers and Accountants is a continuing cooperative group, or whatever you want to call it.

CHAIRMAN GINSBURG: Mr. Turner has just called my attention to the fact that the Committee is not listed in Article III as one of the permanent committees of the Association and, therefore, perhaps it would be advisable, Mr. Davies, for you to amend the report of the Committee to move that the Committee be continued.

MR. DAVIES: I will so move, that the Committee be continued, as a part of the recommendation.

CHAIRMAN GINSBURG: Is there any further discussion? All in favor say "aye"; contrary. Carried.

CHAIRMAN GINSBURG: We will pass to the report of the Committee on Federal Rules of Procedure, Mr. Flavel A. Wright.

[The report of the Special Committee on the Federal Rules of Civil Procedure follows.]

Report of the Special Committee on the Federal Rules of Civil Procedure

During the past year one of our former presidents, the Honorable Harvey M. Johnsen, as Chief Judge of the United States Court of Appeals for the Eighth Circuit, has appointed a committee of practicing lawyers designated as the "Eighth Circuit Committee on Federal Rules of Practice and Procedure." The Nebraska members of this committee are William Spire and Flavel A. Wright.

Based on the belief that the knowledge and experience of the practicing lawyers generally are of great importance in the development of court rules of procedure, the Executive Council authorized the creation of a special committee of this Association to cooperate with the Eighth Circuit Committee to study, and make suggestions for, improvements or changes in the Federal Rules of Civil Procedure.

Your president appointed the following members of this Committee for the year 1961: George Boland, Omaha; Robert Fraser, Omaha; George Healey, Lincoln; Murl Maupin, North Platte; Hale McCown, Beatrice; Flavel A. Wright, Chairman, Lincoln.

No matters have yet been presented to the Eighth Circuit Committee on Federal Rules and this Committee has taken no action in this regard.

The purpose of the Committee is to provide a vehicle for submitting suggestions and ideas of Nebraska lawyers to the Eighth Circuit Committee. It is suggested that any and all members of the bar with complaints or suggestions relating to the Federal Rules of Civil Procedure submit the suggestions or complaints to the chairman of this Committee for consideration by the Committee and such further action as is deemed advisable.

It is recommended that the action of the Executive Council in creating the special committee be approved and that the Committee be continued.

Flavel A. Wright, Chairman

[The report of the Committee was adopted.]

CHAIRMAN GINSBURG: We will go next to the report of the Trustee of the Rocky Mountain Mineral Law Foundation, Mr. Paul Martin.

[The report of the Trustee of the Rocky Mountain Mineral Law Foundation follows.]

Report of the Trustee of the Rocky Mountain Mineral Law Foundation

I am pleased to report on the seventh year of the existence of the Rocky Mountain Mineral Law Foundation and the activities of the organization. The increase in the activities each year shows that the vision of its founders was well justified, and the future of the Foundation is assured. The Nebraska State Bar Association has contributed to a successful program.

A brief reference to some of the functions of the Foundation follows:

(a) Gower Federal Service: The continued publication and distribution of the Gower Federal Service has been one of the most important activities of the Foundation and has contributed materially to the financial success of the Foundation. Since the Foundation assumed its publication, the case index and the Rules of Practice have been added. Plans are presently under way to make available to subscribers all past decisions reported in the Gower Federal Service, from 1948 to the present time, and a topical index is also in the planning stage.

(b) Scholarships: During the past year, six mineral law scholarships were awarded to law students attending the member

schools, who were found worthy of recognition because of their demonstrated outstanding ability in the field of mineral law.

(c) Research Grant Program: At the present time research grant projects have been undertaken by the following schools, relating to the following subjects:

- (1) University of Colorado School of Law, an Annotation of Selected Oil and Gas Operating Agreement Forms.
- (2) University of Denver College of Law, an Analysis of Proposals Submitted to Congress During the Past Twenty Years, Affecting Mineral Law, Location Laws and Procedures.
- (3) Foundation Staff, a Comparison of Mining Laws of the Several States and a Preparation of a Model Statute.
- (4) University of Wyoming College of Law, Subject Matter Analysis and Index of Law Review and Institute Articles on Oil and Gas Mining Law.

(d) American Law of Mining: The Foundation has accomplished an exhaustive and outstanding task of preparing, editing and publishing through Mathew Bender and Co., *The American Law of Mining*, a scholarly complete treatise. This work fills a need of those members of the profession who are practicing in that part of the Rocky Mountain area where the problem of hard rock minerals arises. The treatise has been very well accepted by the profession.

(e) Research Center: While still in its formative stages, this project warrants the support of all lawyers practicing in the field of mineral law. The purpose of the Research Center is to solicit, collect, index and make available exhaustive briefs, essays, memoranda and articles in the area of mineral law. The ultimate success of the Research Center depends upon the cooperation of those interested in mineral law and the work of the Foundation.

(f) Financial Program: It is interesting to note that the budget for the year 1962 has reached the sum of over \$61,000.00. The Foundation is financially sound. The principal income is derived from publication of the Gower Service, royalties received from the publication of the *American Law of Mining* and the proceedings of the annual institutes, income from the registration at the annual institutes and gifts from corporations and individuals engaged in the oil and gas and mining industry. I feel that these expenditures are on a program well worth while.

The Annual Institute for the year 1962 will be held in the new Law Center of Denver University, at Denver, Colorado. Denver is very proud of the new facilities at the law school, and I

hope that Nebraska will have a good representation attending this Institute.

This report should not be closed without referring to the recent resignation of Kenneth E. Barnhill, Jr., as Executive Director. The present stature of the Foundation is greatly due to his ability and devotion. The Foundation, however, has been most fortunate to secure the services of David R. Phipps, a former Nebraskan, as Executive Director. We have no fear as to the continued growth of the Foundation under the direction of Mr. Phipps. I have been very happy to serve as a Trustee of the Rocky Mountain Mineral Law Foundation, as representative of the Nebraska State Bar Association during the past year.

Paul L. Martin

[The report was received and filed.]

CHAIRMAN GINSBURG: There is one committee report that I have deliberately withheld because I feel it is a matter that will require perhaps some considerable time. We will proceed to the Report of the Committee on the Merit Plan of Judicial Selection, Mr. Ralph E. Svoboda.

[The report of the Special Committee on the Merit Plan of Judicial Selection follows.]

Report of the Special Committee on Merit Plan of Judicial Selection

Culminating at least six or more years of sometimes abortive and often disheartening Association effort, the Committee was successful in securing the passage of the legislative bill portraying the Merit Plan of Judicial Selection at the last session of the Legislature. L.B. 315, Senator Joseph T. Vosoba's bill, was finally selected as the vehicle and, with the persevering efforts of the members of this Committee and the officers of this Association, and the able assistance of the chairman of our own Committee on Legislation and of our own Committee on Judiciary, the members of the Executive Council, the District Judges' Association and the splendid cooperation of our fellow member of the Association, Senator Vosoba, the measure was finally hammered out so that it passed with a very handsome majority. It will now go before the voters for approval as a constitutional amendment at the general election in November of 1962.

As the separate report of the Committee on Judiciary stresses, there is a man-sized job ahead of each and every member of the

Association to gain approval of the proposed constitutional amendment in the November 1962 election. There will, therefore, have to be a continuation of the pertinacity, the intelligence, the diplomacy and the dedicated service of all of the persons who heretofore evolved and guided the Merit Plan to legislative enactment. To each and all of them and to the members of the Bar who contributed much to such successful passage, this Committee offers sincere thanks.

The job ahead is prodigious and will require the effort of each and every member of the Association. There will be much to be done in furnishing speakers, organizing lay supporters, and in engendering publicity. For the immediate present, however, the basic necessity is thorough familiarity of the Bar with the contents of the Merit Plan legislation. One of the members of this Committee has kindly consented to prepare an article for early publication in the *Nebraska Law Review* to acquaint the membership of the Association with the measure by furnishing a readily readable outline of its principal features. A great deal of misinformation may circulate unchallenged concerning the Merit Plan, unless the lawyers read it, digest it and know what its provisions are. This the Committee feels is the first order of business, as members of the Association will be asked by their clients and by others for information and views thereon.

It is, accordingly, the recommendation of this Committee that the Committee be continued so that, again with all the assistance that it can summon, it may continue the work of promoting the Merit Plan of Judicial Selection for adoption by the voters. The Committee and the officers of the Association should be further directed as to the role of the Association, as such, in a campaign for adoption and should be given full authority to implement such direction.

By all standards, it will constitute the most important project of the Association during the coming year.

Ralph E. Svoboda, Chairman
James N. Ackerman, Esq.
Chauncey E. Barney, Esq.
Virgil J. Haggart, Jr., Esq.
Tracy J. Peycke, Esq.
Joseph C. Tye, Esq.
Flavel A. Wright, Esq.

[The report of the Committee was adopted and the following motion was made by the chairman of the Committee and the following action taken.]

CHAIRMAN GINSBURG: You have heard the report. Is there any discussion thereon?

DANIEL STUBBS, Alliance: Do you think that authority is sufficiently broad to give you the money you need, Ralph?

MR. SVOBODA: Well, we thought so, Dan. It may be a question of how we raise the money, and as tentatively discussed we may do so by asking for contributions from individual lawyers and from foundations, wherever we can get it.

MR. STUBBS: If you were going to spend Association money I wondered whether we shouldn't make it available now.

MR. SVOBODA: The Executive Council I think has the authority to do that. They have indicated they will help out, yes. George says we have enough money in the "kitty" at least to help a little.

FLAVEL A. WRIGHT, Lincoln: In connection with the money, Ralph asked if I will head up the Committee to try to get this thing through to the voters. I have talked to some advertising people and I think there are two ways you can do this thing: We can rock along and hope for the best and do what we can, and we might "luck out," or you can give it the real bull hunch, and I think that is the only way we can proceed.

The budget that has been suggested to me that we should count on is a figure of \$25,000. That sounds like a lot of money, and it was suggested we might not need all of it, but I think we have got to plan on raising that kind of money.

I think we should start with the idea that, first of all, while the lawyers are vitally interested in this, this is a civic project. Whatever we do we ought to bring in civic organizations. The League of Women Voters, for example, has this as their No. 1 project. They have called me and want to coordinate our efforts on that. I think the PTA organizations are inclined to want to help.

But we are going to have to raise the money from the bar. We do have some money from our dues that we could use, but I think first of all we ought to start, and I think the lawyers generally ought to expect to be approached and to make some voluntary contributions. I don't want to get this to where we are putting a tax on anybody, because a lawyer has a right to oppose this if he wants, but we shouldn't raise the dues because that is going to create more ill will than help. I think all of us ought to plan not only to donate money but to donate a lot of time.

The Woods Foundation, for example, gave us \$500 last year for this session we held down in Omaha at Omaha University. I think we will hold some more sessions like that over the state, and I am hoping we can get some more money out of places like the Woods Foundation.

The Bar Executive Council this noon determined that we should have some money available, but not quite \$5,000, and when the time comes the Executive Council, I think, will be able to appropriate what additional money we need.

I would like to impress on all of you, first of all, the importance of every lawyer's becoming familiar with this Merit Plan and recognizing his own responsibility to study it and make up his mind on whether he is in favor of it or not. A good share of the opposition we have had in the past has come from fellows who haven't taken the time to really give it any thought, and their first impression was that they were not in favor of it.

We learned in Omaha last year that once you sit down for a couple of days and really give it some good hard study, the opinion is almost unanimous that this is what we need and it will be a great improvement in the selection of judicial officeholders.

So I would ask that each of you, before you criticize the plan, at least sit down and make a calculated judgment and be sure that you are against it, and just don't be against it because your first impression is such that you think the elective process may be all right.

Secondly, I think if you are in favor of it, each of you ought to recognize that this Bar Association has been working on this thing for thirty years. You can check the speeches of the past presidents of the organization, and every one of them for the past thirty years has had this as the No. 1 project, primarily. Now we are in a peculiar position where we can put this thing across. We've got the opportunity. The thing is sort of snowballing over the country. Iowa has the same thing coming up; Colorado has it coming up; they passed a sort of a bobtailed version of it in Kansas. The American Judicature Society has a big program on it. We've got a lot of help. We've got the League of Women Voters helping. I think we ought to work on every area of life. I think we ought to get the labor people interested in this. The labor representative at this meeting in Omaha stood up at the end of the meeting and expressed his appreciation that labor was included in a meeting of that type and said that he was in favor of it. Now maybe he has changed his mind but at least we've got a lead there we can follow up on.

I think at this time what we really need to know is whether this group is willing to undertake this project, giving it the full treatment, or whether you think we ought to just let it go to the voters and let the chips fall, or abandon it. That is the only decision we have now. If you want to give it the full treatment, I am sure we can get enough money from the Bar, from the lawyers individually, and from outside sources to finance it, and I think we can put it across.

CHAIRMAN GINSBURG: Is there any further discussion?

CHARLES F. ADAMS, Aurora: I think, as Flavel has said, that this is of tremendous importance, because our clients are going to come to lawyers and say, "What about this?" Most of the opposition is, "Well, you are taking away the right of the people to elect the judges."

The fact is that election of judges is a comparatively new thing, maybe a hundred or seventy-five years. A more important fact is that most of the judges were on the bench prior to this last election—of course we took a lot of them out on retirement—but the vast majority of Nebraska judges on the trial bench, on the Supreme Court, didn't go on there by election at all. They went on by appointment. They went on by purely political appointment where the Governor had only himself to answer to.

It seems to me when people come and say they are opposed to the Merit Plan because it is taking the people's right to elect the judges away from them they aren't familiar with the facts. What we are trying to present to them is an opportunity to get a fine caliber of people on our courts, selected by a panel made up of laymen as well as lawyers. I think it is our duty as lawyers to become familiar with this plan so we can answer the objections that are going to be thrown at us, undoubtedly, by some pretty powerful groups.

CHAIRMAN GINSBURG: Supplementing what Mr. Wright and Mr. Adams have just said, I hope I will be forgiven for infringing upon the privileges of the floor by saying I think I have noticed among the Bar on this question somewhat of a spirit of lethargy.

I am not going to call for a show of hands, but I wonder how many of the people in this room have actually read L.B. 315 and understand it? Since we have Mr. Svoboda and the members of his Committee here who have worked on this subject, it seems to me this would be a most appropriate time for anyone who isn't fully familiar with what the bill provides, or

what we are trying to do, to ask questions and get them answered, because if you don't leave here thoroughly sold on this thing, then the Bar Association has just been wasting its time.

I know perhaps I can be criticized for this but I will exercise my prerogative and say I hope that any of you who have any questions or don't thoroughly understand the bill will take this opportunity now to ask questions about it so that you will be educated on it and, in turn, be able to pass it on to your friends and clients and acquaintances.

Are there any further questions?

MR. STUBBS: May we have it explained?

CHAIRMAN GINSBURG: Mr. Svoboda, why don't you give them a general statement of the provisions of the bill?

MR. SVOBODA: Let me do it this way, by a thumbnail sketch.

First, we are trying to forget where this originated because the plan got the label of Missouri Plan. It was the thinking of our Committee and of the bigwigs on the Committee on Legislation that if there was any way possible to drop that "Missouri" out we should do that. That is why it now has the name of "Merit Plan" because that really, in a word, describes the essence of it.

Here is the way it works, and, as I say, this is not in detail, just thumbnail. It is limited only to the Supreme Court and to the district court. It may be enlarged by the Legislature according to its discretion, by statute, to include other courts all the way, 'way down to the municipal court, but the constitutional amendment names only the Supreme Court and the district court. I want to emphasize that because there has been a little rumble that says, "Does it include the juvenile court?" Well, you know that's a new court and there might be some difference of thinking on the efficacy of continuing the present incumbents of the juvenile court, but it is not in the bill, not until the Legislature in its wisdom, if it wants in the future, extends it to other courts than the Supreme Court and the district court.

How does it work? When a vacancy occurs the Governor of the state or, if he doesn't act within sixty days—and that is to overcome a little trouble they had down in Missouri—the Chief Justice makes an appointment to the office only out of a panel of—three, isn't it?—a limited number. This panel of three is placed before the Governor, or the Chief Justice, by a nominating commission which is evenly divided between three laymen and

three members of the bar, chairmanned by a judge or a justice of the Supreme Court, and the nominating commissions are selected one each for each particular district; that is, if it is a Supreme Court judge it is for his judicial district; if it is for a district judge it is for his judicial district. That is what it is in substance.

What do you do after the expiration of the term of that particular judge? He runs against his own record, nobody else on the ballot except his name with a "yes" or "no" for the voter to act on. In other words, there is still a vote, but you vote only upon whether you retain the judge or whether you release him.

If the voters decide that Judge So-and-So shall not continue to act as judge, then you go back to the original vacancy mechanism whereby the nominating commission meets, picks three names and submits them to the Governor or, if he doesn't appoint, then to the Chief Justice.

That is it in a nutshell. It is working now in Missouri as to Supreme Court and district judges in the Kansas City and St. Louis Districts; it is in Kansas as to the Supreme Court judges. By the way, our bill is patterned on the model bill that was prepared by the American Bar Association. It is not an exact copy but it is very strongly parallel to the provisions of that.

MR. ALEXANDER McKIE, Omaha: Explain what happens to the present judges who were elected a year ago.

MR. SVOBODA: They are carried over. By the way, we increased the district judges' term to six years, the same as the Supreme Court judges.

MR. McKIE: But the point is that the judges who are now sitting on the bench will come under the Merit Plan, automatically.

MR. SVOBODA: That's right, automatically, and they will be the first to have their names placed on the ballot at the election after this bill passes, if it passes. They will be the first ones to be voted on on the ballot as to whether they shall retain their offices or whether they shall vacate their offices.

CHAIRMAN GINSBURG: Just for fear that there may be some ambiguity in what has just been said, I would like to read the provisions of the bill on that point because I think it is quite important. I think Mr. McKie has put his finger on something. We have to have the support of the incumbent judges.

The bill says that those judges who are in office at the time this enactment becomes effective "shall be deemed to have been

selected"—it is deemed they are already appointed—"and to have once received the approval of the electorate, and shall be required to submit his right to continue in office to the approval or rejection of the electorate at the general election next preceding the expiration of the term of office for which such judge was selected or appointed."

So those who are in office do not suffer any inconvenience or any loss by reason of this enactment, but hold over.

Mr. Mattson, did you have a question?

MR. MATTSON: That answered my question. Thank you.

MR. STUBBS: How is the nominating panel selected?

MR. SVOBODA: The nominating panel is selected, as to the bar members, by the particular bar membership in the particular district. Have I made that clear? If it is in your judicial district, Dan, the lawyers who are admitted to the bar in your district will vote for the members of the nominating commission. The lay members are appointed by the Governor, but again out of that area.

MR. STUBBS: At the time the vacancy occurs, or is it a standing committee?

CHAIRMAN GINSBURG: It is a standing committee.

MR. SVOBODA: A standing committee.

MR. STUBBS: So they don't have any particular thing in mind at the time they are appointed?

MR. SVOBODA: Nothing at all.

CHAIRMAN GINSBURG: Along the point of what you asked, Dan, if I may be forgiven, I think what you are heading at is this: "The nominees of any such commission cannot include a member of the commission or any person who has served as a member of the commission within a period of two years immediately preceding." So you can't put anyone on for the purpose of saying, "That fellow is going to fix it so he becomes a judge."

MR. SVOBODA: In other words they can't promote themselves, you see. That gave us a little trouble when we were working on this bill because in some districts you pretty nearly run out of lawyers when you appoint a commission and then have to appoint somebody else.

MR. McKIE: What is the term of that panel?

CHAIRMAN GINSBURG: "The terms shall be staggered and shall be fixed by the Legislature." So they are appointed for staggered terms to be fixed by the Legislature.

MR. SVOBODA: It was changed several times and Senator Vosoba said, "Now, look, don't try to mechanize the whole thing in the Constitution. For heaven's sake leave something to the Legislature," and we assented to that.

CHAIRMAN GINSBURG: Are there any further questions? Does everybody understand the provisions of this bill and feel ready to get out and back it?

MR. SVOBODA: I think I should ask for the privilege of submitting another motion, that the House of Delegates endorse and sponsor the Merit Plan Statute.

CHAIRMAN GINSBURG: Is there a second?

[The motion was seconded.]

CHAIRMAN GINSBURG: You have heard the motion. Do you all understand it? That the House of Delegates go on record as endorsing and sponsoring the promotion of the Merit Plan Statute.

Is there any discussion on that motion? If not, we will call for the vote. All in favor say "aye"; contrary? Carried. Thank you very much.

Now turning to the reports that have not yet been completed, I note that the report of the Committee on Publication of Laws does not contain any recommendation requiring any action by the House.

[The report of the Committee on Publication of Laws follows.]

Report of the Committee on Publication of Laws

The principal interest of the Committee on Publication of Laws was in attempting to request the Legislature to send to each clerk of the district court in every county in the state every bill that was introduced, and the data each day showing the progress of the bill through the Legislature so that district court clerks could keep available in each county as a public record the record of the legislative acts as they progressed.

In line with the Committee's recommendation that this be adopted, a conference was held with the Nebraska District Judges'

Association, and a conference was held with Hugo Srb, Clerk of the Legislature, and the recommendation was submitted to the Legislative Council of the Nebraska State Legislature. It was the thought of the Committee after this work that we were making progress and that our recommendations would be adopted, as the District Judges' Association agreed to issue an order directing the district court clerks to maintain such a record.

On or about the 20th day of January, 1961, word was received from Hugo Srb, Clerk of the Legislature, that "that proposition was submitted to the Budget Committee and in view of the estimate by the Chief Clerk of the Bill Room the Budget Committee voted against the proposition."

We believe in the coming year our Committee should continually attempt to convince the Budget Committee and members of the Legislature that the public interest requires that a day-to-day record be made available in each and every courthouse in the State of Nebraska, so that the attorneys and other interested persons would know at all times the progress of pending legislation and those laws that are passed and approved with an emergency clause that immediately become law, prior to the adjournment of the Legislature.

Robert V. Denney, Chairman
Robert Barlow
John Dudgeon
Winthrop B. Lane
Alexander McKie, Jr.
Warren K. Urbom

[The report of the Committee was received and filed.]

[The report of the Special Committee on Attorneys' Fees in Governmental Matters was called up by Chairman Ginsburg and on motion was adopted.]

[The report of the Committee follows.]

**Report of the Special Committee on Attorneys'
Fees in Governmental Matters**

Since the last annual meeting of the Association this Special Committee has been on a stand-by basis, attempting to keep abreast of any developments in this area and particularly with respect to any work being done by the American Bar Foundation.

Therefore, in view of the fact that additional legislation will be formulated in this area, your Committee recommends that it be continued for another year and that it cooperate with the Coordi-

nator of Atomic Development Activities to secure passage of acceptable legislation which will place control of nuclear activity on a state level.

There has been introduced in the United States Congress a bill transferring jurisdiction of workmen's compensation injuries resulting from use of atomic materials to the federal government, the argument being that the states through their local workmen's compensation statutes have failed to adequately provide for this type of injury. *In view of this movement it is recommended that this Committee investigate the applicability of Nebraska's workmen's compensation statutes to injury or disability resulting from atomic energy radiation and determine if our workmen's compensation law adequately covers this problem.*

Robert H. Berkshire, Chairman
Wilber S. Aten
Robert E. Johnson, Jr.
Vance E. Leininger
G. H. Seig
Richard D. Wilson

[The following report of the Committee on Public Service was received and filed.]

Report of the Committee on Public Service

The activities of this Committee for the past year have consisted principally of carrying out and improving upon the annual Bar Association project of Law Day, U.S.A., and of initiating a new project.

The committee member in charge of the observance of Law Day, U.S.A., 1961, in the State of Nebraska was William Rist of Beatrice, who did an excellent job in organizing the programs in 57 counties in the state, and over the state as a whole. The Douglas and Lancaster County Bar Associations carried out the observance in their respective counties, and in the other 55 counties chairmen were appointed who were in charge of their respective programs. Participation in the counties was excellent and involved news coverage by local newspaper and radio, church participation in the program the Sunday preceding Law Day, communities having service clubs with programs observing Law Day, numerous local proclamations by mayors, and attorneys appearing before school assembly meetings to speak on this occasion.

On the state level there was excellent newspaper coverage in the metropolitan newspapers, and the Governor's proclamation of

Law Day was filmed and taped for radio and television presentation. Thirty-six radio stations and ten television stations participated in presenting this tape and film, treating it both as a news item and as a special feature. In most cases coverage was had on the day before and on Law Day itself. There was also excellent cooperation from a number of outdoor advertising firms who, at no cost to the Bar Association, displayed numerous billboards commemorating Law Day.

Senator Vosoba of the Nebraska Legislature introduced Legislative Resolution 23 relative to the observance of Law Day.

It is felt by the Committee that areas for improvement in future Law Day observances could include increasing the number of counties and Bar Association members participating, placing additional emphasis on programs for students on the college and junior college level, urging greater participation by the judiciary, particularly in public meetings observing Law Day, and placing emphasis on a wider participation by the Bar Association at its annual meeting and before the House of Delegates.

We wish to acknowledge the fine assistance received from Mr. George Turner, Secretary of the State Bar Association, and his secretary, Katherine Schultz, in their work and their suggestions this year.

A new project of the Committee will be first seen by the public on September 16, 1961. This will be a series of articles on law to be published in the *Nebraska Farmer* entitled "It's the Law in Nebraska." This farm newspaper is published twice a month and we have now supplied it with a year's supply of articles which have been obtained through the efforts of all the members of the Committee. These articles are related to subjects of law of general interest to the public, with particular emphasis on agricultural matters. It is hoped that the success of this series of articles will result in their publication in other newspapers throughout the state.

The Committee has also obtained reports from other state bar associations which contain the results of public opinion polls taken to determine lay opinions of lawyers. The Committee intends to use this information in the future to determine the areas the Public Service Committee should concentrate on in developing future public relations programs.

Richard A. Knudsen, Chairman
Auburn H. Atkins
Tyler B. Gaines
Patrick W. Healey
James A. Lane

C. Russell Mattson
Edmund D. McEachen
Pliny M. Moodie
William B. Rist
Donald F. Sampson
Bernard M. Spencer
Joseph C. Tye

CHAIRMAN GINSBURG: I believe that disposes of all committee reports. The last thing we have on the agenda today is the report of the Committee on Resolutions. There were no resolutions, so we have no report of that Committee, but this might be, since we seem to have run well ahead of schedule, an appropriate place for anyone to bring up any subject he figures might be of value to this Association.

I particularly want to call your attention to No. 37 on the list which is set down for the final session, "Presentation of any matters any Section or Committee wishes to bring before the House of Delegates." Now No. 37, at its appropriate time, comes when everybody is in a hurry and anxious to get away. Therefore, since we have some time this afternoon I will accept anything of that kind that anyone wants to bring up at this time.

ALFRED G. ELLICK, Omaha: Mr. Chairman, there is one thing that it seems to me the House should perhaps take some action on.

In his address this morning the President of the Association mentioned that an amendment to the bylaws might be necessary in order to authorize a midyear meeting. I think it would be appropriate, and it was suggested at the Executive Council meeting this noon, that the Chairman of the House of Delegates be requested to appoint a committee to study and, if necessary, draft an amendment to the bylaws to authorize the holding of a mid-year meeting, and that the report of the committee be submitted to the House of Delegates for action, if it sees proper, Friday afternoon when we have our last session. I would like to make a motion to that effect.

CHAIRMAN GINSBURG: Is there a second?

[The motion was seconded.]

CHAIRMAN GINSBURG: You have heard the motion. Do you all understand it? Is there any discussion? I think this is a subject that shouldn't just be passed over hastily. I think this would be an appropriate time to consider whether we want these

midyear meetings, whether they are valuable or worthless; and perhaps the membership ought to take this time to express their opinions. I merely throw that out for your consideration.

MR. ELLICK: Mr. Ginsburg, perhaps Mr. Turner would be willing to give a little summary of how many persons attended the midyear meeting and whether he felt it was a success. I was unable to be present so I am not able to comment.

I want to also explain that the motion is simply to authorize the holding of a midyear meeting, not to *require* it.

SECRETARY TURNER: I don't think you can possibly judge the success or failure of an entirely new venture by one time only. It may take two or three years of trial to determine whether midyear meetings are desirable and whether we want to continue them.

We found that it did give a number of the committees that might not otherwise have been able to hold meetings an opportunity to hold a session there in Lincoln. All of the sections, except the one on Practice and Procedure which has charge of the program part of this annual meeting, held business meetings, probably unauthorized, but the Executive Council agreed to ratify what they did. Probably the sections should have an opportunity, since they do not all participate in the annual meeting, of at least meeting for the purpose of discussing the problems that that particular section is working on and to perpetuate their offices, because eventually we hope every section will have had charge of an annual meeting.

There were, if I recall correctly, 125 present, which we thought was very good for an initial venture into the plan of holding a midyear meeting. Personally I would like to see it continued for at least another year or two to give it an opportunity to prove itself, or we can decide we don't want it.

CHAIRMAN GINSBURG: Are there any further questions? By the way, Mr. Ellick, I appreciate your calling my attention to the fact that I stated your motion wrong. You just want the committee to study and draft an amendment to the bylaws to provide authorization for it. Is there any further discussion on the motion? If not, we will call for a vote. All in favor say "aye"; contrary same sign. Carried.

Is there any further business to be brought before the House at this time?

I want to call attention, before we adjourn, to this meeting that is scheduled for Friday afternoon at 4:00 P.M. Experience

has shown in the past that everyone is very anxious to get away and attendance has been poor, not only poorly attended in person but poorly attended in spirit because the minds of the members have been elsewhere. I want to protest against that situation. As you will notice, this is the time when the reports of the various sections come before the House, and this is the last time that the House can transact the business of the Association for another year. It is too important a matter to skip or to be dilatory about. Therefore I beseech all the members of the House to be sure to be present promptly Friday afternoon at the closing meeting of this House.

Before we adjourn I will appoint the committee for the study of the bylaws, the possible midyear change that has just been voted on, to report at this Friday afternoon meeting: Mr. Ellick to be chairman, Mr. Oldfather and Mr. Stubbs.

Is there any further business before the House?

MR. SVOBODA: Mr. Chairman, there is one topic that I only briefly discussed with the Executive Council but to which I might draw the attention of the House of Delegates. There are a tremendous number of new federal judicial vacancies. I think about half of them have been appointed so far, many on a recess basis.

I have been speculating about it from this standpoint: The American Bar Association has a working arrangement with the Attorney General of the United States whereby any proposed nominees are screened by the American Bar Association, and that, of course, is excellent. But here in Nebraska our federal judicial posts are filled, and they are filled by young men; there may be appointments to the Court of Appeals, and it has been suggested that maybe we should work in the reverse direction, too, of advancing the names of men who might be favorably considered as nominees.

I just toss it on the floor, as to whether or not we should engage in any such venture. The way it operates now, only those who have worked up their courage to become nominees, so to speak, are considered from the standpoint of their qualifications and eligibility. I am sure there are among the members of this Bar Association many who would have excellent qualifications for the post, and yet they have no way, through this Bar Association, no mechanism whereby their names could be favorably considered in that direction.

For instance, we have a Committee on Federal Rules of Procedure. Would it, for instance, be politic and advisable to have

a committee of that kind also get into this field? I have no strong views on it one way or the other but I thought I would throw it out on the floor to see what the reaction of the House might be to it.

CHAIRMAN GINSBURG: Is there any further discussion in connection with the matter submitted by Mr. Svoboda? Does anyone else care to be heard? Mr. Svoboda has made no motion, so there is nothing before the House, as I understand it, requiring formal action, but I think it is a subject well worthy of consideration. We would be glad to hear from anyone who has anything to submit.

There being nothing, is there any further business to come before the House?

MR. WRIGHT: There is another idea I would like to pass on to you. John Randall, a past president of the American Bar Association, is heading up a Section on General Practice, which I think Mr. Satterfield may tell you more about tomorrow. He asked that I mention it to you and see if there is any interest in the Nebraska Bar in such a section. I am sure there will be some interest, and if so, what should this Bar Association do to implement creation of a corresponding section of the Bar which considers the problems of the general practitioner? I am sure there will be some overlapping with other sections but that, I think, is worth your consideration.

CHAIRMAN GINSBURG: Is there any further discussion on that matter? Do you have any thoughts? You should make your wishes or ideas known.

I received in the mail also, just a day or two ago, a letter from the American Bar Association about a Special Committee on Lawyers' Title Guarantee Fund. It is short. I might read it to the membership:

"Is there any organization in your state by which lawyers as a group are able to provide comprehensive title assurance to their clients by combining professional services with indemnity against financial loss? Studies by your ABA Committee on Economics of the Law Practice reveal that trend toward having real property transactions closed without the public having the protection of independent professional legal advice. These studies further reveal that lawyers in some states, such as Florida, Ohio, Indiana, and Kentucky, have united to afford such protection as well as financial indemnity in cases of failure of title, and other states have programs under study."

That is as far as I will go with this except to say this, that at a meeting which I attended of the Nebraska Title Association, inquiry was made of me as to whether the Nebraska Bar Association was giving any consideration to the subject of a lawyers' title guarantee fund. I told them that so far as I knew nothing had been done and nothing was contemplated. That, again, apparently is a subject that is receiving wide consideration in a number of states.

Is there any further business?

CHAUNCEY E. BARNEY, Lincoln: Hearing some references on the floor today led me to believe that maybe what I am suggesting may be premature; perhaps the Executive Council has this under consideration. There are two matters that have come to my attention in the last month, and sitting here this afternoon looking at our committees' reports I am reminded again of our Committee on Attorneys' Fees in Governmental Matters. It seemed to me we got fairly abstract when we ended up by recommending the Committee of the American Bar Association further study the report and see the extent of the problem. This is pretty far away from the solution of economic problems for lawyers in Nebraska.

There are two things I have had drawn to my attention. I am concerned about the whole area of restricted counsel fees in matters whether set by courts or by law or all the way along. We apparently have no committee of this Bar paying attention to that fact.

The two things that came to my attention, that concern me, all of you may have read of and I am sure you did in the advance sheet. I don't now remember the counsel involved so if I am stepping on toes I am not stepping on them intentionally. It was a case that came out of Fremont, a suit on an insurance policy, as I recall, a real estate indemnity policy of some kind. The case was of interest, but as I got to the end of it I was struck by the fact that this was an opinion in a case where the matter had already been to the Supreme Court once, had gone up on demurrer, been reversed, sent back, retried, decreed, been up to the Supreme Court again; and it was one of those matters where counsel fees could be allowed. As I recall, the report indicated that counsel fee of \$300 had been allowed in the district court, which covered both the original trial and the appeal to the Supreme Court; and the second fee allowed was \$300 for the second appeal to the Supreme Court.

Any of us knows this is unrealistic, or it seemed so to me on the face of it. Perhaps somebody ought at least to look at this kind of thing and see whether this is a proper kind of restriction.

Another thing that came across my desk that I became acutely aware of—a local client came in about a problem of a charge that had been made on an estate in Iowa. It looked big to me so I checked the Iowa statute, and at first look it seemed about the same percentage as our statute. You will recall that the administrator's fees are set on a certain percentage of the property handled by the executor. The percentages looked exactly the same. I got to the bottom and I was wondering how in the world they got \$2,400 in attorneys' fees and \$2,400 of executors' fees out of a \$100,000 estate, all of which was tied up in one land contract and money in the bank. The difference was that their percentages in Iowa are figured on gross returns for state inheritance purposes. That is a vast difference from what we have in Nebraska. I don't know, again, whether this is too big or too little, but it seems to me we ought to have some committee of this Bar paying attention to those matters on a continuing basis.

For that reason I would recommend to you, or rather I would move that this House of Delegates—and I take it that the establishment of a committee is one for the Executive Council—that we recommend the inclusion of these matters in our committee structure. I don't want to limit the Executive Council as to whether that should be made an additional area of inquiry by expanding this Committee on Governmental Fees to any restricted counsel fees, but I would move that this House go on record as recommending the establishment of a committee, in one of the areas of our committee, on a continuing basis to review and report on the items of restricted counsel fees.

CHAIRMAN GINSBURG: You have heard the motion. Is there any second?

[The motion was seconded.]

CHAIRMAN GINSBURG: It has been moved and seconded that the Executive Council be requested to establish a special committee to study and report on the matter of allowances of attorneys' fees generally. Is there any discussion on the motion? Mr. Wright.

MR. WRIGHT: I understood that the motion was that the Executive Council be asked to refer this subject to either a special committee or an existing committee as part of its duties. This committee that we just this noon took some action on, on

the economics of the legal profession, may be an appropriate committee to consider it.

CHAIRMAN GINSBURG: I will correct my notes accordingly. You all understand the motion. Is there any discussion thereon? There being no discussion, I will call for the question. All in favor say "aye"; contrary same sign. Carried.

We have with us this afternoon, gentlemen, a distinguished guest, the President of the American Bar Association. I know you will all be anxious to meet him and greet him. I will ask Mr. Hale McCown, our President, to present our distinguished guest.

PRESIDENT McCOWN: Gentlemen, I am sure he needs no introduction and I shall not take your time to make any introduction speech. I will merely present to you John Satterfield, President of the American Bar Association, who has been sitting in the back of the room for the last few moments listening to the deliberations of the House. He arrived this morning and expects to be with us today and tomorrow. Mr. Satterfield.

[The audience arose and applauded.]

REMARKS

John C. Satterfield

Mr. Chairman, Mr. President, Mr. Nebraska A.B.A., Ladies and Gentlemen: It is a pleasure to be with you today. I always watch my watch. It is now eleven minutes past three. I promise not to talk over six minutes.

I was quite interested in your proceedings this afternoon and in the reports that have been made by your committees. On the last matter discussed, the committee of which I was chairman for three years on the economics of the law practice had this review made by the A.B.A. Foundation beginning with the first limitation by a federal action on attorneys' fees in 1868, having to do with veterans of the Civil War. It was interesting to note in that study that only one time, from 1868 until 1960, did any Bar Association representative appear before Congress or, as far as we have ascertained, contact Congress when they were considering restrictions upon and limitations upon attorneys' fees in any federal proceeding, which of course has an even worse effect upon the public, who should have representation, than it does upon the lawyers as lawyers.

We are delighted that you have adopted that resolution, and I hope it will be referred to our Committee on the Economics of the Law Practice and to our Board of Governors because we are quite interested in that subject.

We of course are quite delighted with the work that you have done in the field of the Merit Plan of Judicial Selection. As you know, we have advocated that type of selection for many years, and you have certainly worked out an excellent plan. I have gone over it with Hale, and it certainly is one that has our full support in every way. I am going to mention it tomorrow at the luncheon very briefly.

I was quite interested in what you are doing in legal aid and the fact that your committee reported it is considering establishing, in connection with Creighton University or otherwise, a full-time staff or some fully salaried person to provide legal aid in this particular area and that you are pressing that in other areas.

We also are putting a good deal of emphasis this year on client security funds, and there are, I believe, fourteen states which have adopted client security funds. As you know, there are numerous plans available that can be used to fit the local circumstances. It certainly is a fine way to carry out our obligation as lawyers to the clients of ourselves and other lawyers to see that they should not lose because of any default of a member of our profession.

I was interested also in the report of your committee pointing out the shortage of young lawyers. It is true that in the last seventeen years every year there has been a decrease in the number of persons admitted to practice law as compared to the population of the United States. With the exception of four years out of seventeen there has been a decrease in the actual number of admittees to the bar throughout the United States. There are various reasons, some of which I will discuss tomorrow, but I am delighted to see that the American Bar Association and your Association agree on that basis, that there is a shortage and that we should do something about it.

At the University of Florida, for instance, in seven months the dean and one of the staff members raised \$70,000 to be used for scholarships and loans to deserving law students, and that was done within a seven-month period last year for that one school in Florida. We are considering setting up a nation-wide trust fund to be used for that purpose and to cooperate with and match funds of similar nature which are raised within the states and for local law schools.

We are quite interested in this matter of business corporations, and our Committee, of which Hale is a member, on Professional Ethics is now considering the sixteen statutes which have been passed permitting professional corporations to be formed. Of course we will study very carefully the maintenance of a proper professional, ethical relationship of individual lawyers with their clients and to their clients within a legal framework which will permit us to do for ourselves that which we do for our clients, and that is to minimize taxes on a legal and proper basis to give ourselves the benefit of that which we give our clients in that area.

I was delighted to see you had meetings set up in 57 of your 93 counties on Law Day and that you are putting a lot of emphasis on that, and that you did have the assistance of 36 radio stations and ten TV stations in putting on Law Day in Nebraska last year.

I also was quite interested in your Code for Physicians and Attorneys. I think that has been done in some states. It should be done in every state. It certainly is a fine method of carrying out and keeping the cordial relationships in the use of medical testimony and the relationship of our profession to theirs.

I am delighted to see, too, your consideration of the Commercial Code, which has been adopted by about thirteen states. I am not sure whether it is eleven or thirteen but, as we say down South, "it is going on fifteen." I have a little daughter who is fifteen years old. She is fifteen "going on nineteen." Any of you with young daughters know what I mean. There are about thirteen states that have adopted the Commercial Code. We hope to get it adopted in Mississippi next year. I am not sure whether we will or not.

It is really quite inspiring to come to an Association meeting such as this and see the tremendous amount of work that you are doing. For instance, your institute in new legislation on a state and federal level which you have been holding is an excellent thing. I was telling Hale that it may have been done elsewhere but if so I haven't heard of it. I think you have a "first" there where you hold a regular institute to bring your members the new legislation on a state and federal level and provide a review for their desk so they will have it before them.

This is my first chance to visit the Bar Association in Nebraska, and I want to repeat that I am quite impressed with the tremendous amount of work that you are doing. It is a real inspiration to see how hard members of our profession work, whether it be in Oregon or Nebraska or Mississippi or Vermont,

or wherever it may be, to not only help our profession, which is a secondary basis, but to do those things which help the public and our country, our nation, our state and our local community, because when you look through the things that are being done by this Association and the American Bar Association and other state associations you find that the majority of the things we do are for the best interests of the people of our state and the United States, but we have a perfect right and it is our duty also to do those things which are in the best interest of our own profession and ourselves and our families.

It is really a pleasure to be with you. I am looking forward to seeing you tonight and tomorrow.

CHAIRMAN GINSBURG: Thank you, Mr. Satterfield.

Is there any further business to come before the House? If not, I will declare this session adjourned, and we will be in recess until Friday afternoon, November 3, 1961, at 4:00 P.M.

[The Wednesday afternoon session adjourned at 3:25 o'clock.]

THURSDAY MORNING SESSION

November 2, 1961

[The opening session of the sixty-second annual meeting of the Nebraska State Bar Association, convening at the Hotel Sheraton-Fontenelle, Omaha, was called to order at 10:05 o'clock by Hale McCown, President, Beatrice, Nebraska.]

PRESIDENT McCOWN: Ladies and Gentlemen: May I present to you Father William F. Kelly, Vice-President in charge of Academic Affairs at Creighton University, for our invocation. Will you rise, please.

INVOCATION

Reverend William F. Kelly, S. J.

God our Father, impress deeply into us the high stewardship of our proud profession. May we possess personally and may we transmit to those with whom we deal a profound respect for the laws which buttress and support our human rights. May we in truth be what we seem to be to the youth of our land, to the community in which we live, and indeed to our own families and friends.

We glory in the high challenge of this profession and we ask our loving Creator to make us worthy of its demand. Amen.

PRESIDENT McCOWN: Ladies and gentlemen, it is a pleasure to present to you now Mr. Robert D. Mullin, President of the Omaha Bar Association, for the welcome to this group.

ADDRESS OF WELCOME

Robert D. Mullin

Thank you, Hale. Mr. President and Friends: Today marks the start of the sixty-second annual meeting of the lawyers of Nebraska. These annual meetings are a good thing. Most of our days throughout the work year are spent in contention and struggle with one another. This is the very nature of our honorable profession, and if we are to properly represent our clients it will never be otherwise. But because of this, it is all the more appropriate that we lay down our senate pads and gather together once a year. Here, for a brief time, we stand united on the same side of the counsel table. Here we work together and we play together. It is here that we cement old friendships

and forge new ones. And it is here that we allow ourselves the opportunity to elevate our thinking to a level far above and beyond the day-to-day grind of earning a living.

This year, as never before, we meet in an atmosphere of world-wide tension. I like to think that the lawyers of the world, and especially the free world, more than any other single group will provide the courage and the leadership necessary to meet the challenge which lies ahead. The history of mankind teaches us that this has always been the case.

Many of you may recall that when Jesus was crucified, more than a million people were present. Out of that vast multitude only two men had the courage to step forward to claim his body and give it a decent burial. Both of these men were lawyers.

When the people of England forced their King to sign a guarantee of their liberties 'way back in the year 1215, it was a lawyer who drafted the instrument known as the Magna Carta.

Thomas Jefferson, who wrote the Declaration of Independence, was a lawyer.

Roger Williams, who wrote the first charter of religious liberty, was a lawyer.

Abraham Lincoln, the author of the Emancipation Proclamation, was a lawyer.

Mohandas Gandhi, the leader of India, was a lawyer.

And so it goes. In every crisis the lawyer has been the leader of mankind. Today, more than ever, when we assemble together as a united body of professional men, we should again pledge our talents to solving the greatest human crisis of all: that of helping to save our fellowmen from complete and total self-annihilation.

With the blessings of Almighty God and the help of our brother lawyers throughout the world we can and we will win this toughest of all cases.

Now, in closing, the public officials of Omaha, the citizens of Omaha, and, yes, the lawyers of Omaha bid you welcome as our guests. We thank you again for selecting our community for your meeting, and we wish each and all of you and your wives a pleasant visit. You will need no key to this city, for all of our doors will be open to you. Enjoy yourselves, and have a happy and productive meeting!

PRESIDENT McCOWN: I present to you now a gentleman with whom you are all familiar, to make the response on behalf of this Association: Mr. Charles F. Adams of Aurora.

RESPONSE TO WELCOME**Charles F. Adams**

Mr. Mullin, President McCown, Members of the Nebraska State Bar Association: I deem it a great personal privilege to be permitted to respond to the gracious words of welcome of the President of the Omaha Bar Association. As a matter of fact, this response can only be a heartfelt expression of appreciation for the many courtesies extended to those of us and our ladies who live and move and have our being in the sparsely settled regions of Nebraska beyond the confines of Douglas County. We are also mindful of the fact that these things do not just happen—that they come about only through the untiring efforts and energy of the members of the Omaha Bar and their ladies. As your guests, we are truly mindful of all that you have done for our comfort, our convenience, and our entertainment.

It is our earnest desire to so conduct ourselves that we will bring no embarrassment or disgrace to you or to the Nebraska State Bar Association. However, should any of us have the misfortune to be discovered in circumstances lacking in dignity and decorum, we earnestly trust that you will extend to us your sympathy rather than your condemnation, that you will enfold us in the broad mantle of jurisprudential charity and that you will forgive us our transgressions.

Finally, may I again repeat that all of us and our ladies extend to you, and your ladies, Mr. Mullin, a very sincere "thank you" for your warm and cordial words of welcome.

ADDRESS OF PRESIDENT**Hale McCown**

The rules creating, controlling and regulating this Association, after specifying the duties of a President, state: "He shall also deliver an address at the regular meeting of the Association next succeeding his election." I would like to tell you simply that my address is Beatrice, Nebraska, and let it go at that, but I have been specifically advised that such interpretation of the rule should not and would not be tolerated as a proper fulfillment of the duties thus imposed.

The basic general report on the activities and the program of the Bar Association during the past year has already been presented in the report of the Executive Council to the House of Delegates yesterday, and I shall not repeat it here.

While I recognize that it may sound like a cliché, nonetheless I am completely sincere in saying that I have had superlative cooperation from the officers, the Executive Council, sections and committee members and chairmen, the Secretary's staff and the various local bar associations during the past year. Without them and their dedicated efforts, this Association's program and accomplishments would be utterly impossible. There have been so many who have devoted their time and efforts to our collective cause that it would be impossible to designate them all within the limited time available. There are, however, two individuals whom I must single out.

This year Mr. George H. Turner has entered his twenty-ninth year as Secretary of this Association. His guidance, his judgment, and his faithful and devoted service have been a pillar of support to me and your officers. This Association over the years has accumulated a debt to him which it will never be able to fully repay.

Mr. Herman Ginsburg has not only served as the chairman of your House of Delegates for the last two sessions, but once more undertook the task again this year of acting as chairman of your Committee on Legislation. His knowledge, experience, and untiring efforts had much to do with the successful culmination of the legislation program looking toward the adoption of the Merit Plan for Judges.

For more than thirty years the presidents of this Association have been advocating and working toward the adoption of a program to provide for the appointment of judges on the basis of professional merit, rather than have them designated by the uncertainties and vicissitudes of the elective process. We can now report that these many years of work and effort have been partially rewarded by the attainment of the first of the two major goals toward which we have all been working. The Legislature has passed the bill calling for the presentation of a constitutional amendment to the voters of Nebraska providing for the adoption of the Merit Plan for the Selection of Judges. The last and most important goal will be the election next year at which the proposed amendment will be submitted to the vote of the people of Nebraska. That goal must be the primary objective of this Association for the coming year.

This is *not* a lawyers' bill. This is a bill to improve the administration of justice and is consequently for the benefit of *every* citizen of this state. We must inform ourselves, and we must see to it that every other organization and, if possible, every individual citizen is informed about the proposed amend-

ment. While we as lawyers, dedicated to the ideal of freedom under law, bear the primary responsibility for initiating changes for the improvement of the administration of justice, we cannot do the task alone. We must lead, we must organize, and we must inform the entire citizenry of Nebraska with respect to the administration of justice and its importance. We, and they, must be reminded that it stands as the cornerstone of the structure of individual freedom to which we all give lip service.

While this is a very important step forward, it is only one improvement in the field of administration of justice. The members of our profession bear a very heavy responsibility for leadership in this entire field. This responsibility we have too often taken lightly over the years.

More than fifty-five years ago a young professor at the University of Nebraska Law School uttered these words: "... I venture to say that our system of courts is archaic and our procedure behind the time. Uncertainty, delay, and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice—direct results of the organization of our courts and the backwardness of our procedure—have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community.

"Our system of courts is archaic in three respects:

- (1) In its multiplicity of courts,
- (2) In preserving concurrent jurisdiction,
- (3) In the waste of judicial power which it involves.

The judicial organizations of the several states exhibit many differences of detail. But they agree in these three respects—too much of the current dissatisfaction has a just origin in our judicial organization and procedure. The causes that lie here must be heeded. Our administration of justice is not decadent, it is simply behind the times."

Those words of Dean Roscoe Pound have echoed down through the years. Although much progress has been made, these words of Dean Pound, spoken more than a half century ago, remain true.

The quality of the administration of justice is, and must be, an area of primary responsibility of the members of our profession, both bench and bar. As lawyers, we have tended to regard our obligations in this area as extending only to those matters which happen to come to our individual attention; or involve us

or our individual client's cases or interests. There is in my opinion, because of our profession alone, if for no other reason, an individual obligation and responsibility of every lawyer for the over-all administration of justice. We should be not only collectively but individually concerned with prompt justice, inexpensive justice, and efficient justice, and of necessity with the machinery and tools of its administration. And we need to be ever alert for the means to improve and not merely retain it.

In the age in which we live, to stand still is to watch the world go by, in the law as well as in every other field. If lawyers are at times critical of the courts, we are so as friends of the court. Our problems are common and we have the greatest reason and need for cooperation. The bench profits by a bar with a reputation for ability and integrity, and the bar shines in the reflected glory of an able, sound and respected judiciary. I am happy that there exists this close friendship and relationship between the bench and bar in Nebraska.

A judge cannot function in a vacuum. It is not enough that he offer a prayer as in the Good Book, "Give Thy servant an understanding heart to judge Thy people, that I may discern between good and bad." Neither does the lawyer live on a legal island, surrounded by precedents, statutes, and decisions, and separated by a professional gulf from those we sometimes refer to as laymen. The judge and the lawyer should know not only what the courts decide, but the circumstances and conditions, social and economic, to which legal principles are to be applied. They should know the state of popular thought and feeling which make the environment in which these principles operate in practice, and while recognizing that law is a science, they must know that it is one of the social sciences.

As judges and lawyers, we need to take separate and joint action, looking to specific and general over-all improvements in the field of administration of justice; not only for the immediate scene, but for the long-range view. Certainly the time has come for Nebraska to make an all-out effort to coordinate, unify and improve its own system of administration of justice, and to that task I invite the efforts and the attention of every member of this Association and every citizen of Nebraska.

The administration of justice is today, as always, the most important and fundamental foundation upon which individual freedom itself stands. There can be no freedom without a system of justice which interprets and enforces it. The average citizen's concept of freedom itself, and of the law upon which it stands, is formed and shaped and colored by the administra-

tion of justice which he observes under that freedom and the law.

The tasks of the judge and of the lawyer are conceived and carried out in terms of ideas, concepts, and legal principles. While we work in this intangible field, we must never forget that these ideas, concepts and principles of law affect people. In our heritage, these legal principles are, and must remain, firmly imbedded in the tradition of freedom and the rights of the individual. The tasks of the judge in this intangible and tremendous intellectual field were once described by Judge Learned Hand as "shoveling smoke," but if they be approached in the spirit of liberty, then the rights of the individual will remain forever alive. Mere change must not be confused with progress, nor efficiency achieved at the expense of freedom.

Judge Hand's own description of the spirit of liberty best describes the spirit in which the task must be approached. "The spirit of liberty is the spirit which is not too sure that it is right, which seeks to understand the minds of other men and women, remembers that not even a sparrow falls to earth unheeded; it is the spirit of Him who taught mankind that lesson it has never learned, but has never quite forgotten, that there may be a kingdom where the least shall be heard and considered with the greatest."

Gentlemen, our next order of business is the report of our Secretary-Treasurer, Mr. George H. Turner.

REPORT OF SECRETARY-TREASURER

George H. Turner

Mr. President, Members of the Association: I wish to report that the accounts of the Association have been audited by the accounting firm of Peat, Marwick, Mitchell & Company of Lincoln.

Some of you may remember from last year that it was voted by the House of Delegates to close the fiscal year of the Association on August 31 each year instead of following the practice which we formerly had of closing at the end of the month ahead of the annual meeting, thereby giving the accountants a little more time to analyze the accounts of the Association and prepare their report.

They have prepared a report in which they state they have thoroughly examined the accounts and found them to be in order, and also examined the account of the Daniel J. Gross Nebraska State Bar Association Memorial Trust.

The audit report was submitted to the Executive Council yesterday. It has been approved. It will be published in full and in detail in the proceedings of this Association.

Now if I may at this time also make a few announcements. I know that some of you may be wondering about the box of apples at the entrance of this room. There is a very fine lawyer practicing in Seattle, Washington, who was admitted to the bar in Nebraska upon his graduation from the University of Nebraska Law School in 1903. At the time we integrated the Bar in 1938 he was delighted that he could at last be identified with the Nebraska State Bar Association. He is extremely proud of his membership in our Bar. His name is Elias Wright. Some of you may remember that he visited the Association some eight or ten years ago and thoroughly enjoyed himself. He was unable to come this year, but about two weeks ago I received a letter from him asking where the Association meeting would be held and about how many ordinarily attended. So I wrote him we would be at this hotel and that we usually registered somewhere around 850 to 900.

Last week, much to my surprise, I received a letter from him telling me he was sending me ten boxes of Washington Delicious apples to express his good wishes to his brothers of the Nebraska Bar. You will find them just outside the door.

Our luncheon speaker today is a very dedicated lawyer. He is the President of the American Bar Association and an inspirational speaker. I know you will thoroughly enjoy what he has to say to you.

Then at the dinner tonight we have Judge John R. Brown of the United States Circuit Court, a former Nebraska practitioner who practiced at Holdrege, Nebraska. He has advised us that his address will be very much in the lighter vein. I urge you very strongly to please get your tickets for these two events at the earliest opportunity. Thank you.

PRESIDENT McCOWN: May I add my comments to George's announcement. John Satterfield's subject this noon will be one that I think you will be interested in. If you will notice the title, it is "How to Be a Lawyer Without Going Broke."

John Satterfield, as you all probably know, was chairman of the Committee on the Economics of the Bar of the American Bar Association for several years and has probably done more to further the lawyer's economic interest in the past few years than any other single individual. It is a subject which he knows thoroughly. I am sure you will enjoy it.

Judge Brown—some of you who may belong to the American College of Trial Lawyers may have heard him in New Orleans in March—is a delightful speaker. I am sure you will enjoy it.

The next item on the agenda is the report of your Executive Council. This report was made yesterday to the House of Delegates. I have condensed it somewhat for presentation to you today.

REPORT OF EXECUTIVE COUNCIL

Hale McCown

Your Executive Council met somewhat more frequently than usual this past year on some seven separate and specific occasions plus numerous incidental in-between ones.

They authorized and there was created a Special Committee on Judicial Selection and the Merit Plan for the Selection of Judges. The Special Committee for the Merit Plan for the Selection of Judges has already begun preliminary work for the election next year and will probably be approaching many of you for help and assistance during the coming year.

The continuation of the Legislative Bill Digest was authorized and carried out, as you know, during the last legislative session. That is a task which George Turner's office and staff conduct, and I am sure you all appreciate the work and effort they have put into this Legislative Bill Digest.

The Council has approved some minor changes in the group accident and health policy, disability, and I suggest that there are still some shortages in the coverage for it in order to put it finally and completely into effect. I suggest that you check at the booth. Our insurer on our group accident and health policy is just outside the door to your left.

We also, this past year, have approved a new group major medical insurance policy which we feel is a very fine one. We are, I believe, twenty-five short of the necessary number to put it into original and effective operation. I suggest that it may be appropriate that you drop in at the booth immediately outside the door if you have not yet had the information or made up your mind with respect to these policies.

The Council devoted considerable time and research and review to the case of *Lathrop v. Donohue* in which the Supreme Court of the United States in January upheld the validity of the integrated bar association. We are not quite as Jack Wright tells me Missouri has been since, almost afraid to take any move that

does not affect all lawyers generally because of the decision, but there are some problems in the area which have had to be looked at.

The Council authorized, on a trial basis, the holding of a midyear meeting of this Association for the purpose of transacting committee and section business. Because of the change in format of our program last year, of having the program at the annual meeting presented by only one of the sections, the other sections in many instances did not have an opportunity to meet or transact their business or to have their programs which they had developed. This gives the sections and committees and other groups an opportunity to meet other than at the regular annual meeting.

The Council approved a formal welcoming ceremony for newly admitted lawyers in Nebraska, and your President in June presented each of the newly admitted lawyers of Nebraska with a copy of the *Nebraska Lawyers Desk Book* with the compliments of this Association.

The Council also approved the proposal of the Junior Bar Section for the publication of some 4,000 pamphlets describing and setting forth the legal profession as a profession, for use in connection with high school Career Days throughout Nebraska, and furnished some financial assistance toward the publication of these pamphlets.

The continuation of the Law School Student Placement Service for the graduating seniors of both Creighton University and the University of Nebraska has been approved, was carried out last year, and will be again conducted this next year in our *Nebraska State Bar Journal*.

Last and perhaps most important, the Council has authorized the creation of a special committee for the final drive toward the adoption of the Merit Plan for the Selection of Judges.

At this time I would like to call for the report of your American Bar Association delegate, Mr. John J. Wilson.

JOSEPH C. TYE, Kearney: Mr. President, may I make a motion ahead of that?

PRESIDENT McCOWN: Certainly.

MR. TYE: I would like to move that this Association express our appreciation to our brother in Washington for the ap-
ples and to extend to him a special invitation to be with us next year.

[The motion was duly seconded.]

PRESIDENT McCOWN: Thank you very much. You have heard the motion and the second. All in favor will please say "aye"; opposed the same. Thank you, Joe.

REPORT OF AMERICAN BAR ASSOCIATION DELEGATE

John J. Wilson

Mr. President, Ladies, and Members of the Bar Association: The American Bar Association is a voluntary association of lawyers of the United States, and our principles are to uphold and defend the Constitution of the United States; to maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge of experience in the field of law and the promotion of public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of bar organizations in the nation and in the respective states as are within these objects and the interest of the legal profession and of the public.

Through representation of the state, territory, and local bar associations and the House of Delegates of the Association, as well as large membership in the bars of each state and territory, the Association endeavors to reflect so far as possible the objects of the organized bar of the United States.

As you know, the American Bar Association is governed by a Board of Governors now consisting of fourteen, or at the next election there will be fourteen members of the Board of Governors, and one delegate from the state called the State Delegate, who is elected by the members of the American Bar Association of that state, and at least one member elected by the bar association of the state; and the number each state is entitled to depends on the size of the bar association. In Nebraska we are qualified for only one bar delegate.

The work of the Association is carried on by eighteen sections, each within the jurisdiction defined by the bylaws. All of them require a membership fee except the Junior Bar Conference, which is limited to members of the Association under the age of thirty-six, and as a younger member joins the Bar Association he is automatically a member of the Junior Bar Section.

The fees of the American Bar depend on your age and years of practice: \$20.00 for lawyers first admitted to the bar in 1956 or before; \$10.00 for lawyers admitted in 1957, 1958, and 1959; and \$5.00 for lawyers admitted in 1960 or later.

At the annual and midwinter meetings all these sections report, as well as committees of the American Bar Association. Some of you get a report of the concise statement of what took place. This last annual meeting there were several changes in the constitution and bylaws, principally in organization and succession of power. Also the Association approved the work of the National Conference of Uniform Laws.

At the August meeting in St. Louis they approved three uniform laws: The uniform debt tax credit act; the uniform nonresident, individual income tax deduction act; and the uniform code of military justice. They also approved a second addition to the American Bar Center in Chicago, a \$1,200,000 building, to be ready, they hope, in 1963, which is being built without calling for assessments from any members of the Association. The Bar Center is doing a marvelous job on research. Their services are available to all members of the American Bar Association, and I presume their services would be extended to others if they sought their advice.

There are two important decisions to come out from the Committee on Professional Ethics in the American Bar Association, they hope by January 1. One will be in respect to the minimum fee schedule adopted by state bars or local bars. In other words, whether it will be unprofessional conduct if you fail to meet the minimum fee schedule adopted by the Associations. The second is concerned with the ethical propriety of law firms forming corporations or associations, as has been discussed before the House of Delegates, and as you have been reading in the papers.

The American Bar Association now has about 102,000 members. I think they try to speak uniformly for the lawyers of America. They are represented by the lawyers of each state, by your representatives in the House of Delegates. They are trying to keep abreast of the times, trying to counsel Congress on certain amendments to the laws, carrying on uniformity between states; and in general it is the lawyers' organization of America.

I am sure today noon you are going to hear more of the American Bar from our President, John Satterfield. It is very interesting at any time you attend the annual or midwinter meeting of the House of Delegates to see the dignity and the fore-

most thoughtfulness and thinking of these lawyers from all over the United States.

PRESIDENT McCOWN: Incidentally, gentlemen, in talking yesterday with John Satterfield with particular respect to the membership of the Nebraska Bar Association members in the American Bar Association, one thing that was rather intriguing to me, and I don't know the reason for it, is that their figures show that in Nebraska individual practitioners five to three are nonmembers of the American Bar Association, while those of us practicing in partnership are two to one members of the American Bar Association. Why that should be I don't know.

The next item on the agenda is the report of the House of Delegates to be presented by the Chairman of the House, Mr. Herman Ginsburg.

REPORT OF THE HOUSE OF DELEGATES

Herman Ginsburg

Mr. President, Members of the Association: The House of Delegates met as scheduled and all business presented was promptly and, I believe, properly disposed of.

The committee reports were diligently considered, were approved as submitted, and the recommendations made therein were adopted. These committee reports are all printed in the program which you all have, and I certainly hope that you have all made it a point to familiarize yourselves therewith. These reports touch upon practically every facet of the practice of law by the membership of this Association and constitute actually the business of the Association. I hope that you all will familiarize yourselves with these committee reports, if you have not already done so.

There were no resolutions offered from the floor either by members of the House or by members of the Association; therefore no committees to consider resolutions were appointed. That prompts me to call your attention to a matter that was brought up by several members of the House of Delegates.

It is the thought and the possible fear that some of the members may feel that they do not have the privilege or the right to attend the meetings of the House and to be heard or to speak. If there is any such feeling among the Bar, I hope you will be disabused of that feeling immediately, because the House of Delegates would welcome and appreciate the attendance of the membership at its deliberations. No member has to feel that he is

not entitled to attend the meetings of the House, which is simply your body and your delegates, in any event.

There was considerable discussion of the matter of proposed professional corporations, to which some reference has already been made. It was decided that this matter should be referred to the Executive Council of the Association with the recommendation that it appoint a committee to study and report on this subject at the next session of the House.

The report of the Special Committee on the Merit Plan of Judicial Selection was considered at great length and with deliberation, and the membership expressed unanimous approval thereof. Not only was that report unanimously approved, but to emphasize the point it was resolved further that the House of Delegates go on record as endorsing and sponsoring the adoption of the constitutional amendment for the Merit Plan of Judicial Selection.

The House further considered the proposal of the Executive Council to change the bylaws of the Association to authorize midyear meetings, and the Chairman of the House was directed to appoint a committee to submit necessary amendments to the bylaws of the Association for that purpose. That committee has been appointed and was directed to report at the Friday afternoon session.

A recommendation was adopted to the effect that the Executive Council of the Association refer to one of the established committees of the Association, or to a special committee if deemed advisable by it, the matter of a study of reasonable allowances of attorneys' fees in legal matters, involving not only courts but other agencies.

Various members of the House submitted suggestions relating to Bar Association activities, but since no motions were made thereon, no action was taken.

President Hale McCown presented to the House our distinguished guest, President John C. Satterfield, President of the American Bar Association, who addressed the House briefly, complimented our Association on our activities, particularly with reference to the matter of the Merit Plan for Judicial Selection.

There being no further business the House adjourned at 3:30 P.M., to meet in its final session on Friday, November 3, at 4:00 P.M.

PRESIDENT McCOWN: Gentlemen, in that connection I might also report to you that the Executive Council at its meet-

ing yesterday noon authorized the creation of a Committee on the Economics of the Law, which will be appointed very shortly.

The next item on the agenda this morning is the report of the Judicial Council by Judge Edward F. Carter, Chairman.

REPORT OF JUDICIAL COUNCIL

Edward F. Carter

The work of the Judicial Council has been particularly heavy up to the time of the adjournment of the Legislature. No meetings of the Council have been held since the Legislature adjourned, but it will meet within the next thirty days to begin its work in anticipation of the next legislative session in 1963.

The Judicial Council presented twelve proposed bills to the Legislature for its consideration at the 1961 session. All of these proposed bills were enacted into law except one. Since these proposed bills deal with judicial procedure it is worth while to mention briefly their effect upon the practice of law.

L.B. 385 is the legislative result of two bills submitted to the Legislature, one of which provided for changes in the boundaries of existing judicial districts to make them more nearly conform to population and case load; the other to provide for the splitting of all two-judge districts in the interests of economy.

The Judicial Council itself lacked unanimity on the second phase of this bill. However, the views of all were expressed before the Committee on Judiciary, and otherwise. The result is the final determination of the Legislature on the subject, and while the recommendations of the Council were not in all respects adopted, it will do much to provide a readjustment of the work load of district judges without increasing their number.

It will be borne in mind that there had been no adjustment of work loads in the various districts since a minor change in 1923. During the last forty years there have been great shifts in population which brought about great inequality in the work loads of district judges. Surveys made by a subcommittee of the Council revealed that proper changes in district boundaries without the addition of district judges would do much to solve the problem. This was done without disturbing the positions held by present judges. We think the enacted bill on the whole brings about in 1965 many of the results that have long been needed.

L.B. 386 provides for the filing of case-load reports by clerks of the district court with the Supreme Court for the benefit of that court and the District Judges' Association.

L.B. 387 provides that the Supreme Court may assign available district judges to other districts with congested dockets, or when the judge thereof is disqualified, absent, disabled, deceased, or for some other adequate reason.

L.B. 388 provides that in rendering a judgment the court shall make a notation thereof on the trial docket and the clerk shall give notice thereof by mail within three days. This is intended as a protection against the rendition of judgments without the knowledge of litigants or their attorneys. This proposed bill had the active support of the Bar Association.

L.B. 389 was a proposal to make the Nebraska extradition law conform with the uniform act. It purported to make the extradition act applicable to charges by complaint or information as well as by indictment as the present act provides. This bill did not get out of committee.

L.B. 390 provides the method of forfeiting a cash bond in a criminal case.

L.B. 391 provides for the probate of the will of a resident of another state who owns real estate in Nebraska. An original probate in this state is authorized in addition to the ancillary proceeding already provided for.

L.B. 392 provides a method of electing to take under the statute rather than under the will when the surviving spouse is insane or mentally incompetent.

L.B. 393 provides that a suit against a safety patrolman may be brought either in the county where the cause of action arose or in Lancaster County.

L.B. 394 provides for an appeal in a criminal case the same as in civil cases. The act provides that the notice of appeal shall state the nature of the offense and the sentence imposed. If a suspension of sentence is desired, the request therefor must also be included in the notice of appeal. A petition in error is no longer required.

L.B. 395, L.B. 396, and L.B. 397 are companion bills dealing with the jurisdiction of the municipal court of Omaha. The purpose of these bills generally was to relieve the county court of Douglas County by giving county-wide jurisdiction to the municipal court of Omaha, primarily in traffic matters.

These enacted laws tend to simplify our procedure and to expedite the work of the courts. They tend to eliminate delay and expense in the administration of justice in this state. *

I again call upon the bar for suggestions for the improvement of court procedure. While we have made great progress in the improvement of our court procedure, we could do more if the bar would aid us with constructive suggestions. We urge your cooperation in this respect.

PRESIDENT McCOWN: May I add my personal commendation to Judge Carter and the members of the Judicial Council. Here is a program already in effect regarding judicial administration and the administration of justice with every lawyer in Nebraska ought to be more familiar, and to whose support we ought to rally much more strongly than we have in the past.

At this time we have an announcement as to group life insurance by Mr. Walter Black of our group life insurance carrier, John Hancock Insurance Company.

GROUP LIFE INSURANCE

Walter Black

President McCown, Members of the Bar Association: It is with considerable pleasure that I brought to you this, the fourth annual report of the progress and status of your group life insurance coverage.

To date there are 787 lawyers in the State of Nebraska who have this coverage. That amounts in volume to \$7,625,000. Annual premium as of December 31, the end of this fiscal year, is \$96,446. Death claims thus far amount to \$112,000. That represents a loss so far this year of \$15,554.

As a result of that, of course, we are unable to predict or anticipate individually any dividend return this year. Many of you will recall the splendid dividend we had the first year. However, that reflects the fact that there were less claims than the annual premium.

The next is a very important feature of this report. The home office has agreed to permit the month of November, this present month beginning yesterday, until the very last day, for open enrollment. That means this: Those of you who haven't had an opportunity since the inception of the case may come in. We have a booth on the far side of the mezzanine out here and there will be someone in attendance at all times. The en-

rollment card is very simple, it is a white one about this size, but those of you who have not already entered during the free period will be required to fill out a white card, which is your application, and this gives a few health facts concerning you as an individual.

If everything is of clear nature on that white card, your insurance will go into full effect the first of December of this year. If there is something further that the company desires, a more complete physical examination, then it might be held up until the first of January.

There is one exception to these requirements, however, and that pertains to the new attorneys who have not to date had an opportunity to become enrolled, such as graduates last summer, or people moving into the state, etc. You may come in on the open enrollment card.

If you read your copy of the *Nebraska State Bar Journal* of April, 1961, which is Volume 10, No. 2, there was a brief article concerning your group life plan. The article indicated that from the inception of the plan \$263,500 has been paid out in claims. Including this year, to date some \$75,000, we'll say. That represents over \$300,000 that has been paid out as death claims.

In the back of the room there is Glen Egger. Glen, would you please stand? Is John Adair here or is he out at the booth? These are two young men who stand by to assist you in answering any questions as to your enrollment as of this present date.

Incidentally, there are also some prizes to be given. If you guess the possible cost of putting your boy or your neighbor's boy through four years of college, etc.—I won't go into the details—and you hit it on the nose, there is a very worthwhile prize that will be presented to you.

PRESIDENT McCOWN: At this time we have the announcement of our new officers by Mr. George Turner, our Secretary.

ANNOUNCEMENT OF NEW OFFICERS

George Turner

Mr. President, Members of the Association: At our annual meeting one year ago, you elected as President-Elect, Ralph E. Svoboda of Omaha. He takes over as President of your Association at the close of the current meeting.

Under the constitution and bylaws of the Association the Executive Council is required to nominate candidates for office ninety days prior to the annual meeting. These nominations were made by the Executive Council at a meeting held in July. You all received a notice. The nominees were:

For President-Elect: George A. Healey of Lincoln.

For Member of the Executive Council at Large: Clarence E. Haley of Hartington.

Also under the bylaws, if no opposing candidates file by petition within thirty days after the announcement of the nominees of the Council, those nominees are automatically elected. So I am happy to tell you that your President-Elect for next year will be George A. Healey of Lincoln, and Clarence E. Haley of Hartington will continue his very fine service as a member of the Executive Council.

PRESIDENT McCOWN: The last item on our agenda is the report of the Committee on Memorials by Mr. Robert Beatty of North Platte.

REPORT OF COMMITTEE ON MEMORIALS

Robert H. Beatty

Mr. President and Members of the Nebraska State Bar Association: Your Committee on Memorials, consisting of Mr. Earl J. Moyer, Mr. George B. Hastings and myself, respectfully submit the following report:

Since the adjournment of the last annual meeting of this Association on October 7, 1960, death has taken from our membership fifty-three highly respected, distinguished and honorable lawyers whose names are as follows:

Harry R. Ankeny, Lincoln
Richard E. Beal, Omaha
Joseph O. Burger, Omaha
Frank J. Byrd, Gothenburg
Phil B. Campbell, Osceola
Frank H. Copley, Lincoln
Joel O. Cornish, Omaha
Milo E. Cowdery, Omaha
Albert E. Elsasser, Omaha
J. H. Falloon, Mt. Rainier, Maryland
Henry W. Fouts, Lincoln
Lucien B. Fuller, Lincoln

Okley H. Gibbs, Omaha
LaVerne H. Halcomb, Kimball
Guy A. Hamilton, Geneva
Harold E. Hanson, Logan, Iowa
Earl Hasselbalch, St. Edward
Harry D. Haykin, Omaha
Edward C. Hermansen, Lincoln
James M. Johnson, Omaha
Oscar Edwin Johnson, Omaha
Paul M. Johnson, Oak Park, Illinois
T. V. Jorgensen, Omaha
Martin G. Kratt, Omaha
Lorenzo C. Litton, Omaha
Patrick McGovern, Omaha
Herbert F. Mayer, Grand Island
Raymond P. Medlin, Albion
Merlyn E. Modig, Denver, Colorado
Melvin Moss, Fairbury
R. M. Mueting, Norfolk
Oscar E. Nelson, Minatare
Louis E. Nore, Albion
Patrick W. O'Connor, Omaha
Robert W. Patterson, Scottsbluff
Dean Pomeroy, Casper, Wyoming
John F. Power, Sioux City, Iowa
Walter W. Price, Syersville, Iowa
E. G. Reed, Kearney
Harry J. Rothrock, Clay Center
Rex B. Sheppard, Omaha
R. J. Shurtleff, Norfolk
Harry Silverman, Omaha
A. Sheppard Taylor, Omaha
Albert B. Tollefsen, Kearney
Harry L. Tschantz, Omaha
Adolph S. Victoria, Omaha
Joseph A. Vojir, Omaha
Adolph E. Wenke, Lincoln
W. W. Wenstrand, Omaha
H. B. White, Omaha
Dana R. Williams, Long Beach, California
H. R. H. Williams, Grand Island

These fifty-three lawyers whose names I have just read have, during their entire legal careers, always been recognized as standing for the highest ideals of professional conduct, un-

questioned fidelity to the courts and their clients, absolute fairness to their adversaries, untiring industry in their efforts to see the law and rights of man vindicated and never defeated. The indomitable spirit and faith of these lawyers in our system of law and government and their contribution thereto have made America and its precious freedom a little richer and more secure to us all. Their contributions to society, citizenship and to our profession will long stand as a monument of inspiration to us and those who may follow to emulate their achievements and contributions to the advancement and standing of our profession and to the public service.

It is in such matters as these that we now eulogize them as noble lawyers.

Let us now stand in loving memory and tribute to the lives, service, and accomplishments of these fine lawyers and splendid Americans.

[Moment of silence.]

PRESIDENT McCOWN: Thank you very much, Bob.

Gentlemen, may I call your attention to the fact that our morning session is now over at approximately 11:10 or a little before, and that we have completed the morning program with what might be termed expedition. If it is like some of the comments I have had on some of the other programs and procedures that I have endeavored to follow, I feel that it exemplifies the old statement that a lawyer has a difficulty for every solution.

This is our solution for the morning. Thank you all for being here. The session is adjourned.

[The Thursday morning session adjourned at 11:10 o'clock.]

THURSDAY LUNCHEON SESSION**November 2, 1961**

[The Bar Association luncheon was presided over by President McCown.]

PRESIDENT McCOWN: Gentlemen, welcome to the Association luncheon at the sixty-second annual meeting of the Nebraska State Bar Association.

Now, gentlemen, it is my pleasure to present to you our speaker for this noon, the President of the American Bar Association, Mr. John C. Satterfield.

He honored us by arriving yesterday morning, was with us during our sessions of the House of Delegates yesterday, attended our Past Presidents' dinner last evening, and has been with us at the sessions today.

His topic you probably have noticed, but I want to mention particularly that, probably more than any other one man, he is responsible for the tremendous advance in the program of the American Bar Association in connection with the economics of the law practice. He has initiated, and they are now being carried on, many programs in this field which were first produced and generated by our speaker of this noon.

Not only is he a delightful southern gentleman from two cities in Mississippi, one called Yazoo City and the other Jackson, but he is also a gentleman who delights in stories involving the legal profession as well as himself. I find that he is the delightful subject of some of his own jokes, which is a little unusual sometimes in speakers. He has been a delightful guest and I know you will enjoy him as a delightful speaker. His topic, "How to Be a Lawyer without Being Broke." The Honorable John C. Satterfield, President of the American Bar Association.

HOW TO BE A LAWYER WITHOUT BEING BROKE**John C. Satterfield**

Mr. President, Honored Guests, I believe it is Ladies and Gentlemen, certainly Gentlemen, I'll say Ladies and Gentlemen: I am delighted to be with you today. We are all interested perhaps, in this subject, of the talk at luncheon. I notice the subtitle was not put on the program. The main title is "How to Be a Lawyer without Being Broke"; the subtitle is "Do Like I Say and Not Like I Do."

I am especially pleased to be in Nebraska because of the outstanding contributions that Nebraskans have made to the American Bar Association and to the legal profession for so many years.

You have an elderly gentleman here by the name of George Turner who, when I came into the House of Delegates of the American Bar Association, had been a member since the memory of man runs not to the contrary, and he helped to teach me how to act in the American Bar Association. I am sure you know, at least from a local viewpoint and perhaps nationally, that he is considered one of the outstanding secretaries of a bar association in the United States. Anybody who can be on the job for twenty-nine years and still be up-to-date and modern is pretty good. And it is nice to be in George's home state.

Jack Wilson and Hale McCown have been doing outstanding service in our Association for a number of years. Jack, as you know, is your Association Delegate taking part in our activities. Hale has a very important assignment on our Ethics Committee, which has some tremendously important problems before it now.

All of us have enjoyed working with your Chief Justice Bob Simmons, who has worked with and for the American Bar Association not only in the United States but in other countries.

Then I don't have to tell you about Clarence Davis and Laurie Williams and Bart Kuhns who have served in many capacities. I was a member of the National Conference of Commissioners on Uniform State Laws, and Bart is responsible for most of the work they have been doing for many years. If you haven't been at one of those meetings, they work harder than any other group of lawyers I have ever seen.

This year the American Bar Association is carrying on a program which was sparked by Dean Roscoe Pound in August, 1906. He was, as you know, Dean of the Nebraska Law School from 1903 to 1907, and when he was thirty-six years old he arose in the House of Delegates of the American Bar Association and pointed out judicial reforms which should be carried out in our judicial system. It caused a storm of fuss and protest and then finally agreement.

This year the American Bar Association, under a committee headed by Mr. Justice Tom C. Clark of the Supreme Court, with the cooperation of fourteen organizations active in this field, are putting on a massive program in the field of judicial administration which is actually inspired by the work that was brought about through Dean Pound's speech in 1906.

I had the honor of speaking at a luncheon in honor of Dean Pound in Boston several weeks ago. As you know, he is the author of a tremendous five-volume work on jurisprudence which he completed at the age of ninety-one. He is an inspiration to me, because I am planning to retire when I am eighty-five, and it was inspiration to see this tremendous legal mind doing this work, and coming from Nebraska, where as I remarked last night apparently the corn you eat tends to prolong life more than corn we drink in Mississippi.

I am delighted to bring you greetings from the American Bar Association. As you know, we have 102,678 members, and through our House of Delegates, with delegates from every state bar association, 19 affiliated organizations, and the large local bars, we do actually represent some 250,203 lawyers in actual practice in the United States.

A little later I will mention one or two facts about our membership. We are planning to increase our membership to between 125,000 and 150,000 this year. As President of the American Bar Association I would not want a single lawyer to join the American Bar Association just to increase its membership. The chief purpose of the drive is that the services which we offer and render to our members may be available to more lawyers in the United States.

We have 78 active committees of the Association, 18 sections, and those sections have 432 committees, all of which are working to serve the members of the A.B.A. and the legal profession. It is a pleasure to bring you greetings from the Association.

When I get up in a meeting like this, even though I have made speeches all my life—I am now half a century plus half a decade plus two years old; almost as old as George Turner—I still feel like the Ole Miss boy who went to MSCW to see his girl friend. Now MSCW is either Mississippi State College for Women or Mississippi's Sweetest Collection of Women, depending on your attitude or perhaps your age.

They had a Shattuck Hall where the girls all ate their dinner; in fact, I spoke there yesterday to 1,768 girls at MSCW on the way up here.

So at this time they had several Ole Miss boys on Saturday, several Mississippi State boys were there—you couldn't get the girl off the campus on Saturday anyway so you got a free lunch in Shattuck Hall—there were five or six Ole Miss boys, 700 girls and a few State boys.

The matron called on one of the Ole Miss boys rather unexpectedly to return thanks. Well, he didn't even say the blessing at home but he was game so he stood up and shut his eyes and his knees shook. He says, "O Lord, we thank Thee for our sins; forgive us for this food. Amen," which was one of the sincerest blessings ever asked.

I was quite interested in reviewing the reports of your committees and to see the outstanding program you have in the Nebraska Bar Association. All of you have a wonderful opportunity to serve the citizens of your state in supporting the Merit Plan for Selection of the Judiciary. As you know, it is based upon the Missouri, and then perhaps called the American Bar Association, Plan. It has been in effect in six states for a number of years and is being considered in several others. It has been the instrument of divorcing the judiciary and the selection thereof from politics.

When we ask a man to sacrifice and serve as a member of our judiciary, we should not burden him with taking part in political elections from time to time when he is rendering proper service to the people and to us. I am delighted to know that that will be submitted to the voters, and as your President said this morning, I am confident that every member of this Association will put his shoulder to the wheel, not to obtain anything in particular for the legal profession, but to serve the people of Nebraska to see that the judiciary is put on the best possible basis to take care of our citizens when they come before our courts. It is a wonderful opportunity you have to serve here in your state.

I am going Saturday to Chicago to meet with John Randall from Iowa, former President of the A.B.A. We are considering setting up a Section on the General Practice in the American Bar Association. There are 86,367 in individual practice, who are practicing alone in the United States, 86,367 who do not belong to the American Bar Association. We believe a Section of General Practice will be of service to them. I think a number of the state bars are considering similar action.

Now to get on to the subject of the address today, sometimes referred to as "money," sometimes referred to as a patriotic endeavor to enable lawyers to pay a higher income tax to the "gov'ment," not the government, otherwise known as the lawyers' economic problems.

I would like to hit on three things. I have made some sixty-nine speeches on this subject the last three years and I can talk from twelve minutes to two hours. Don't worry, I've been

told when I am supposed to quit, and I am going to quit! I have a watch right here I am watching.

When this committee was appointed four years ago and I was asked to serve as chairman, the first thing we thought we should do was to find out whether there was an economic problem in the legal profession. I will simply give you three facts and let you reach your own conclusions. There are others that are material on that subject.

The first is that over a twenty-year period, the latest we have available, the income of the employees of all industries in the United States increased 131 per cent. The income of all self-employed, non-farm persons in the United States increased 144 per cent. The income of the medical profession increased 157 per cent, which is not disproportionate to the average increase of self-employed persons, non-farming. The average income of lawyers for the same period increased 58 per cent, which is a little more than one-third of that of our kindred profession and something more than one-third of the average increase for self-employed persons.

During that same period, or an equivalent period, we checked the national general income, the percentage that was utilized to pay for legal services during a period when the need of legal services had increased substantially in many areas—taxes, regulations, etc. At the beginning of the period 1.39 per cent of the gross national income went for legal services—1.39 per cent. About twenty-two years later .49 per cent of the gross national income went for legal services. It decreased to a little more than a third of what it was at the beginning of the period compared to the national income.

At the latest figures—and we have some that are being compiled now that give us a little later dope—the average income of lawyers in the United States before income taxes was \$10,258, and half of the lawyers received an average of less than \$7,200 a year. We hope and believe that has increased in the later period. That was six years ago when we had complete comparable information; we will have some more this year.

We decided there was something wrong. There is no reason why those proportionate relative figures should exist. I would like to give you two illustrations of why we so concluded. Although there have been improper attritions on our practice by lay agencies either through unauthorized practice or recognized competition, and even though we must do something about it and are planning to, nevertheless, shall we say 90 per cent of

the problem can be solved by lawyers themselves individually, collectively, and in relationship to the public.

One thing is the proper calculation of fees. I think it is a very simple proposition. Many of you I am sure have seen this: How are you going to calculate a fee? We always wondered about it until about twelve years ago we started reading up on some of this to see how to do it. We still wonder most of the time but not as much as we used to.

We have found that the average overhead in a law office through the United States is 38.6 per cent. [buzzing sound]. That is known as "Minister's Aid." We recommend that every Board of Stewards and Board of Deacons in the United States buy one and give it to the preacher and set it for five minutes of twelve. I just want to back up the fact that if I am going strong here in a few minutes, don't worry, we'll get out in plenty of time.

Now the average overhead in law offices at the last check we had was 38.6 per cent of the gross receipts. We have kept up with it for the last twelve years and find we vary from 32 to 38 per cent depending on circumstances. So let's say 40 per cent.

Then if you want to find what you should receive, you know your locality, your community, your training, your ability in relation to other professions, other lawyers, other businesses. Suppose you are a man that should take home \$12,500 before income tax. You would have to take in \$20,800 in fees on a ratio of three to two, three to go home and two to pay overhead. If you are entitled to a \$15,000 net income before income tax, you have to take in \$25,000, \$15,000 to take home and \$10,000 to pay the overhead. If you are just out of school you are entitled to \$6,000; you have to take in \$10,000 to take \$6,000 home.

What relation does that have to charging fees? That is this: The last time I checked up on it there were 365 days in the year. I am going to get the Mississippi legislature to change that—as President of the Bar I need more than that—but at the last count it was 365. But there are 52 Sundays. You are supposed to go fishing either on Saturday afternoons or Wednesday afternoons depending on the size of the town you are in. That's 26 half-days gone, 26 days, half a day, for 52 weeks. There are 8 legal holidays—the wife thinks you shouldn't work on them even if you do. You are entitled to two weeks' vacation. I had two weeks' vacation nine years ago. It sure was good! Anyway you ought to have two weeks' vacation. You are entitled

to get sick, go to meetings like this, church meetings or other meetings seven days a year.

Now if you did all that, as the carpenters and bricklayers and other laborers do, that would be 105 days gone. You would have left 260 days on which you could actually charge work to clients. So there you can charge from 4.2 to 7.2 hours per day to clients, because think of the time you lose "shooting the bull," talking about politics, doing civic work, running errands for your wife, comforting your stenographer—I mean mentally, not physically. So in other words, if you average five hours a day that would be 1,300 chargeable hours.

If you want to actually find out how much you should charge per hour and relate it to the income you should receive on that basis—and we find that we have about 1,500 hours average chargeable in our firm, but take the 1,300 on the average—it would mean if you are a \$12,500 man that you would have to charge \$16.00 an hour to get to take that much home. If you are a \$15,000-a-year man you have to charge \$20.00 an hour; if you are a \$6,000-a-year man you would have to charge \$7.70 or \$8.00 an hour.

Then if you will do this: Use a very simple time record. There are many of them around; you can make one up yourself. Actually keep up with the time you spend and a little notation of what you did, relating of course to the case and to the client. Keep that from day to day, have the girl put it in the books at the end of the week or the end of the day or do it yourself, depending on the circumstances, and you would be surprised how many hours you waste, and how you'll have to quit wasting them if you keep up with it.

Then if you enter that on a client's ledger with two columns for memo of time, here is what you can do: In the first place, when you go to charge a fee you will know whether you made or lost money on that case. I don't suppose that one out of ten times do we ever charge the amount of time we have put in. It is either more or less depending on the circumstances.

We had a case not long ago where we charged a \$2,500 fee, and that is a big one for us. The partner who handled it was quite proud of it. We checked up on it and found we lost \$1,750 on that case. We had \$4,200 worth of time in that case and we charged \$2,500.

To give you one other illustration, we represented a female lady from south Mississippi recently who had the only water system in the little town. We had a good time. We had writs of prohibition and injunctions and elections, and all sorts of go-

ings on for two years. Dan Shell and Hayes Challeck and myself handled it for our firm. We got together and decided what to charge. Hayes said, "Charge \$2,500," and Dan said, "About \$5,000." Of course I had sense enough to keep my mouth shut until we checked the records. We got through and sent her a bill for \$7,500. Now, if Lucille had gotten a bill for professional services rendered, \$7,500, she would have dropped her false teeth, she didn't have rugs on the floor, they would have broken, and she would have been mad at us for the rest of her life. We sent her a twelve-page, single-spaced bill, and every day that Dan or Hayes or myself worked on the case we would say, "March 13, briefing case in state library; March 14, conference with Mr. Jones of the Mississippi Rating Bureau"; didn't put the time of course but simply the things done and she was delighted to receive it, and we got a check back in the mail the next day or two. I wasn't at breakfast with her the next morning but I am sure when Lucille asked the blessing the next morning she thanked the Lord it wasn't any higher.

Which is another way of saying that you can do this: You can analyze every case in your office to see whether you made or lost money on it. You can determine the retainers that you charge. We went into this some years ago, and at that time we were checking a lot of abstracts for oil companies. The rate then was 50 cents a page; it has gone to 75 cents; I hope it is higher than that up here. I had a partner who is a little bit heavier than I am and he loved to sit behind his desk and check abstracts. He would turn the pages, "Four bits, four bits, four bits, four bits, four bits." And he thought he was making money! We checked up on it and when it came to the curator man and quitclaim deeds and chain of affidavits and supplemental opinions, we found we were losing money on that type of practice. We have the nine of us practicing together now, so we started turning away from it. We had one man spend full time and another man two-thirds of his time on that type of work at that time; now we have one man who spends about one-fourth of his time on it, because we found we were losing money on that type of practice.

If you will check into it you can always tell whether you lose or make money on it as compared with the fee, and then you really know how much to charge and what you have put into it.

There are so many things we can do in our individual practice. For instance, I do not have time today but there are all kinds of dictating machines. You can take this portable ma-

chine, hang it around your neck and have a little mike with you, go out to the scene of an accident, and of course if you get there soon enough and the ambulance is still there you turn it up and you get a "wah, wah, wah" on your machine. But if the ambulance has left before you get there you can take your witness out and, "My name is Jim Smith. On April 13, 1961, on the corner of such-and-such a street, so and so happened." He will be standing right there, and you take the full statement on the machine and have it typed when you get back to the office.

You go into the record room to check a title, you make some notes to be sure there is no mistake on the machine. You stand in the record room and dictate everything you take from the record to be put into the abstract or the title. We use it, of course, to check records and subpoena duces tecum. While we go into the office on the subpoena we take the dictating machine with us and dictate everything we need from the fellow's records.

We have a pamphlet here which evaluates eighteen different kinds of copying machines and nineteen different kinds of dictating machines which cost from \$175 to \$3,000 apiece, giving the nature of work done, the cost of each page, and the cost and nature of the results that can be obtained. We can individually increase the income and do it properly without any additional expense to our clients. However, if we find that we are not charging reasonable fees and are in a position to maintain our charge made, I do not believe we will have any difficulty with our clients because I think many of them wonder why we do not charge a reasonable amount when we send them a bill for what is probably less than the services were worth.

What good does it do? In Port Gibson, Mississippi, a town of 3,000 people, where I was reared, my father practiced there for fifty years. Yazoo City, Mississippi, has 12,500 and our main office is in Jackson, a city of 150,000. But what good does it do if Jim Jones in any one of those towns, particularly the two smaller ones, charges reasonable fees but Bill Smith, across the street, who is just as good a lawyer, charges less?

That is where the organized bar comes in, and I understand you have just appointed a Committee on Economics of the Law Practice. I would like to take the next seven or eight minutes to make some suggestions concerning what can be done by lawyers collectively through the organized bar.

In Port Gibson, Mississippi, Uncle Joe was a millstone around the neck of the legal profession, and on account of Uncle Joe I

had to work my way through school, which I did for seven years. It cost father exactly 100 bucks for me to go to college on account of Uncle Joe.

Uncle Joe was a good lawyer. The only trouble was grandfather died and left him too much money. Father came along and married his sister and she didn't get as much as Uncle Joe did. So Uncle Joe loved to practice. He was an outstanding lawyer, he was entirely ethical, capable, a good lawyer, but one of the biggest fools who ever lived, because he would charge a fourth or a third of what it was actually worth to handle an estate. He didn't particularly need the money. He felt sorry for folks so he would charge a third of the value of the services. He would handle titles for the bank there for less than one-fourth of what a reasonable fee would be. For thirty-five years the bar in Port Gibson, Mississippi, starved to death on account of Uncle Joe, one of the finest lawyers I ever knew. I guess you don't have that situation in Nebraska but I know we have had it in Mississippi.

Now, what is an approach from the bar association viewpoint? The American Bar Association has prepared a series of five pamphlets, and you who are members never have received these. In the Time pamphlet we have suggested a procedure for bar associations. May I briefly give you one or two possibilities.

For instance in Mississippi when I was President of the state bar we appointed a standing committee on Economics of the Law Practice. We had a survey made of the state—and by the way, the American Bar Association has been working three years to prepare a basis of survey to cooperate with state bars in surveys of the legal profession, both in connection with fees and many other factors, which are available if you care to use them. We had checked not only the State of Mississippi but also surrounding states to see the relation of fees charged by us to those in surrounding similar states. We came to the conclusion that our fees in Mississippi should be increased 50 per cent on the average over a period of seven years.

We appointed a standing committee charged with a re-examination of our advisory minimum fee schedule on a state-wide basis to increase it where it should be increased or decrease it if it should be decreased, but affirming the findings of the committee that the fee should be increased on the average 50 per cent over a period of seven years. I think we have made very good progress. That is one method by which it can be handled.

Now on advisory minimum fee schedules, as they are called, you have the basis that I understand is considered the best, a

state-wide schedule with authority given to the local bars to vary it up or down, preferably up, as the local circumstances permit. But that can be a millstone around your neck if it is simply a compilation of customary charges as distinguished from reasonable minimum charges. Then it doesn't perform the function it should. Because minimum fee schedules, advisory schedules, are for the purpose of giving a guide to a lawyer regarding a reasonable charge to be made on the minimum circumstances, minimum amount involved, minimum amount of work done, and the minimum factors that enter into a fee. Unless they are revised from time to time on a reasonable and proper basis, they can hurt rather than help, but they can be a wonderful help when they are properly done.

Of course, in connection with them you have the problem of those who are fee-cutters, some of whom do it from a basis like Uncle Joe's, I'm sure—although we didn't have a schedule in those days—and some will do it for the purpose of soliciting business.

We have had a number of opinions from various state bars, and our Ethics Committee, of which your President of this year, Hale, is a member, is considering that problem and will give an opinion within a few weeks.

But you could have this happen. It has happened in a state not too many miles from here: it was not Nebraska. They had a minimum fee schedule printed on one page. One lawyer took it and framed it and put it in the waiting room. He wrote on the bottom in red ink, "If you go to any other lawyer in town he'll charge you bar fees; you come to me and I'll charge you 20 per cent less," which the various state bars have held to be a form of solicitation and subject to a reprimand and discipline by the bar.

If your committees follow through the procedures available they can, for instance, make use of a speakers bureau we have set up in the American Bar Association to furnish speakers to you for panels, institutes, etc., on the economics of law practice. We have prepared a speaker's kit which gives numerous articles in the field so that anyone who cares to speak on this subject can be prepared to do so. As a matter of fact, if you take these five pamphlets of the A.B.A. anybody can make a three-hour speech—I'm not going to do it today—but anybody can make a three-hour speech by the use of these pamphlets alone.

We have prepared the basis of survey to be used if you care to check your fees against those of other states, nationally. I don't know what you've found, but I know that we found in

Mississippi there is as much variation as 300 per cent from one county to another in Mississippi for no reason whatsoever in certain types of fees.

Then if you put on institutes and seminars you may, as many states have done, Minnesota is one, North Carolina is another, prepare this type of material to go into your lawyers' desk book which is given you by the Bar, so you will have the type of material before you to assist in connection with the fees.

There is almost no end to the service which can be rendered to the legal profession, and through us to our clients, by a concerted, organized effort to see that we render our services in a businesslike manner, that we take advantage of every modern facility, every modern procedure in the practice of law, and that we know when the fee is rendered that we are relating it to the various elements that appear in Canon 12, and we determine for ourselves in each instance whether we made or lost money on the case.

Now, don't misunderstand me. The commercial phase of the practice of law, if you want to call it that, the making of money, is not the most important. My success as a lawyer and yours does not depend on the income tax we pay or the kind of car we drive or the house we live in reflecting our gross income. It depends upon the services we render to our community, to our state, and to our nation. But the highest ethics of the profession, the greatest service rendered, is not in contradiction of proper business practices; it is supplemental to and goes hand in hand with carrying on all of our work in a businesslike manner.

We frankly believe that although our income is far below what it should be, as indicated by these three things I mentioned awhile ago, although the persons admitted to the practice of law in the decade from 1940 to 1950, as compared to 1930 to 1940, declined 25 per cent while the population was increasing 25 per cent, although those admitted to the practice of law have decreased in the last ten years from 89 per million to 57 per million, showing we are losing, as your committee found in support this year to your convention, we are losing the men that should come into the profession, we feel that the greatest part of that, perhaps 90 per cent, can be remedied by us and us alone if we do it properly, both individually and collectively.

It has been a great pleasure to be with you. We have all enjoyed working with your fine Nebraska lawyers. The American Bar Association is there to service its members and the profession generally, and one of the greatest pleasures that we have in working in the American Bar Association is to meet men like

you from state to state and know that we all want to do what is right and the best for our profession and our country.

[The audience arose and applauded.]

MR. SATTERFIELD: I will now read these five pamphlets. It won't take over four hours.

No, as a matter of fact there will be a presentation at this time. We are delighted to have seen the outstanding record of your state in one phase of our American Bar Association activity. We are pleased to have with us Mr. Dave Peshkin of Iowa, Vice Chairman of the Membership Committee of the American Bar Association, who has rendered yeomanlike service in the membership field of our Association for a number of years. I now introduce to you Dave Peshkin, who will present two awards at this time. Mr. Peshkin.

DAVE PESHKIN: President Satterfield, President McCown, Members of the Nebraska State Bar Association: As Mr. Satterfield has just stated, there are many phases of work in the legal profession which can be carried on only through the well-organized bar associations.

I speak of *the* bar associations because I include the local bar associations, the state bar associations, and your national bar association, the American Bar Association.

Right now at this time there is going on in this country a movement, an attempt to take personal injury litigation out of the hands of the lawyers. One of these attempts is being headed by a prominent lawyer in one of our largest states. The entire field of estate planning is now being threatened by people who are not qualified to perform that service for the public. Real estate practice in many states has now slipped out of the hands of the lawyers. The entire practice of income tax in many states has long left the doors of the lawyer's office. The only people who can cope with problems like this for your benefit and for the benefit of the public as a whole is your organized bar.

Several years ago the American Bar Association recognized this problem to the extent that it wanted to encourage bar association activity not only on the national level but on the state level and the local level as well, because only on all three levels, doing the best that they can do, will we be able to protect our profession, ourselves, and, in turn, the public at large.

It used to be said that the bar associations were only for the large law offices, the large law firms, for the corporate lawyers, for the insurance lawyers. You in Nebraska know this is not

true. Sitting in on many meetings of the House of Delegates and the Board of Governors of the American Bar Association, the phrase used in the last ten years has been, "What service can we render to the common lawyer, to the 86,000 lawyers who practice by themselves in this country, who are not members of the national bar association of this country, the American Bar?"

It is interesting to note from your addresses this morning that in your own state you have three out of every five lawyers practicing by themselves, and yet statistics show, uncontradicted in every state, that the lawyer practicing by himself invariably has the lowest net income. These are the lawyers that we want to try to serve, to help them out so that they can increase their income and do a better job in the practice of the law.

In recognition of this the American Bar Association two years ago decided to conduct a program to recognize bar associations that have done an outstanding job on all levels of participation in the work of the organized bar. It is indeed a pleasure at this time on behalf of the Standing Committee on Membership of the American Bar Association to present to the lawyers of the State of Nebraska through the Nebraska State Bar Association an award for having achieved the goal of having at least 50 per cent of its members as members of the American Bar Association.

President McCown, on behalf of the American Bar Association I would like to make this presentation to you for the lawyers of the State of Nebraska through your State Bar Association.

I was also pleased to hear this morning of the great esteem which the leaders of the organized bar of the State of Nebraska and the members of this Association hold for your distinguished Secretary, George Turner. I can tell you, as Hale so well knows, that George Turner is regarded and held in the same esteem in the American Bar Association and throughout national bar circles as he is here in the State of Nebraska. Over the years George has rendered yeoman service to the American Bar Association to bring additional members into the Association. There isn't a year that goes by but that, through his own efforts, more than one hundred members from the State of Nebraska are brought into the American Bar Association by George.

I would like at this time, on behalf of the Standing Committee on Membership of the American Bar Association, to recognize the many years of service that George has rendered to the organized bar by the presentation to him of this award as authorized by the Board of Governors of the American Bar Association.

PRESIDENT McCOWN: Thank you' very much, Dave.

May I call your attention to the fact that the Institute on Appellate Practice and Procedure will convene in this room at 2:00 P.M., in approximately thirteen and one-half minutes, as soon as we have had an opportunity to clear out the tables.

Thank you very much for being with us. Luncheon is adjourned.

[The luncheon session adjourned at 1:45 o'clock.]

THURSDAY AFTERNOON SESSION

November 2, 1961

[The Thursday afternoon session of the Institute on Appellate Practice and Procedure was called to order at 2:20 o'clock by John C. Mason, chairman of the Committee on Continuing Legal Education.]

CHAIRMAN MASON: I wish to welcome all of you to the Institute on Practice and Procedure. There are outlines on the table at the far corner of the ballroom in case any of you failed to find those when you came in. There are three outlines for this afternoon's program; one is on Supreme Court of Nebraska Procedural Steps; Preparation of the Brief on Appeals is the second one; and Appeals from the Federal District Court to a Court of Appeals is the third one. If any of you have not picked up your outlines you might like to do so.

The Institute this year is being sponsored by the Section on Practice and Procedure, of which Mr. Maupin is the chairman. The subject matter which was chosen for this year's institute is Appellate Practice and Procedure, and we are going to attempt to give you information on the various appellate steps which we believe are part of the practice of Nebraska lawyers. You will note from your program that we have excluded appeals to the United States Supreme Court. We did this with the thought that there are quite rare occasions when Nebraska lawyers seek such appeals. Of course it is extremely important when you do have one, we recognize, but we felt within the time limits which we had it would perhaps be a better service of your time to present the appeals which are more common, which all of us have to make from time to time, and that by giving a little more time to those we could serve the ends better.

This afternoon we are going to discuss "Appeals from the State District Court to the Nebraska Supreme Court," and also "Appeals from the United States District Court to the United States Court of Appeals."

Tomorrow morning we are going to discuss "Appeals from Administrative Agencies to the State District Court, or to the Supreme Court," and "Appeals from the Courts of Limited Jurisdiction to the State District Court."

Friday afternoon, tomorrow afternoon, we are going to discuss some of the techniques of appellate practice and the advocacy of your matter in appellate practice. Tomorrow afternoon's speaker is Mr. Wiener, who is an author on this subject

and a lawyer with a considerable amount of United States Supreme Court and other appellate practice.

Turning then to this afternoon's program on "Appeals from the District Court to the Nebraska Supreme Court," we have three speakers on this subject. First is George Turner on the rules of appellate procedure; secondly, Mr. Maupin will discuss the preparation of briefs for appeals to the Supreme Court; and then Judge Carter will tell us about the actual functioning of the Supreme Court.

Our first Speaker, then, is George Turner, who received such laudatory comments this noon that I find it is probably unnecessary repetition for me to try to add to that.

Mr. Turner was graduated from the Nebraska College of Law in 1923 and has served his entire career with the Supreme Court, beginning as a clerk to the Chief Justice of the Nebraska Supreme Court, then in 1932 being appointed Clerk of the Supreme Court, which position he has held since that time.

Mr. Turner is going to speak to us on the rules for appellate procedure in the Nebraska Supreme Court.

RULES FOR APPELLATE PROCEDURE IN THE NEBRASKA SUPREME COURT

George H. Turner

Mr. Chairman, Members of the Association: Due in a large measure to the work of the Judicial Council, Nebraska has the least complicated system of appellate review of any state with which I am familiar. It has been brought about through recommendation to the Supreme Court for amendments to the rules of court and bills proposed to the Legislature for adoption.

I propose to discuss with you the procedure for lodging a case in the Supreme Court, leaving it to the speakers who follow me to deal with what happens thereafter, and I will address myself particularly to appellate procedure in civil cases.

It should be borne in mind that in Nebraska there is but one single jurisdictional step to be taken by a lawyer to perfect an appeal, and that is the filing of a notice of appeal in the district court and the payment to the clerk of the district court the statutory filing fee within one month from the date of the order from which the appeal is taken. From that time on, the burden of making filings is an official one devolving upon the clerk of the district court in the matter of the filing of a transcript and upon the official court reporter as to the bill of exceptions.

This is quite different from the old and cumbersome method by which a praecipe was required designating the parties to the appeal and the requirement that counsel file the transcript. The path to an appellate review then abounded in traps for the unwary or the inexperienced and often resulted in denial of a review to the litigant.

Now, if you have given your notice of appeal within time, it becomes the duty of the clerk of the district court to file the transcript within one month from the filing of the notice of appeal, and his failure to do so within time does not prejudice the appeal.

At this point let me interject a suggestion with reference to the giving of a notice of appeal. It would be very helpful to us in the clerk's office if the caption of the notice of appeal listed all of the parties, both plaintiff and defendant. It is true that Rule 1 B of the rules of the Supreme Court provides that the clerk of the district court shall, when he sends in a certified copy of the notice of appeal, also certify the names of all of the parties and their relation to the case in the district court. The clerks of district courts, however, quite generally disregard this requirement, and if a notice comes in labeled "John Doe, *et al.*, plaintiffs v. Richard Roe, *et al.*, defendants," we are at a loss to know how to properly designate the parties on appeal.

Bear in mind also that under Rule 1 B it is no longer possible to perfect multiple appeals from the same judgment. All parties filing notices of appeal are designated as appellants and all other parties are designated as appellees. If a party who is not satisfied with some portion of the judgment of the district court wishes to raise the issue in the Supreme Court, he may either join as an appellant or take cross-appeal under Rule 1 D by raising the cross-appeal in his brief as appellee. This is a substantial modification of the old method which required the filing of a praecipe on cross-appeal.

One important provision of Rule 1 F is with respect to the dismissal of an appeal. This rule requires that an appellant may not dismiss his appeal without due notice to the appellees. This rule was adopted by the Supreme Court upon recommendation of the Judicial Council to provide for a situation which would enable an appellant to dismiss his appeal after the time for taking an appeal by an appellee had expired, and thus cut off the appellee's right to a cross-appeal. In this connection I suggest that an appellant who perhaps has arrived at a settlement with the appellee and wishes to dismiss his appeal, do it by a straight dismissal with a waiver of notice by the appellee rather than by

stipulation. The reason for this is that we do not consider a waiver as an appearance, which requires the payment of the statutory appellee's appearance fee of five dollars, while we do consider that joining in a stipulation for dismissal invokes action by the court and requires payment of the fee. It is obviously less costly to do it the way I suggested.

Rule 4 sets forth what should be included in a transcript, but it should be remembered that if some portion of the record is omitted from the original transcript, either party may file a supplemental transcript, without obtaining leave of court, prior to the date the case is argued or submitted to the court. After that time leave must be obtained whether on motion or by stipulation. Under former practice, when counsel desired to file a supplemental transcript he was required to file a suggestion of diminution of the record and motion for leave to supply. Such procedure was eliminated by the adoption of present Rule 4.

One of the most significant achievements in the process of simplifying appellate procedure has been the promulgation by the Supreme Court of a rule setting out the method of obtaining a bill of exceptions. Most of you remember the extremely complicated method provided by statute for serving and settling a bill of exceptions. The statutes provided for preparation of the proposed bill of exceptions by the court reporter, service thereof on adverse counsel within a specified time, return by such adverse counsel, again within specified time, and, finally, settlement of the bill by the trial judge, for which also a limited time was fixed. This technical proceeding placed a great burden upon the attorney for a litigant desiring to appeal, and the books are full of cases where a bill of exceptions was quashed on motion for failure of counsel to complete the settlement of a bill of exceptions in entire compliance with the requirements of the statutes.

Now no court delights in depriving a litigant of a review of his cause because of a defect in the preparation of his record, so it was that the Judicial Council recommended to the 1959 Legislature that all of the cumbersome provisions of the law with respect to preparation and settlement of a bill of exceptions be repealed and that an act be passed simply providing that this method be as provided by rule of the Supreme Court.

To implement this legislation the Supreme Court adopted what is now Rule 7. The rule was drafted by the Judicial Council and recommended to the court as the simplest and most workable method of preparing this part of the record that the minds of the practicing lawyers and judges who compose the

Council could devise. This rule provides that an appellant shall file a praecipe for a bill of exceptions with the clerk of the district court within one month from the date of the order from which the appeal is being taken, and provides further that if less than all of the evidence is called for by the praecipe, such praecipe must have endorsed upon it the written consent of all parties. If this is done the responsibility of the attorney, so far as jurisdictional steps are concerned, is at an end, and responsibility for further action rests upon the clerk of the district court and the court reporter. The rule requires that the clerk deliver a copy of the praecipe to the court reporter forthwith and send a copy to the clerk of the Supreme Court. From the date of filing shown by the praecipe we are able to fix appellant's brief day. The rule then makes it the duty of the court reporter to deliver the finished bill of exceptions to the clerk of the district court within two months from the date of the filing of the praecipe, and the clerk is required to notify all parties or their attorneys and the clerk of the Supreme Court that the bill has been filed. If the court reporter has been unable to complete the bill of exceptions within the two months allowed him, only the Supreme Court can extend the time, and this upon application made within one month after the time originally allowed or within one month after the expiration of a previous extension of time or as a safeguard within such additional time as the Supreme Court in its discretion upon proper showing may allow.

This method of amending a bill of exceptions is now much simpler than under prior procedure, which required service on counsel and settlement by the trial judge. Now amendments may be made by written agreement of counsel, to be attached to the bill of exceptions, at any time prior to the submission of the case to the Supreme Court. If counsel are unable to agree on amendments, Rule 7 makes provision for submission of the proposals to the trial judge at such time and place as he shall fix.

One significant amendment to Rule 7 has been adopted since it was originally promulgated by the court. This amendment relates to a situation where the reporter who took the testimony is unable to prepare a bill of exceptions (usually due to death or disability). Such bill shall be prepared under the direction and supervision of the trial judge and shall be certified by the judge and delivered to the clerk of the district court.

I purposely omit any discussion of the rules relating to the preparation, service and filing of briefs, as these rules are so clear as not to require interpretation.

After the record is complete by the filing of a transcript and bill of exceptions and the case is at issue by the filing of briefs, it is ready to be placed upon the "Final Call." The Final Call is a list of cases to be submitted at each session of the court beginning with the third week of September and running through June of each year. A copy of the Final Call is mailed to all attorneys of record in the cases listed for argument at least ten days before the date set for submission. After a case is set on the Final Call, it will not be continued except upon motion and a showing of necessity. With each Final Call there is issued a Proposed Call, which is a list of cases scheduled to be called for submission at the session next after the Final Call. Cases on the Proposed Call may be continued upon order of the court obtained either on motion or by stipulation. The court does not allow oral argument on a motion to continue. Bear in mind that a Final Call is made up from cases appearing on the previous Proposed Call, and it is done about two weeks prior to the session at which they are to be heard. If a particular date during the upcoming session is desired, such arrangement will be made for you if you will notify the Clerk.

A word should be said about the procedure which is followed in case either party is in default in the filing of briefs. Rule 15 provides that whenever the brief of appellant is not on file by brief day, the judgment will be affirmed or the appeal dismissed, unless upon sufficient showing it is otherwise ordered by the court. No such order is entered, however, until all attorneys of record have been given ten days' notice of the proposed order by certified mail. When an appellee is in default of briefs the appellant is entitled to proceed *ex parte*.

On the oral argument of a case each party is allowed thirty minutes unless the time is extended by the court for special reasons. Applications for the allowance of additional time for oral argument must be made by motion and prior to the issuance of the Final Call. Should there be more than one party, either appellant or appellee, represented by different counsel, the thirty minutes allowed must be divided unless a special allotment of time is secured from the court, and this also must be done before the Final Call is issued. Rule 19 B with respect to oral argument on motion for rehearing is one frequently misunderstood. It provides that a ten-minute oral argument on motion for rehearing may be had as of right upon written request which has been served on opposing counsel three days prior to the date of argument. The rule provides that such arguments shall be heard on the Friday of each session of the court. They are to be heard

on the *first available date* following the filing of the motion unless continued by stipulation or upon order of the court for good cause shown. It is not our practice to advise counsel of the hearing date since it is automatically fixed by rule.

Some of what I have said thus far applies principally to the appeal of civil cases and some applies equally to the review of criminal cases, but I feel that your particular attention should be called to recent legislation which materially changes the procedure for the review of convictions in both felony and misdemeanor cases. This is the bill to which Judge Carter referred this morning as having been passed at the 1961 Legislature upon recommendation of the Judicial Council. This came about with the passage by the 1961 Legislature of L.B. 394 which amends Section 25-1912, R.R.S. 1943, as a result of recommendations to the Legislature by the Judicial Council.

You will note that this act makes the appellate practice in criminal cases substantially the same as in civil cases. Under the new act within one month from the sentence appealed from or the overruling of the motion for new trial, counsel files with the clerk of the district court a notice of appeal and either pays to that clerk the statutory docket fee of twenty dollars, or files his client's affidavit of poverty.

The required notice differs from the notice given in civil cases only in that it must state the nature of the offense for which the defendant was convicted and must recite the sentence imposed. The purpose of this requirement is to advise the clerk of the Supreme Court as to whether the offense is a *felony* or a *misdemeanor*. If the conviction was for a felony and suspension of sentence pending review is desired, a request for such suspension must be incorporated in the notice of appeal. If the conviction was for a misdemeanor, request for suspension of the sentence is not directed to the Supreme Court but to the district court. Upon receipt of a copy of the notice of appeal in felony cases the Clerk of the Supreme Court will issue a form of writ of error advising the district court that the sentence has been suspended pending review and directing that the defendant be admitted to bail. In misdemeanor cases the writ of error will simply advise the district court that an appeal has been filed and directing that court to execute the sentence unless application for suspension is made to the district court under Section 29-2302, R.R.S. 1943.

Please note that the filing of a petition in error is no longer required in criminal cases and that the parties are now appellant and appellee, and not plaintiff in error and defendant in error

as in the past. Note also that the duty of making timely filing of the transcript devolves upon the clerk of the district court and is no longer the responsibility of defense counsel.

I have endeavored to present my understanding of present appellate procedure, but I realize that memory is tricky, so for my own use I have prepared a check list of procedural steps. Just as I would not tell you the time of day without looking at my watch, I would not answer a question as to procedure without a look at my check list. I keep it in the upper left-hand corner of my desk and reach for it whenever the phone rings and the operator says "long distance calling." Thinking that some of you might like such a list, I have had it mimeographed, and copies may be had at the table at the rear of this room for those of you who have not already picked one up.

One word of warning. If you do pick up a copy remember that it will probably have to be revised at the close of each legislative session.

CHAIRMAN MASON: Are there any questions that any of you would like to ask? I think it might be well for us to have question periods after each paper since we move from one subject to another to some extent. Does anybody have any question upon when the time begins to run from action by the district judge, for example?

If you think of anything you want to ask later, we can also have a question period at the end of these papers, which deal with Supreme Court practice.

The next speaker is Murl Maupin of North Platte, member of the law firm of Maupin, Dent, Kay & Satterfield. Mr. Maupin came to Nebraska from Missouri originally. I believe he was in the same graduating class from law school that George Turner was in. He is a member of the Federal and American Bar Associations, the American Judicature Society, Federation of Insurance Counsels, International Association of Insurance Counsels, Association of Insurance Counsels, Fellow in the American College of Trial Lawyers, and the American College of Probate Counsel. I cite those to indicate that he really is very active in the North Platte area.

He is also a member of the Law Science Academy and the Defense Research Institute. In addition to that he served as a lieutenant colonel in the United States Army from 1943 to 1947, and was admitted to the United States Court of the Allied High Commission for Germany.

Mr. Maupin is going to talk to us about the preparation of briefs on appeals to the Supreme Court.

PREPARATION OF BRIEFS ON APPEALS TO THE SUPREME COURT

M. M. Maupin

Mr. Mason, Ladies and Gentlemen of the Association: When confronted with an appeal or confronted with the decision of whether or not an appeal should be taken, I always think of that time-worn political slogan, "Let's look at the record," for to me that expression, time-worn by politicians perhaps, is nevertheless a "must" for the lawyer who is confronted with the necessity of preparing for an appeal in the Supreme Court of Nebraska. Further, the preparation of your brief is dependent almost entirely, if not entirely, upon the record that you are working with.

The time, of course, to start the preparation of the trial record from which you hope to prepare a brief is before the time that you start participating in the case in the district court or the lower court from which you are appealing. In other words, in my view a careful, conscientious lawyer will think at the very inception of his litigation in terms of having a record at the completion of the trial in the district court that will stand up if you are successful in the district court and your adversary decides to take you one step higher.

I know of nothing, and I speak from some experience, that is more disheartening after having successfully conducted a lengthy trial in a lower court than to have some silly adversary think he has some prospects in the Supreme Court, take you up there, and then suddenly you get one of those little cards saying, "Reversed and dismissed." That is about the most disheartening experience you can have, but there is one step further, and that is the day that the mandate follows taxing you with all of the costs, not only in the lower court but in the Supreme Court. That is the day that will cause you to think that it would have been highly desirable to have done a little something different when you first started in on the litigation in the trial court.

Assuming, though, that you are ready to make your decision, whether you are going to advise your client to take an appeal and become an appellant in the Supreme Court, or if you are forced to that decision by virtue of your adversary having lodged this case that you have so successfully won in the trial court in the Supreme Court, I follow—I don't necessarily recommend that anybody else follow it, but I have found it workable at least for me—to follow certain check lists, as it were, or preparatory steps.

The first thing that I think is important is to review your trial record and to *know* it, to know everything that is contained in that record before you start the first step in the preparation of your brief. At that stage of the game it seems to me important to again review the theories of law that you used presumably with success in the lower court.

Right there, likewise, if you have been busy in the meantime and some interval of time has expired since you completed your trial in the district court, is a proper place to check the decisions that you have relied upon before to find out if the appellate court has said anything different, new, helpful, or harmful since you last so proudly espoused a certain case before the trial judge. Sometimes you find that the opinion you thought was so good has been commented upon adversely by the Supreme Court, or even completely set aside.

At that stage of the game, before you begin your work, is an excellent place to again review and to attempt to analyze the legal theories, propositions that your adversary had in the trial, or if by chance you are an appellee to attempt to analyze and understand the legal positions asserted by your adversary in the appellant's brief. At this stage of the game is a good place to start thinking about the statement of your assignments of error or the points you intend to rely upon for affirmance if you happen to be an appellee.

Again, as George has just said he keeps a check list on his desk, I would never start the preparation of a brief without again reviewing the court's rules applicable to your brief—they are about the same for an appellant or an appellee—but you lay them out in front of you and take a quick look at them.

Then, and for the first time, you can start a draft of the material that you ultimately intend to hand to the printer as your finished manuscript. The method of doing that varies, I know. I have discussed this with a great many lawyers. One fellow will do it in longhand, another one will dictate it and re-dictate. My theory is that if you have a stenographer, dictate a quick rough draft and start working from that. You will conserve more time, you will make more progress, you will end up with a product that comes closer to satisfying you, I think, than following the old habit of attempting to write out word by word, change and re-change. In other words, if your time is not more valuable than your secretary's time, it is probably a good idea for you to look the situation over and perhaps change chairs with her.

When you get to the mechanics of the preparation of the manuscript, many people approach it in many ways. Personally, I think under the rules of our Supreme Court where they provide for the setting forth of a statement of the question involved, it occurs to me that is one of the very, very important parts of anyone's brief. Fiction writers, you know—and I am not suggesting that when we write these briefs for the Supreme Court of Nebraska we are preparing them for the consumers of fiction—but nevertheless there are certain rules of writing that probably apply to everything that has ever been reduced to print, and that is to put it together in such form that it will catch and hold the attention of your reader. You are attempting to project your ideas on paper, you are attempting to set them forth so as to catch and to hold the attention of the reader.

I know there are members of the profession who hold to the view that you waste time in spending much time on a brief because they are never read anyhow, but I am not of that school. I think that they are read, and I think they are seriously read by all of the members of the appellate court, and they should be prepared with that thought in mind.

So in this statement of the question there have been many good articles written on it appearing in the *American Bar Association Journal* and elsewhere. Some of the writers on the subject say that is where you should learn to recognize and use the narrative hook of fiction. In other words, if you can state your question accurately, concisely, completely, and yet in such language so that it has—I shall call it "judicial appeal"—so that it has an appeal to the reader of your brief, I think it is important. I think that is the reason the court made the rule that you could set it forth there.

Maybe you will have to go down to the very end of the preparation of your manuscript before you finally formalize your statement of the question, but that is as good a starting point as any, in my opinion.

The next thing is the statement of your case under the rules of the Supreme Court. This should be accurate and it should be complete. But in my view that doesn't mean copying fifteen or twenty pages of printed material into your brief in recopying and rehashing the transcript. In making this statement of the question, keep in mind that the court by rule has prescribed certain rules that you gear your testimony to the record. Follow those rules in quoting from the record throughout the preparation of your brief.

The next step, not necessarily the one you would follow but to me in the order of priority and importance, is a statement of your facts. Make it factual, gear it to the record, avoid argumentative statements in your statement of facts. If you wish to argue the record there is a proper place for it, and that is under the heading of argument. In my view, if it can be done in view of the type of a record you have, matters of first importance should be first stated in the statement of facts.

From there on to your assignment of error: Those, I think, should be minimized; they should not be stressed. Many times I think you can find that a single assignment of error will take care of a great many paragraphs that you may have set up in your motion for a new trial. If you have to state several, as you do occasionally, by virtue of instructions or various phases that you are trying to take up, nevertheless seek to minimize them, but remember under the rules and under the point of attempting to have a readable brief that these points assigned as error should then be carried on into your brief. In other words, don't assign an error and then forget all about it, because if you do you can pick up your opinion later and you will find that some author of an opinion of the Supreme Court has maybe passed it entirely, or if he has even mentioned it he has said something to the effect "such-and-such was assigned as error but was no further urged, so we will not consider it further."

In the preparation, then, of your propositions of law I think the rules of the court provide, and I think that it is proper to follow, that your propositions should cover the scope of the errors assigned. My idea is that if you can pick out one applicable syllabus from a case that you are relying upon that exactly fits the matter that you are now subjecting to the court, it is far better, far more important, and will render you much greater service than trying to become the author yourself of a statement of law. I operate on the theory that the same judge who may have written the opinion before whose syllabus you are now borrowing for your proposition of law may by chance be writing your opinion in the case at bar, and he may have liked his language before and he may desire to use it again.

Check and Shepardize every citation that you use in a brief. There is nothing more disconcerting to me than to pick up an adversary's brief and find a citation and I reach for a book and find that it is stated erroneously. Then I have to search it out myself. I suspect that same thing holds true with the judges themselves, and if they find that you have been sloppy or careless in your citation of authority they may look askance at some

of the statements you have made of the facts or other material in the brief.

On your argument it is my view that insofar as possible it is desirable to follow the chronology of the propositions of law that you have set forth and to restate them at the beginning of the particular sections of the argument that you are devoting to that particular proposition. Attempt, if you can, to demonstrate the applicability of the law that you rely upon to your trial record, and again in the argument specifically cite from the record the supporting evidential material contained in your record to corroborate the argumentative statement that you are making.

Avoid vituperative and derogatory remarks concerning your adversary, concerning the court, concerning witnesses, if it is possible to do so. In any event, I am quite certain after a few years' experience that you are wasting your time and your client's money to spend any portion on a printer's record excoriating the trial judge who beat you below. That has no place, in my opinion, in a brief on appeal.

I like, if I am an appellee, if I can possibly do so, to spend some small portion of my time and of the brief in attempting to treat of the authorities that may have been cited by the appellant, if you are an appellee. Attempt, if you can, to point out wherein the authority cited by him is not applicable to the factual situation you are working with in your present appeal.

I hold to the theory that you should be accurate—accurate in statement, accurate in citation of authority, accurate as you know how to be from the beginning to the end of your brief, because in my opinion inaccuracy or errors in citation, errors in statement of the record, in the eyes of an appellate court are practically inexcusable.

Having worked through this process where you have gotten these various sections set up in rough draft form, you are at the point where you can start throwing them together under the rules, drafting and redrafting. I know a number of successful lawyers who have achieved some degree of fame as appellate lawyers in our own Supreme Court who may write, draft, redraft into the third or fourth time in the preparation of a manuscript for the Supreme Court.

Attempt to achieve readability, legibility, accuracy of statement, and, if you can, try to be logical. That is sometimes hard to do, but attempt to achieve some degree of logic. And above all, attempt to achieve intellectual honesty in the presentation of your manuscript.

Finally, there comes a point when if you've got the time to do it and take the time you can go back over it and do an editing job and usually save yourself several, if not a great many, pages of what at first blush appeared to you to be a wonderful argumentative statement, but when reading it over and editing you will find you've got the same thing repeated in there four or five or six times. With a busy appellate judge if you have sold him on that argument the first time, the second time he hits it he is liable to look at it a little longer, and the third time he reads it he may discover the fallacy in it, so I suggest that you edit it down and get it into readable proportions and readable length, so that when you finally send it to the printer as your finished manuscript you may not be satisfied with the way it works out from a legal standpoint but at least you can say to yourself that you've done the best job you know how in making the presentation on behalf of the client that you represent.

I hold to the theory that these judges who sit on the appellate courts for a period of years finally get to the point where they do some self-evaluating of counsel who appear before them. I think it is possible for a lawyer going before the Supreme Court to establish himself a reputation, maybe not a reputation as a good lawyer, but a reputation at least as an individual who is honest and who is accurate with the court. I think that that is something to be desired. I think something that all lawyers from their first appearance down to their last before an appellate court should strive to achieve is a reputation at least for intellectual honesty, even though you have not been able to achieve a reputation as a legal giant.

I have one closing remark, and that leads me to a little story. In your brief I have suggested brevity, but I do not subscribe to the view that you should minimize your record or cut it down to where you miss important points to achieve brevity. On the other hand, I think you owe it to your client to be certain that you get every point and every piece of evidential material before the court that may be of benefit to your client in the consideration of your case by the appellate court.

Mr. Mason suggested that I had at one time been a member of the bar of the Court of Appeals of the U.S. High Commissioner of Germany. I had occasion to appear numerous times before the famous Judge Clark who at one time had been a member of the Circuit Court of Appeals before he went to Germany. You will remember him if you haven't heard of him before: He was the gentleman who took a leave of absence during World War II, and during his absence someone filed his resignation that he had

left with the President in the event that he would be a prisoner, or what not. So he found that he had resigned from the bench. He came back here and, as I recall it, he submitted a claim before the Court of Claims. At least, he came back and tried to reconstitute himself a recipient of the salary, if not the title, of a member of the Court of Appeals.

He became the Chief Judge of the High Commissioner's Court in Germany, and he was quite a character. He was in the newspapers frequently. He liked it.

I had occasion to appear before his court on a case that had been sent to me by a lawyer in Berlin where an individual had been convicted of moving United States government property across the now famous division line at Brandenburg tower in Berlin, over into East Berlin to be taken into the black market. A few government trucks and little items of that nature were disappearing.

In presenting this appeal from the record, this cold record, it occurred to me that the complaining witness, the only witness the government had, had testified adversely, oppositely, falsely. He testified to about every given thing. So in the preparation of the brief I took occasion to quote each and every statement of this complaining witness in the trial record, drawing attention to when he had said this and when he next said that and when he next said this.

In appearing before the court—we had an hour for the presentation—I just had gotten to that point where I had finished saying, "May it please the Court," when Chief Judge Clark cut in on me. You have to know the locale pretty much as to how this court operated over there. The Germans would flock in: there was a room that would hold perhaps two hundred people, and there was always standing room only when the court was in session. I was all geared up to where I wasn't going to split an infinitive or draw the second breath so I could crowd in my argument exactly in that one hour that was allotted to me. I hadn't really made any allowance for an interruption, but as I say I had just gotten to that stage when Judge Clark stopped me, and he said, "Is it your contention that the complaining witness is a liar?"

Well, that was my contention, but it was a little early in my argument for me to assert myself so bluntly. I thought it might be proper to feel my way along just a little longer before I decided the proper answer to the Judge's question. I made some sort of an answer to the effect that I thought the record might sustain that sort of an inference. I started in again and he said,

"Well, just a minute. Are you arguing here that he is a liar, that he perjured himself?"

I said, "Yes, that is the basis of my presentation of this appeal, your Honor."

He cut in about that time. He said, "Well, I personally think he is a damn liar."

I had about 59 minutes and 30 seconds of my argument left, but at that stage of the game I noticed the other two judges seemed to sort of agree with the Chief Judge so I said, "That is our case, your Honor," and I quit—as I now quit.

CHAIRMAN MASON: Our next speaker is the Honorable Edward F. Carter, Judge of the Supreme Court of the State of Nebraska. Judge Carter finished Nebraska Law School in 1919 and practiced in Bayard, Nebraska, until 1927, at which time he became district judge in the Seventeenth District, a position which he held until 1935, in which year he became a member of the Supreme Court and has served there for twenty-six years to this date.

Judge Carter is one of the outstanding judges on our Nebraska Supreme Court. I was going to leave it at that, but with the admonition for intellectual honesty which we have just received from Mr. Maupin I can feel it is really my duty now to say that I would say that if I were introducing *any* member of the Supreme Court. In any event, sir, we are honored to have you with us to talk to us about the functioning of our Nebraska Supreme Court. Judge Carter.

APPEALS FROM DISTRICT COURT TO NEBRASKA SUPREME COURT

Edward F. Carter

Mr. Chairman, Members of the Bar: It is my purpose to discuss the treatment of appeals in the Supreme Court after all procedural details in perfecting the appeal have been met. It seems logical to say that some knowledge of the manner and method of treatment by the court would be advantageous to counsel in properly presenting their appeal.

The filing of an adequate brief is of prime consideration. The form of the brief is, of course, prescribed by rules of court. These rules must be complied with, and the lawyer who is not thoroughly familiar with them is taking unnecessary risks. I will not discuss these rules generally but I shall attempt to point out the importance of some of them from the standpoint of the court.

It is very important for the appellant's counsel to set forth the errors upon which he relies in his assignments of error. Ordinarily, the court will pass only on the assignments of error as contained in the brief. Carelessly written assignments of error may result in the court's not determining the point that was sought to be raised. It is important also that the propositions of law involved be set forth, they being the legal support for the errors assigned.

It has been my view personally that a concise statement of the controlling facts is of great value. They must of course have support in the record. The psychological effect of stating facts which have no support in the record is bound to create doubt about the position of the brief-writer. While the court determines the facts from the evidence adduced in the record, it would be naive for me to state that misstatements of fact might not in some instances surround the brief with a questionable atmosphere as to its accuracy. There is nothing to be lost in stating the facts in a manner that properly reflects the record. Nothing is gained by doing it otherwise. It is expected that in dealing with conflicts in the evidence, each will present the contentions of his client in respect thereto. But such conflicts should be met head-on in the argument contained in the brief, and not by twisting the plain meaning of the evidence.

It is essential that the brief contain the cases and legal arguments upon which you rely. It is important that the authorities relied on be quoted or otherwise discussed. It is discouraging for the appellate judge to find a long list of cases cited which appear to have no relevancy to the legal principle involved. It involves the useless reading of cases, which, instead of being helpful, magnifies unduly the work involved in arriving at a correct conclusion. A case that is not worth quoting or discussing in the brief is not worth citing. It is dangerous to cite cases in a footnote without reading them and applying the foregoing rule as to their use in the brief. An energetic search for controlling cases is of great assistance to the court and, in this respect, it must be observed that the very purpose of a brief is to assist the court.

Occasionally we receive briefs which are what I term "underbriefed." More often we receive those which I term "overbriefed." Unnecessary repetition in a brief is costly to the client and wastes the time of the court. Often inconsequential points of law are elaborately set forth and supported by numerous authorities when they can have no reasonable application to the issues. This tends toward long, tedious briefs that only add to

the problems of the appellate judge. A thorough understanding of the case and the principles controlling its proper disposition are of inestimable value in the preparation of a good brief and the assistance it gives to the court.

We are generally favored with good briefs, and I do not now intend to criticize the bar with reference to them. It is a commendable attribute, however, to strive for perfection in brief-writing, both from the standpoint of your client's interest and that of the court as well.

The court is not awed by thick briefs, although they are justified in certain cases. The court has great respect for briefs that comply fully with the rules, that are concise, logical, devoid of unnecessary repetition, and supported by recognized authorities. The number of authorities is not of controlling importance, although in cases of first impression majority and minority rules in other jurisdictions have their place.

The same rules apply to the appellee's brief. I point out, however, that a cross-appeal is perfected by its assertion in appellee's brief. No other procedure is required to lodge it in the Supreme Court. It must be set forth in a separate division of the brief, and the rules applicable to the appellant's original brief apply to the cross-appeal.

Briefs *amicus curiae* may be filed at any time before the issuance of the Final Call without leave of court. Thereafter leave of court must be sought, and it is usually permitted as of course. Such briefs can be of great help, particularly when they deal with questioned legal principles.

Motions may be filed in the Supreme Court for reasons that are too numerous to mention here. Notice must be given and a hearing had in accordance with the rules. After submission, the motion almost without exception is referred to a member of the court, who reports his findings and recommendations in writing. The action of the court is then taken thereon, usually at the following court conference. In disposing of motions, opinions are not written, except in those matters not previously decided by the court and which appear to be of such importance to the bar that an opinion is warranted. Motions are assigned in turn to the judges without regard to the nature of the proceeding or the intricacies involved.

The oral argument and its purpose and importance is usually a subject of interest to the bench and bar. There are many divergencies in viewpoint on the object to be attained by the oral presentation of one's case. I shall confine myself to a statement

of my views and leave to others the privilege of expressing their own. At the outset, I might say that some judges like to examine the briefs before oral argument, others do not. Personally, I prefer to hear about the case first from the lips of counsel. It seems more alive and fresh, and holds your attention more than if you are hearing what you have already read. It eliminates the possibility of preconceived notions gained from an examination of the briefs, and the consequent necessity of engaging in battle with yourself in subjecting any such views to the facts disclosed from the evidence. I concede that it is a matter of choice by the individual judge, dependent somewhat on the make-up of the individual.

Appellant's opening argument should commence with the nature of the case, the parties to it, whether it is a jury case or otherwise, the result, and the matters about which you complain. The facts as you understand them from the record should then be as clearly set forth as possible. The facts are important since ordinarily but one member of the court examines the whole record, although when necessity requires it is read by two or more members of the court. Reading from the briefs is not recommended except to read from exhibits or the important testimony of a witness essential to your argument. Reading from controlling cases is justified in presenting your legal contentions. But reading your argument from the brief is generally a waste of time since each member of the court has the brief before him. The real purpose of the oral argument is to give the case a personal touch, the assertion of the rights of your client, and your main contentions with the emphasis which the printed brief cannot supply. If I had to choose between a complete statement of the facts or the exposition of the law, I would state the facts. The law can be obtained more easily from the briefs than can a complicated fact situation.

Appellee's argument should generally follow the pattern set by the appellant, answering the argument made directly and concisely both as to law and fact. When you have completed your argument by covering the essential points of your position, it is an appropriate time to take your seat. Anything further that you may add is apt to be repetition and destructive of the common sense and logic which your presentation has brought out.

Irrespective of my personal views, I know full well that no two lawyers will present a case in the same manner. The experience, skill, learning, and general make-up of the lawyer will largely determine the manner of presentation of his argument.

It is necessary that you be yourself. It is pure folly to try to ape another lawyer who has impressed you. I do not advocate the placing of oral arguments in a pattern from which there shall be no deviation. My only purpose is to point out the object of oral argument and its importance, and leave to the lawyer the way he can marshal his talents to accomplish the desired results.

The case is submitted when oral arguments are completed. The court then has the benefit of the record, the briefs, and the oral arguments to assist it in arriving at a conclusion.

Following the oral arguments for the day, the cases are assigned to the members of the court who are to prepare the opinions. No discretion is employed in the assignment of cases. Each judge gets those cases which fall to him under the established rule. A judge has no assurance that he will draw any case before the assignment is made, although he usually knows the case or cases he will draw during the oral argument. Following the assignment of cases, they are discussed in conference and tentative views expressed. Such views are binding on no one and are intended only to aid the judge to whom the case is assigned to determine the controlling issues and the applicable legal principles. The writer of the opinion is under no compulsion to follow the views expressed. Upon the examination of the evidence and the applicable law the opinion may be, and often is, contrary to the tentative views expressed at the preliminary conference.

The case is then left in the hands of the judge to whom it was assigned. In determining the facts and the applicable law, and in coordinating them into an opinion, each judge functions according to his own methods. This work necessarily includes the reading of the bill of exceptions and the examination of the briefs of the parties. He takes whatever time he deems necessary to solve the problems of the case. When his proposed opinion is prepared, copies are sent to the other members of the court. Conflicts of views with those of the writer are usually worked out among the judges before the opinion is called up for adoption or rejection. Where irreconcilable differences arise, the case is usually argued at length in the court conference and, after full discussion, is determined by formal vote. If the proposed opinion is adopted, it will be released after editing by the Supreme Court reporter. The editing includes the verifying of the facts in the record, checking the correctness of quotes and citations, and the application of certain rules as to uniformity that have become customary over the years.

If the proposed opinion is rejected, and the writer feels that he cannot acquiesce in the view of the majority, the case is re-

assigned. Opinions will be held up for a reasonable time on request for the preparation of a dissent or concurring opinion. The usual custom is to have the opinion and the dissent released at the same time, although there have been exceptions to that rule.

Our rules provide for the filing of motions for rehearing and oral argument thereon on request. The purpose of the rehearing procedure is to call the court's attention to errors in the opinion. A mere rehash of controverted facts ordinarily is of little assistance. If facts should be misstated in the opinion, or if an important issue was not determined, or if there are other defects in the court's opinion that might have required a different result or even the application of a different rule of law, the rehearing procedures provide the time and place to present it.

The court does not treat a motion for a rehearing lightly. It is referred to a member of the court other than the author of the opinion for investigation and a written report, which report is in the hands of each member of the court before it is acted on at conference. Some rearguments are granted when the court thinks they are warranted. Some corrections are made by supplemental opinion where a reargument would serve no useful purpose. The rehearing process can be described as a guard against error in the court's opinions which may creep in irrespective of the meticulous efforts of the court to avoid them.

I can say without hesitation that the Supreme Court has set up a method of procedure in processing appeals to eliminate the danger of error in every way that it can. Changes in our procedure have been made from time to time when it appeared advantageous in the accomplishment of that objective. But even so, errors will be made, since judges have the same human tendencies to err as do others. That there are some hazards involved in the handling of appeals cannot be denied. To deny that mistakes are made is to assert infallibility, something with which humans are not endowed. We make every effort to keep mistakes at a minimum, and the assistance of lawyers in their presentations aid in the accomplishment of that end in proportion to the quality of the briefs and oral arguments in each case.

Many of the things I have stated here are well known to you and constitute a repetition of the knowledge you have acquired in your experience as lawyers. On the other hand, it is well to point up the importance of these steps as they relate themselves to the work of the court in handling its case load.

We have attempted, particularly with the aid of the Judicial Council, to simplify procedure, to reduce the time and expense elements, and to expedite the court's business without reducing

its efficiency. The result has been that the work of the court has been current. For several years every case ready to be heard has been argued and submitted before the summer recess, and except for rare occasions the opinion has been written and released before that time. Delay, the bane of all courts, has been reduced to a minimum without reducing the efficiency of the court. There are those, of course, who question the efficiency of the court in its disposition of certain cases. This is a normal and unavoidable situation. The success of the court will be determined largely by the bar as a whole and the respect that the bar has for the integrity of the court's decisions.

CHAIRMAN MASON: Do any of you have any questions involving the material which has been presented so far?

ROY E. BLIXT, Arnold: Is there any advantage for an appellee to forego making a statement of fact?

CHAIRMAN MASON: The question is: Is there any advantage in having the appellee not restate the facts where he feels the appellant has fairly stated the facts? Is that the question? Would you care to comment on that, Judge?

JUDGE CARTER: If the facts have been once fairly stated and you so state, there is no necessity for your repeating the facts. There is no question about that. It is surplusage and repetition. If the facts are pretty much agreed upon, that solves that problem so far as the oral argument is concerned.

CHAIRMAN MASON: I believe we will take a five- or ten-minute recess and then we will reconvene.

[Recess]

CHAIRMAN MASON: If you gentlemen will please take your seats we will resume our program.

The second part of our program this afternoon deals with appeals in the federal court as distinguished from the state court. We are going to deal with appeals from the United States district court to the United States court of appeals. Our speaker for this part of the program is Mr. James W. R. Brown of the law firm in Omaha of Fitzgerald, Hamer, Brown & Leahy.

Mr. Brown is an Iowan, having graduated from the University of Iowa with a J.D. degree in 1942. He worked for a short time with the Washington, D.C., firm of Covington & Burling until he went into the Army, and then upon his discharge from the Army in 1946 he returned to Omaha where he became associated with the firm of which he is now a partner.

Mr. Brown's work has been largely in the corporate law and taxation field. He has had certain notable success, noted locally at least, in the appellate work, having recently received a decision of the Eighth Circuit Court of Appeals in a very substantial tax matter on a split decision involving the question of depreciation of transmission lines owned by utilities. It was a test case in the nation, and on a refund claim Mr. Brown was successful in obtaining a refund for Northern Natural of some \$140,000, which in Lincoln is not chicken feed. I imagine most of his time in tax work now has to do with his own tax return, or so I understand.

Mr. Brown is going to talk to us about the procedure of appealing from the United States district court to the United States court of appeals. It is my pleasure to present James W. R. Brown of Omaha.

APPEALS FROM UNITED STATES DISTRICT COURT TO UNITED STATES COURT OF APPEALS

James W. R. Brown

Mr. Chairman and Fellow Members of the Bar: As John has indicated, my discussion is going to deal with appeals from the federal district court to the court of appeals. In fact it will be somewhat narrower in scope even than that. I am going to deal almost exclusively with appeals in civil cases, and I am also going to direct my remarks to appeals to the Court of Appeals for the Eighth Circuit, since there are some differences in the rules in the different circuits.

First of all, I think it might be well just to review the sources to which we must resort to determine our procedure. In that connection there are three what I would call "official" sources: First of all, the statutes, the sections of the judiciary and judicial code which pertain to appeals. Those are set out in the outline, specifically Sections 1291 to 1294 of Title 28 of the United States Code Annotated; Section 2071; and 2107.

Sections 1291 to 1294 simply deal with the jurisdiction of the court of appeals, define what jurisdiction it does have, which is all appellate. Section 2071 in substance says that the federal court shall have the power to promulgate rules to control the conduct of the business in those courts; or in other words, it is the rule-making section. Section 2107 specifies the time in which a notice of appeal must be filed. I might say that I believe it is the only section of the statute which sets out a specific rule as to procedure, and yet I should also add that it simply duplicates the provision in the federal rules themselves.

The second source to which we must resort, of course, is the Federal Rules of Civil Procedure which were promulgated by the United States Supreme Court for the conduct of business in the district courts, but those rules, particularly Rule 72 to 76, inclusive, provide the procedures for appeals from those district courts.

Then the other source of rules or regulations are the rules of each court of appeals, and in our own Court of Appeals for the Eighth Circuit those rules which are currently in effect are those which were made effective on March 1, 1959.

In addition to these three official sources there is a very handy little work that has been put out by Mr. Tucker, who is the Clerk of the Court of Appeals for the Eighth Circuit. It is entitled "Suggestions to Attorneys Concerning Appellate Rules and Practice." It is a very handy little work which summarizes and states in very simple terms what you must do, and makes certain suggestions which are very helpful. It can be obtained from the clerk without any cost, and it carries the statement that it has been put out with the approval of the court. I think it is very helpful, particularly when you are taking an appeal for the first time. So much, then, for the sources to which we must look with respect to guidance in appeals.

I think we ought to take a look at the jurisdiction of the court of appeals with respect to decisions of the district court. Here, of course, we must look to the sections of the statute 1291 to 1294, inclusive, and particularly 1291. We can divide that jurisdiction for purposes of discussion, anyway, into two categories: First, appeals from final decisions; and, secondly, appeals from interlocutory decisions or orders.

The provision in the statute with respect to appeals from final decisions I have quoted in the outline, and I will just simply read it: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts...except where a direct review may be had in the Supreme Court." So you see that that is a very broad general grant of power to review all final decisions of the district court, with the one exception. That exception, while it is narrow, is important, and I should reiterate it in those instances in which a direct review may be had in the Supreme Court. It is important to distinguish when you go to the court of appeals and when you go to the Supreme Court, because if you go to the court of appeals in an instance in which you have a direct appeal, then you are simply forfeiting your appeal.

There are two situations in which your appeal would be to the United States Supreme Court. One of those is where an in-

terlocutory or final decision of the district court holds an act of Congress invalid, and in that proceeding either the United States or an agency of the United States or an employee or officer as such is a party. So if that occurs, your appeal is directly to the United States Supreme Court.

I might repeat that wherever any interlocutory or final decision of the district court holds an act of Congress invalid in a proceeding in which the United States or an agency or officer is a party, then your appeal would be to the United States Supreme Court and not to the court of appeals.

The other instance, and it is also a very narrow situation, is one in which a three-judge court either grants or refuses to grant an injunction, permanent or interlocutory. In that instance, again, your appeal would be to the United States Supreme Court and not to the court of appeals. In all other instances the appeal is to the court of appeals.

Now in contradistinction from the final decisions the area of review in interlocutory decisions or from interlocutory decisions is very narrow, and it is specifically defined in the code. I have set out what I believe are the situations that permit of such an appeal in civil cases in the outline.

The first of those is from an interlocutory order of the district court granting, continuing, modifying, refusing, or dissolving injunctions, again except where a direct review in the Supreme Court is permitted, and of course that would be in the case of a three-judge district court.

Another instance in which an appeal from an interlocutory order is permitted is in connection with the appointment of receivers or refusing to wind up receiverships or orders that are incidental or necessary to the winding up of a receivership. Where special relief is either granted or refused, an interlocutory order can be reviewed.

Another instance which I have cited there which really doesn't pertain in a civil case is an admiralty case. Certain interlocutory orders in admiralty cases are of course appealable.

One that we don't have too much to do with around here but which is important is in patent infringement cases where the judgment is final except for the accounting. An appeal can be taken. For instance, if you have the district court determining that the plaintiff's patent is valid and that it has been infringed, then the next step is to determine the damages, which generally is a rather extensive accounting procedure. In order to avoid the necessity of having that accounting done in the event that the

court of appeals reverses and holds that the patent is invalid or that it has not been infringed, an appeal is permitted in that instance.

There has been added very recently another special situation in which an interlocutory order can be appealed, and that involves a situation where there is a controlling question of law which the district court states in its order that an immediate appeal may materially advance the ultimate termination of the litigation. So if the district court states in its order that an immediate appeal may advance the ultimate determination of that litigation, then if the party within ten days makes an application to the court of appeals, the court of appeals may grant it. So it is dependent upon the discretion of both the district court and the court of appeals.

Then just for completeness I might state that there are a number of instances in bankruptcy proceedings in which appeals from interlocutory orders are permitted.

Now let's go to the question of venue, which is very easy, and that is that you appeal from the district court decision to the court of appeals whose territory embraces that district court. Pretty obvious.

Now we come down to the method of perfecting the appeal, and again that is a very simple procedure. The only jurisdictional act necessary is the filing of a notice of appeal. There is no necessity for a motion of new trial or any other preliminaries; you simply file in the district court a notice of appeal.

What is the time within which you must file that notice? Here we have generally two rules. The general rule is that it must be filed within thirty days from the entry of the judgment appealed from. If the United States government or any agency or officer or employee as such is a party to that proceeding, then the time is sixty days for *all* parties, not only the government or the governmental agency but for the private party. It becomes sixty days. I might say here that the Federal Rules of Civil Procedure, I believe 81-F, defines the Collector of Internal Revenue as an officer of the government for this purpose. I assume that would embrace also the district director; there has simply been a change of name, but it would be helpful if that rule were brought up to date.

All right, now can you get an extension of time? Assuming it is an ordinary situation where the government is not a party and you have a thirty-day time in which to file the notice of appeal, can you get an extension of time? The answer is "No" except under a very limited situation, and that is one where through

excusable neglect you failed to learn of the entry of the judgment, and even in that instance the extension of time cannot exceed thirty days from the expiration of the original time, and therefore if you fail to learn of it no matter how innocent of neglect you may be, you are just out; the appeal time is over.

There are certain motions which will stop the running of the appeal time, and I have set those out in the outline. One of them is for judgment notwithstanding the verdict; for a new trial; motion to amend or make additional findings of fact; or a motion to alter or amend the judgment. If any of those motions are filed, it stops the running of the time, and then when the order is entered, either overruling or sustaining the motion, the time commences to run all over again. The thirty-day or the sixty-day period starts to run anew. It doesn't pick up at the point where it had ended at the time of the filing of the motion.

We have seen that the perfecting of the appeal is a very simple thing. You file in the district court a notice of appeal within either thirty days or sixty days of the entry of the judgment. What must that notice of appeal contain? Again it is extremely simple, and it need contain only three things: No. 1, the name of the party taking the appeal; No. 2, the judgment or part thereof from which the appeal is taken; No. 3, the name of the court to which the appeal is being taken. It has even been held that the third one is not jurisdictional, so that the procedure is about as simple as it can be. That is all you need do. You do not need to serve the notice. The rules provide that service will be made by the clerk, but if the clerk fails in his obligation it does not affect the validity of your appeal.

Now the subject of bonds. The rules provide that you should file your cost bond with the notice of appeal. If the cost bond is filed, if it is in the sum of \$250 you do not need to get the prior approval of the court. If a supersedeas bond is filed, of course, you do not need a cost bond.

The rules provide that the supersedeas bond shall be conditioned to satisfy the judgment, costs, interest, and the damages for delay, and the supersedeas bond must be approved by the court.

We have two simple steps of filing the notice of appeal and filing a bond. The next step will be the docketing of the appeal and the filing of the record on appeal. Here again the procedure is streamlined and simple, and they have made it about as easy as it can be to take an appeal from the federal district court to the court of appeals.

The first thing you will want to do is serve and file in the district court: No. 1, a designation of the record upon which the appeal will be made; No. 2, a transcript of the evidence.

As far as the designation of the record is concerned, our own court of appeals has made that about as simple as it can be. You can file a designation which simply says that the record on appeal will consist of all of the original papers and all of the evidence, and that is sufficient.

If all of the record is not designated, then you must file a statement of points so that the opposing party will be able to determine whether the portions of the record which you have designated are adequate to present the questions which he has raised. But in the ordinary course I see no reason why in almost every case you wouldn't simply designate all the original papers and all of the evidence.

Your next step would be to pay the clerk of appeals the court docket fee of \$25.00. The third step, which would be at the same time, would be to have the clerk of the district court transmit to the court of appeals certified copies of the notice of appeal and all relevant docket entries.

Our court of appeals rules say that the mere transmission by the clerk of the district court of certified copies of the notice of appeal and of the relevant docket entries will be deemed the equivalent of filing the original record on appeal. Of course if at any time the court of appeals desires to resort to the original record, all it has to do is order the clerk of the district court to transmit it up there.

So the docketing and filing of the original record on appeal are pretty simple steps.

Now in what time are you required to complete that? Forty days from the filing of the notice of appeal. The district court can extend that time, but not more than fifty additional days. The court of appeals does have discretion under Section 73-A to extend it further, but the district court does not.

We have gone through some fairly simple steps so far: Notice of appeal filed in the district court, your bond filed and approved, and then docketing and filing of the record on appeal, which involves three very simple steps.

The next step, of course, is to file your printed brief and printed record. The appeal will ordinarily be determined on the basis of the printed record, and the brief and the printed record must be filed within forty days of the docketing of the appeal. The rules set out how many copies must be filed. There are

thirty copies of the printed record, and you have to serve, of course, the opposing party in the case of the brief and the record.

We have seen that in our designation of the contents of the record we can very simply designate all of the original papers and all of the evidence. Does that mean when you print the record that you must print all of those matters? The answer is "No." Your printed record should contain only what is necessary and what is required by the rules.

The rules require that all of the essential pleadings and the date in which they were filed must appear on the record. It does not mean all of the pleadings but all of the *essential* pleadings. It must include all the essential docket entries. It must include the judgment or order appealed from. If the district court has written an opinion, that opinion must be set out in the printed record, or if it has already appeared in the Federal Supplement, you need only refer to the volume and page of the Federal Supplement in which it appears.

You must also set out the findings and conclusions of the trial court. You must set out in the record complete jury instructions, and then so much of the evidence as may be necessary to enable the court to determine the question presented. That evidence can be set out entirely in question-and-answer form, or it can be partly narrative or all narrative. Ordinarily I would think that the sensible thing to do would be to reduce what you can to narrative, the background and preliminary matters, and then when you get to the crucial testimony set it out in question-and-answer form.

If rulings on evidence are challenged, then you must set out the evidence, the objections, and the rulings thereon. If the sufficiency of the evidence is raised, of course, then you must put in all of the evidence that relates to that question.

The record should not contain anything that is unnecessary. For instance, your captions on your pleadings, your verification, anything that can be deleted without omitting the substance can and should be deleted to cut down the expense and the unnecessary printed matter which is submitted to the court of appeals.

If the appellee feels that something has been omitted from the printed record that ought to be there, he is in a position to file a supplement to the record, and just to sort of give you the attitude of the court with respect to keeping the printed record down to the essentials, I would like to read from Mr. Tucker's suggestions:

"Counsel for all parties to the appeal are requested to cooperate in eliminating from the record nonessential matter. For

example, in a removed case omit the removal papers, unless removability is an issue. Omit non-essential pleadings, process and the motion, verification of pleadings, acknowledgments of instruments, bonds on appeal, and similar items not in dispute. If there are many exhibits of which one is typical, reproduce only one."

And he goes on with a number of suggestions and then this statement: "Counsel will not be penalized for an omission of essential matter from the printed or multigraphed record if attributable to a good faith effort to eliminate non-essential matters."

He also puts in a very worthwhile suggestion, and that is that the counsel for all parties should get together, if possible, ahead of time to agree on what is essential.

I have mentioned that the appellee may supplement the record if he feels that relevant material has been omitted or that a narrative statement is not fair. I think I should also mention that sometimes you run into problems which make it rather difficult to comply with the rules as far as setting out or reproducing in printed form a lot of exhibits or particular exhibits, and the rules provide for special arrangements. You may get an order of the court authorizing you, for instance, to have an original exhibit transmitted instead of copies or reducing it to printed form, x-rays, or some photographs, or complicated exhibits. Likewise it may be that instead of printing you can have the material photographed or multilithed or some other process which would be a lot cheaper than having the whole thing printed.

An instance comes to mind in connection with one matter that I had where the government put in all of the annual reports of a corporation for 1943 through 1961. To go through and have to print all of that material with all kinds of diagrams, etc., would have been prohibitive cost-wise and it wouldn't be very helpful anyway, so we got an order of the court permitting us to submit simply the five sets of the original reports themselves and bound them together in a volume.

So if you have problems like that, the court is very helpful in working them out in a sensible and practical way.

With respect to the briefs, those are filed forty days after the time in which the case is docketed. First we have the thirty days within which to file your notice of appeal, forty days within which to docket the appeal and file the original record, and then forty more days within which to file the printed record and your brief.

I might say that there are twenty copies required to be filed, and of course you must serve each opposing counsel.

Answer brief, you are given twenty-five days; the reply brief, you are given ten days.

The rules set out the form very explicitly, and I don't think it would be worth while to go into a discussion of that. I will say that the length of the brief is limited by the rules: The appellant's brief cannot exceed eighty-five pages; the appellee's brief, eighty pages; and the reply brief, fifteen pages.

One other matter which is worth mentioning, particularly in view of the fact that it differs from our state court procedure, is that you cannot cross-appeal in your brief. If you are going to appeal you must file your own notice of appeal within the proper time.

Oral arguments are granted as of course and you do not have to request them, and the time limit imposed is forty-five minutes.

That gives a sort of brief outline of the appeals from federal district court to the court of appeals, and I think that the overall comment that could be made is that the rules make it just about as clear and simple as they can. I think there isn't much we could do to improve them, but I suppose there could be something.

CHAIRMAN MASON: I think one of the matters of interest to all of the lawyers, and I am very pleased Mr. Brown mentioned it, is the fact that the rules of the court of appeals are not absolutely inflexible. I think this is a good thing to know. At the Judicial Conference held in St. Louis a month or so ago of the Eighth Circuit this point was expressed, and I am sure that the court of appeals has very good reason to have rules and to have them followed in practically all cases, but if it should happen that there are some really unusual situations, such as Mr. Brown mentioned about reproducing parts of the record, or something, I think it is well that the lawyers know that it is not impossible to make this fact known to the court and to get some deviation from what normally would be required as far as the record is concerned, or the printing of the record, etc.

We have present with us today the Chief Judge of the Eighth Circuit Court of Appeals, Harvey Johnsen, who is also a past member of our Nebraska Supreme Court. We are very pleased to have you with us, sir, and I encourage you to make any comment which you feel would be for the good of the cause now or later.

We also have present with us the man who will be our speaker this evening. I don't want to steal the thunder from this evening's program, but the Honorable John R. Brown, who is Judge of the Fifth Circuit Court of Appeals at Houston, Texas, and is a Nebraska University graduate, comes from Nebraska originally, is here, and Judge Brown consented to give a few observations to the lawyers of appellate practice as he sees it from the viewpoint of the bench.

Judge Brown, we would be pleased if you would do so now.

COMMENTS FROM THE APPELLATE COURT VIEWPOINT

John R. Brown

The most important thing is that I give you ample time to relax and get yourselves in shape to suffer under this microphone a little bit more this evening. I am going to make a dry run because when I talk tonight it is going to be very serious. I will be very brief because of the desire to put everyone in a state of complete relaxation if not articulate awareness of what is going on.

The first thing you ought to know is a question of geography. According to my last understanding of the map, the states of Arkansas, Missouri, Iowa, Nebraska, South Dakota, North Dakota, and Minnesota are in the Eighth Circuit, not in the Fifth Circuit, and any information I might pass out could be very unreliable.

I am sure that while Judge Johnsen was so kind as to defer to me as the visiting fireman and not speak now, he will feel compelled to make some kind of rejoinder simply to preserve law and order in the Eighth Circuit. I would say in his behalf that he need feel no embarrassment because I doubt that many of my fellow judges would follow the advice I was about to give you. But anyway I have these thoughts on my mind and I am going to make this speech in an hour's time—tonight not that long—in Louisiana under a title which I have also picked called a "Do-It-Yourself Kit for a Federal Appeal."

There are not very many places where you can trip up in the federal court, but there are two or three. It amazes me as a judge that it is done so soon, and that is in the trial of the case. Mr. Maupin said you start to make the record when you try the case.

I think the basic trouble with most lawyers is that they have either forgotten about the federal rules or they have only one copy. I think a priest carries with him the Bible, any worth-

while minister of the Gospel carries the Testament along, and I don't know why a lawyer doesn't carry the rules to court with him. They are very brief—eighty-one rules in all. That is the first thing I make my law clerks do, as I get a new one each year, is to get his own personal copy. One thing the West Publishing Company does is accommodate judges in return for the somewhat generous supply of material which we offer them to print.

You would be amazed how many lawyers who ought to know better forget to make a motion for an instructed verdict, and if you don't do it you are practically out in the cold. Then if you really want to get the thing reversed and rendered when you are right, where an instructed verdict ought to have been granted, you have to have a motion for judgment (J-NO-V) and you have to give ten days' notice. Justice Black and some of his fellow judges have worked out a theory that if you fail to give the ten-day notice, it is a violation of the Seventh Amendment. It is a little hard to follow but anyway he says it is, and as a consequence it doesn't matter how outrageous the decision was and how much it has to be reversed, all you can do is set it back for what we once described as a useless trial. Of course that discourages people, and it isn't often they go through the rigors again of a second one. But it is amazing how often lawyers will forget to take those two simple steps.

The rules are so^o simple. They are a marvelous instrument, written in such simplicity that it is just amazing that they can either be forgotten or the judges can make them seem so complicated at times when they write about them. I think the more we write about federal rules the worse we make it.

There is only one other place where you can get caught in this mess, and that is on the entry of the judgment. This is really some theological metaphysics, because if you will read the rules you will see that the entry of a judgment is an act done by the clerk, not a judicial act at all. That starts the time running. It results in some terrific injustices at times, particularly where the court has written a memorandum opinion and says, "Let judgment go for the plaintiff" or "Judgment for the plaintiff accordingly" or "Let judgement be entered for the plaintiff or the defendant" or "Relief is denied." Is that a judgment? Well, you can flip a coin and it all depends. There's no clear indication at all what is going to happen. The only thing I would say to a lawyer is that every time that judge messes around with that case after that order you don't like, you ought to file another notice of appeal. That makes a lot of work for the appel-

late court but I think it is a healthy, therapeutic prophylaxis, because it will make us realize that we have engrafted some very awkward, very artificial, and highly technical restraints upon those rules.

You can tell I have probably written a dissent on this a couple of times, and if you want to read my views one is *Prince Carter O'Neal v. United States* where, for want of a single little paper, the lawyer gave a notice of appeal, as he can in Alabama, to the judge in open court; the court reporter, who is a hired man for the federal government, who is duty-bound to write it up and file it, and if he doesn't the chief judge of the circuit and the district judge of the district get criticized, and he wrote it up, but the man didn't give a written notice of appeal. We held that that was a failure to give a notice of appeal, and I said I thought that was Benton's skeleton really rattling. I could hear all of the skeletons and bones rattle with a thing like that, just for want of one single little piece of paper.

Well, oddly enough it turned out Judge Reeves—incidentally, the person who is assigned to write the opinion in Louisiana is called the "organ of the court"; there is some doubt in what sense that term is used—but Judge Reeves was the organ of the court in *Prince Carter O'Neal* and I was in dissent, and when Judge Reeves then took it under that part of the appeal which was still good under 60-B which gave him a chance to review it without any regard to time, he discovered that right in that record which he said was inadequate they had given an appeal bond which stated everything that the notice of appeal should have stated and we had to hold that the appeal was timely.

Then another place where you get into some trouble on this business of the kind of judgment and what you can do, is the case of multiple parties and multiple claims under Rule 54, and if you can figure out why judges have made that so complicated, then you are better than I am.

My court is committed to what I consider to be a very unsound rule, and I have written in dissent on that, and I think that the Supreme Court's advisory committee on the new rules is going to correct it. In effect, it is that if there are multiple parties but not multiple claims, just multiple parties growing out of one transaction with two, or three, or four impleaders and actions over and compulsory cross claims and the like, that that is not such a case as can be certified under Rule 54 as a final judgment. So it means that when the only person who is solvent or the only insurance company who can respond is let out by a judgment, the judge has to sit around and try a useless case so

that the final judgment can be appealed, at which time it then will be determined whether he was in error when he let that party out to begin with.

Now that doesn't make much sense, as I said. It is just about that bad. I think you will see that the rules are going to be changed so that if it is a case of multiple claims or multiple parties, both, then the rules will be given literal application and the judge can certify that there is no real need for any further delay.

You see what happens: it imposes a terrific burden on lawyers, I think. And judges have made it this way. If you are in doubt, if there has been a suit by a plaintiff against two defendants, and one defendant impleads a third party under a third party complaint, and he lets the third party defendant out or he lets one of the defendants out, it is a single transaction, the only thing the plaintiff can do safely is to take an appeal, because if he doesn't he is bound to be told later on probably by the court of appeals that he should have appealed, that that was really a final judgment.

So he appeals and then it comes on either administratively or you set it down for an argument or a motion to dismiss and you say, "This appeal is premature," and send it on back. Then he goes back, as he knew he had to do anyway, and they wait and they come back again and then they make this argument that he should have appealed the first time.

Well, he is protected pretty well in that situation, but it does get very technical. What it does is put conscientious counsel who is aware of this drift in case law in a position where he has got to put unnecessary burdens upon the appellate court and the staff of the district clerk and the court of appeals. What is worse, all the time that this useless appeal is going forward the district court, either out of a feeling of respect for the court of appeals or compulsion to his notion of the law or just general lassitude with certain knowledge he has plenty to do otherwise, just lets that case rock along. So the wheels are really grinding, but they are grinding needlessly and to no real good, and where they ought to be turning they are stopped.

That is something you want to look at very carefully. That is one place I believe people can get more involved and their rights prejudiced.

Now 1291-B, the Interlocutory Appeals Act, if judges will give it what I consider it ought to have, a liberal sort of a real practical, realistic application, will pull most of these chestnuts out, because that was a response of the Congress to the judicial conference, to have an interlocutory appeal where the nature of

the case is such that this one or two points of law or fact will really dispose of this case.

I don't know what attitude the Eighth Circuit has taken; we have taken a very liberal one. We allow them very liberally. After we have heard their arguments, we have held that it was improvidently granted in a couple of cases, but by and large we have found it to be a very helpful thing. We look at it as a practical matter. We know lawyers are going to settle cases if the issue is disposed of on which they are seriously in dispute, or if a person who is really the only solvent one or the only likely solvent one is let out, that will be the end of it.

Now if that doesn't materially advance the disposition of the case, as Congress says, I don't know what does, and you will see it does not have to be a dispositive question—whatever that is! I have never really known, but it is a good tool.

My brother Brown, brother Bill or brother Jim, in his effort to give me too much of the time, was a little bit careless when he said it was thirty days. There is a ten-day appeal on that interlocutory appeal, and if you are in the Fifth Circuit, depending on what panel you get, you had better be careful how you present it, because Judge Reeves and I held in an opinion I wrote, but Judge Jones dissented, that if you came to the judge in his chambers and presented it, it was presented to the court.

My brother Warren Jones, also a Nebraskan, incidentally, who then went to Florida in search of a living, held that you had to file it with the clerk, and since it wasn't filed with the clerk that day it was too late.

Well, that is a wonderful thing about a majority vote! But it is a good tool.

That is all I want to talk about on technicalities. I want to get on to what I think is more important. I don't know whether I would ever win any cases before Judge Johnsen in his court. I am not too sure I would ever win them before my own. I know my record was not too good when I was practicing.

But I think people forget what the purpose of an appeal is. I am not talking primarily from the standpoint of an appellant.

What are you trying to do? You are trying to capture somebody's mind, and I think everything you do in writing or orally ought to be in that direction. The one thing you are not going to do is to capture a mind if you put it to sleep, and you can go to sleep quicker looking at printed material than you can listening to somebody talk, despite the evident show of great alertness in this crowd late this afternoon.

One of the mysteries to me as lawyers write for judges is why it is sort of like a strip tease; you think it is going to be a little more exciting if you can put it off just a little bit longer; and if you can tell the judge what the case is about on page nine it is so much better than on page one. Well, I don't believe that's so. I think page one of a brief is the place to tell them what it is about. Now you have a "rassle" with your printer, I know, because he wants to put—and have you ever noticed how so many people want to say, "This is an appeal from the District Court in and for"—you've got to always put in that "in and for"—"in and for the Western District of Nebraska, sitting at McCook, Nebraska, wherein the defendant was . . ."—all that is in the caption. You haven't taught that judge anything, but you have imposed on him because he doesn't know whether there might be a nugget some place lost in that sentence.

I never have understood why you didn't throw it right up to him right now on page one: "This case challenges the proposition or raises the question whether the administrative agent could receive a doctor's report in evidence without the attendance of the doctor for cross-examination." You generally have one or two cases or it is a jury case involving a serious question of liability, a federal torts claims act involving assignment of a claim, whatever it is, you can put it in a paragraph.

And what you do in a written brief I think you ought to do in an oral argument.

I happen to come from a court that reads the briefs before the argument. That is said as though this is some kind of a special claim. Every judge, every court has his own desires on that. Some judges, just as Carter said, think it is better to hear the argument first. I think it is important that counsel know what the habit of the court is and then pattern himself accordingly both for the brief writing and the argument. But if it is a court that customarily reads the briefs in advance of argument, you know that that is going to be your chance to smear that case. Now that's an awfully injudicious use of colloquial, careless, sloppy language, but you get the point, don't you? You are trying to create an impression. And you had better create an impression! Sometimes it is going to come difficult. The judge will finally see "maybe he was just trying to keep me unclear on this so I would dig so hard that when I found it I would consider that I had found gold myself and it would be more valuable." But most of the time you are trying to create an impression.

There are a lot of habits in briefs that I think go a long way to discourage what I call a favorable reception to this effort to

capture this man's mind. The worst enemy you've got is the printer. You fight with him about page one. Then you get to page two and you have these propositions, points and counterpoints. In Texas we write terrible briefs. We've got a bunch of old rules about points and counterpoints and counter-counterpoints, and they put that in index, Point One stated, restated, and nowhere is there an index to tell you what it is.

Then somebody decided that if it was really worth reading it ought to be italicized or put in boldface type. In Texas in our briefs here will be Point One, fifteen or twenty lines long, and then Point Two, Point Three, Point Four, Point Five; it goes on to sixteen or seventeen at times and then you come back with no space between the last sixteen and here is Point One restated. So they restate it again. All this time this judge is sitting at home trying to look at "Wagon Train," and he is going to get lost because the case went thataway, see!

To me, reading more than three or four lines of italicized print or boldface print is like trying to read Abraham Lincoln's second inaugural address as it is cut in stone in the memorial. I had occasion last summer to try it, experiment, as I went there again. You can't read it. It simply defies easy reading. Now why do you want to put that kind of labor on a judge?

The next thing is: Give him some space. If you go buy a book you don't find the author finishing Chapter One where the mortgage is about ready to be foreclosed, and then you start Chapter Two where this fellow rides in on a white horse with money that he has obtained by ill-gotten activities to pay off the mortgage—you don't read that on the bottom of the same page. I don't know why printers or courts feel—I suppose these rules that limit the number of pages are going to produce some of these things, because if you've only got eighty-five you are going to jam it up as much as you can—but I don't know why you don't use some space, if for no other reason than to give the judge a comfortable place to take a sigh and say "My God!"

Now I am also a great believer, because I think these people who write professionally for pay and get certainly a more avid reader group than we do—we *have* to read it; I wouldn't go out and buy those briefs, I don't believe—these people who write know that just like a little child you can hold his attention span just so long and then you've got to have something to divert his attention. I think one of the great things is a topic head that just kind of tells you in advance in a nice short pithy little way what is going to come next. The nice thing about

them is that they don't have to be a sentence. They could be three words; a rhetorical question, a very short one; a little bit of a wisecrack now and then, but you can break the thing up, and it is amazing how effective it is. You see it a lot in government briefs, and I think they do, generally speaking, a very creditable job.

Suppose the appeal revolves around four or five cases, Nebraska Supreme Court cases, or a doctrine known as the wash-house doctrine or the coal tar doctrine or something like that. You'll hear about the coal tar tonight. Well, put it right there: "The Coal Tar Doctrine," and then you get them thinking; or "The Riddle of 117-J"; or "What Does 341-E Mean?" That is collapsible corporation. We may talk about that tonight, too.

These things are all aimed to keep this man whose mind you are about to take over alert and interested if you can—and if you can't you're wasting your time.

Now a reverse of this is that I have come to realize that judges aren't so dumb after all. It took me a long time, but I don't really believe that most of the time you have to tell the judge, sort of like a modern television commercial, you don't have to tell the judge what's coming, what has happened, and then you do it and then tell him what has just occurred, and you tell him what the case is going to hold. It is a celebrated case, it demolishes your opponent, it does everything to the district judge, and then you quote from it, and then you repeat exactly what has taken place. I don't believe you have to go quite that far.

One other little technical thing on briefs. I don't know why you labor so long in trying to explain an involved factual situation when a picture or a drawing would do the trick better. The Chinese proverb is, "A picture is worth ten thousand words." There are a lot of lawyers and some judges who are awfully squeamish on this because it isn't in the record. Well, that is a lot of trash. Because the court rules do not prevent you at all, in all ethical propriety, from drawing an accurate restatement of that physical setup in your own words.

If you can do it in your words, you can hire a commercial artist, and I would generally recommend against the use of a reproduction of a court exhibit. I was an admiralty lawyer and I never saw a shipmaster who was any good as a witness and who really knew how to operate his ship who could draw the diagrams for a collision. It looked like a couple of cocoons just getting close to each other. But you can take the evidence and in a perfectly honest sort of way, reconstruct some drawings by

a commercial artist that lay the whole thing out. It is amazing at times how this goes on for page after page and finally you turn the brief over and you draw a diagram of your own. "How to Win Friends and Influence People"—if that is the way you do it, then you are on the right track, but you might put the judge to sleep.

I think it is a good thing to make it easy. Any modern writing would have it. In a magazine or a newspaper there it would be.

Some of the best briefs I have ever seen are in patent cases—if they remember that the record is somewhere else. I am a peripatetic judge, just like Judge Johnsen is; we travel all around and you can't carry those records with you, but you can bring a trunkload of briefs with you, as I did yesterday. They forget that they go on. I can talk about patent lawyers for a long, long time, because they've got a weird jargon all of their own, and it is designed to conceal any possible revelation of the truth. But all it takes is just a clear picture or a drawing of this instrument.

There was a case argued before us about offshore raids. It was a serious case. They always bring in this stuff and set it around the courtroom, just like a striptease, and you wonder when they are going to bring it out of the box. They've got a handle sticking out so you are just at a peak, to the point where you can't stand it.

This was a very involved kind of thing about taking positions by radar in geophysical shots in the Gulf of Mexico for geophysical exploration. This was really not a patent case but it grew out of it. It was an unfair practices case, where people were stealing other people's secrets, and they really did. But it was important for use to decide whether they did steal anything and whether it was of any importance.

They kept talking about it, but the obvious implication was, "This is too involved for you to understand." So I finally said to this one lawyer, "Is there any real danger in our understanding how this thing works?"

That was no piece of brilliance because the truth of the matter is that we sometimes, and quite frequently, have a better understanding of mechanical principles, as infirm as they are, than we do of legal principles.

Just one final thing: If you are arguing before a multi-judge court where the panel changes from time to time or day to day or week to week, as I am, and I presume the Eighth Cir-

cuit is that way (now that the New Frontier has supplied us with much needed help, we have nine judges), how you are going to pattern your case depends on who is on the bench. This is supposed to be a lofty, cold-blooded, objective, intellectual science but it isn't so. We are human beings, and I say, "Thank God, we are." This would be a terrible legal system if we were some kind of super-automatons.

You ought to know—because it is the throw of the dice frequently on how certain things are going to come out, and if you will just watch opinions, you'll see it, mannerisms in court, and points of interest—you ought to know who the judges are. It is a remarkable thing with only seven judges on the Court of Appeals for the Fifth Circuit, with no names more complicated than Brown, Jones, Cameron, Tuttle, just two syllables, and we've got Hutchinson, a little bit involved but he has been around a long time so everybody knows him, but these lawyers don't know who we are. The only time I am offended with my simple name is when I am called "Smith." But you can see them when they come in the courtroom; they are trying to figure out who we are. Of course they could ask the clerk five minutes before and he would have been glad to tell them who he was working for that day.

It is a very important thing, I think, to try to figure out the personalities, because every judge has his own approach to every one of these problems. And as Job said, "Oh, that my adversary had written a book!" because it isn't long before West Publishing Company has revealed it to the world.

I think a smart lawyer is one who really knows as soon as he can find out who the judges are who are going to make up the panel, and if he is a regular practitioner in that court it would be well to have some understanding of what some people would call their prejudices and others might call predilections or someone else might call just a sort of a tendency. Whatever it is you ought to know about it.

You can see that the only message I have here is, as I said in the title to one of my speeches, "You don't want justice; you just want to win." It's a shocking thing, but you just think it through. That is the way this system works. If you want to win you want to get the mind of that judge, and if you've got three of them that's just three times as much work as you had with one, and with seven I wouldn't know what you would do.

CHAIRMAN MASON: I believe that will adjourn our session for this afternoon.

[The Thursday afternoon session adjourned at 4:45 o'clock.]

ASSOCIATION DINNER FOR MEMBERS
AND THEIR LADIES

PresidingHale McCown, Esq.
President, Nebraska State Bar Association

Introduction of Guests

AddressHon. John R. Brown
United States Circuit Judge for the
Fifth Circuit, Houston, Texas

PRESIDENT McCOWN: I am not a toastmaster. I am merely to make the introduction of the speaker of the evening.

Our speaker is a native Nebraskan. As more of you may not know, although many of you do, he is a native of Holdrege, a graduate of the University of Nebraska. At first he tried to tell me it was in the class of 1918 but later admitted it was somewhat later and probably a little more accurately placed at about 1930. He later attended the University of Michigan Law School and for a while, I believe from what he told me, he actively practiced law in Holdrege for a period of time which he says is somewhat indistinct but nonetheless definite.

He then departed for the State of Texas where he felt that the climate was preferable. I gather that the correct adjective to apply in front of the word "climate" was "financial," but nonetheless he went to Texas and practiced there and has been, since 1953, a judge of the United States Circuit Court of Appeals for the Fifth Circuit at Houston, Texas.

He has told me that for the last few months he is not certain whether he has spent more of his time at judicial labor or at labors of speaking, since he does speak on many occasions. Judge Carter, who is an old acquaintance, I gather, and Judge Johnsen also have had the needle out for our speaker during the evening, and I have heard several comments passing back and forth. If you happen to see some signals going on between the speaker and these gentlemen to his right you will know this is merely a friendly gesture to express their approval of his remarks.

We are delighted to have him with us tonight. Many of you in Nebraska have heard him perhaps before. He spoke at the honors convocation at the University of Nebraska. Some of you who are members of the American College of Trial Lawyers heard him in New Orleans this spring. I am delighted, and the State Bar Association is delighted, to present him to you tonight.

It is therefore my privilege to present to you the Honorable John R. Brown, our speaker of the evening. Judge Brown.

[The audience arose and applauded.]

ADDRESS

Honorable John R. Brown

One of my friends has said that I never use one word where two would do, and I have never wanted for volume. I am the bull of Bashan, and if any of you have difficulty hearing, let me know. I never thought I would come to this!

Now I want to lay down some ground rules. This is a big crowd and you have been listening all day long. My friend Clarence Davis has the best seat in the house because he is close to the door, but I've warned him that I am going to keep one eye open and not let him go. The rest of you are free to leave whenever you wish. There is no point, however, in trying to crawl out. It is impossible to do, and if you have to go will you please go standing up.

I have brought out this watch but, like President Satterfield, I had two watches at Minnesota where I made a speech and I set one for half an hour and the other one for an hour, and neither one of them was successful in stopping me. This one I am not going to pay any attention to but it makes you feel more comfortable if I have it here to kind of plague my conscience.

I should start out formally now and say "President McCown, President-Elect Svoboda, and President-President-Elect Healey, and all others who have any aspiration for this job in the years to come": The President did not tell you what the subject of my speech was going to be. As a matter of fact, I got a telegram from this energetic Secretary of yours, who doubles in brass as the brains of the Supreme Court of Nebraska, some two or three weeks ago when I was out on circuit, and by the time it caught up with me I didn't get to answer it. He asked me for the title of this speech so he could put it in the program. One of the difficulties I had was that I really didn't know what it was going to be about so I could hardly make up a title. That doesn't really bother me ordinarily because what the President didn't tell you was that the people who heard me in New Orleans at the American Academy of Trial Lawyers and those who heard me in Montreal, Canada, at the International Association of Insurance Counsel under various titles are going to hear the same speech again tonight. It doesn't matter.

I told you this afternoon I made a speech on "I don't want justice; I just want to win." But I did select for tonight a very ominous title which I wrote out and put in a letter and then forgot all about, called "Electronic Brains and the Legal Mind; Any Work for the Legal Machine?" Now it may be some time before we get back to that subject.

Those of you who by profession have to follow my labors and read my writings, and I am regarded as one of West Publishing Company's better judges because I never write a short opinion if I can help it, and those of you who suffer through these speeches as I go around—Judge Hutchinson, the revered man on our court who is now eighty-two years of age, said that I succeeded to all his bad habits, but I did relieve him of the responsibility of going around the country. He said I had the hoof and mouth disease—I wanted to talk all the time and travel while I did it.

Those of you who put up with me will know that I always make a point. I have a point to make. Now there are only three things about it that are a little disturbing. I have a lot of trouble in getting to it. It takes some time, but when we get there it's not real sure that it will be recognized, and if it is, it is not at all sure that it will be worth anything.

But I have important messages to bring—five minutes have already gone by. I guaranteed somebody today that they wouldn't learn anything tonight and, Judge Johnsen, if I don't keep that promise I hope you will never let me come back in the confines of the Eighth Circuit again. So if I accidentally register some factual statement of any importance or any legal doctrine I wish you would clap at that moment, or I will warn this little lady when I have something worthwhile to report.

One of my difficulties is that I never really know what to talk about or, if I decide, whether I am going to stay to it or quit it.

Chief Judge Simmons had some remarks to make during the dinner about somebody who begged for five minutes more, and then when he got it he proceeded to read an opinion of the Supreme Court of Nebraska. The Chief Judge asked him if that was what he wanted the five minutes for, and when he said, "Yes," he said, "Well, you can sit down. We can *read* our own opinions."

There was a sort of an implication in the Judge's mind that there might be some doubt about whether they could understand it but . . .

I can say this: I am like the man who came down from Washington somewhat as a hero and told you how to run your school system. I am not going to do that tonight.

Incidentally, this is the day of youth, you know. I hope no one will think this is amiss since I am not part of the New Frontier—I am part of the Old Frontier—there was overheard a large and loud clamor in a Washington cocktail lounge last week. A young man was thumping on the table and he said, "If I am old enough to be Attorney General, I am old enough to get a beer."

I was talking about this long-winded lawyer, not a long-winded judge, and I don't know what it is but a lawyer always says, "Just one more thing." Well, there never has been such a thing as "one more thing" or "just one more minute." It is always two, or three, or four. This lawyer kept going on and going on, and he finally said, "Your Honors, if I can just trespass upon your time for one more moment," and the Chief Justice said, "Young man, it is no longer a question of trespassing upon our time. Are you going to encroach upon eternity?"

I don't really see the relevance of what I have said so far but I have this sort of feeling, and this is semiserious and you can note it with whatever you do on that machine over there when you push all those pedals down at one time. That means "the court" ordinarily, I understand from these stenotype operators, as though the whole ceiling is about to fall in "bloom" like that when the judge speaks.

I like to make these speeches because it is a way for me to revive my self-confidence. I had a notion, and I am sure most of you lawyers do who have been aspiring to be judges and get one of these fat-cat sinecures, that once you got to be a judge you would be respected for a person of real substance. I used to think that, but I found that when I go to an airline to get a reservation I've got to stand right behind some other ordinary mortal; I take my position in line for anything else; if there is no seat on the airplane, I step aside. No one seems to know that I am a judge, and if they do, they care less.

But I had expected at least a certain amount of respect out of lawyers. Now before I tell you this story—it is always better if I kind of keep you on edge so we will come back to that. But I had this sort of feeling. I wrote the President the other day and I said, "I hope nobody expects too much seriousness out of this. I have a great compassion for laymen." Isn't that an awful word? And laywomen is even worse. These poor things don't understand what we have been talking about all day long

and they care less, but they had to come out here and eat this ham and chicken with gravy and they ought to at least be spared more of the same.

I think as a matter of fact that lawyers also have a double dish of this and don't need any more of it. They are sort of like the elevator operator in one of these gilded cages in a London hotel. You can imagine them, those of you who have been there can recall them and those who haven't been have seen pictures, and of course he had a seedy-looking uniform on with epaulets all over the place, as though he was in a circus that had just about gone broke. A book salesman got on and said, "Mister, I am selling a set of encyclopedia and they cost you 39 pounds, 10 and 6. I think you need it. I want you to buy it."

He said, "I am not interested in those at all."

He said, "Why aren't you?"

The elevator operator said, "I already know more than I get paid for."

Now that is the position of lawyers. We have all heard, and it is very important and it is serious and I wouldn't minimize it, but the rule of law—one of my brother judges said, "If I hear another rule of law speech, I am just going to have to quit the profession," because we do pour it on. There is no doubt that the keys of the kingdom are in the hands of the lawyers, if you ask the lawyers; and if there is any doubt about whether they are, they are at least in the hands of the judges. The trouble is some of the people don't always support us.

Anyway, we are back to my story now. I had felt that lawyers, of all people, would support me and show a proper respect. I had an experience crossing Lafayette Square, which is a place near the courthouse in New Orleans where each spring there are beautiful camellias and azaleas, but it is known really as a habitat of winos. And I have a good close respect for them because I am one myself. Whereas everybody else and the public generally had treated me rather coolly and without any regard for my high office, I was walking across this park in the shadow of the statue of Henry Clay and William Penn—I don't know how they got in the same block—when a fellow ambled up to me that I knew had spent that night before under the bench. He was bleary-eyed but he had a need, I could tell, and I knew I was going to be touched, but I found it irresistible because he didn't just come up and say, "*Brother*, can you let me have a dime?" He said, "*Judge*, can you let me have a dime?" I knew I had finally been recognized for what I am.

That helped me, but the lawyers bothered me because they, too, were a little bit reluctant, and I thought, "At least in the courtroom they will pay me proper respect."

We had a case in the Fifth Circuit in New Orleans involving Red 32. Now this comes as close to real information as I will get to tonight, I think. Red 32 is a coal tar dye that makes green oranges orange. Now the trouble was that when the Old Frontier came in, in 1953, they decided under the federal statute which forbids the use of any deleterious, poisonous substance that coal tar dye, which up to that time had been permitted to be used to dye green oranges to make them orange, that they should examine into this.

Well, they did. Our Mormon friend and all his assembled Old Frontiersmen went to work and they conducted a great number of tests. They found that if *a rat ate 3,412 peelings of oranges in a day* the rat would die. And they concluded that that must be dangerous. So they changed the rule, or tried to.

Then somebody felt that he ought to have that reviewed in this court of law. So here was the Secretary of Agriculture and his lawyer on one side, and this group of orange growers. Judge Jones sat on my right. He is a Nebraskan, incidentally, who wandered by way of Denver to Florida where he bounced around with and through the depression and ended up with a fine firm in Jacksonville, now on the court of appeals. He was there representing green orange growers, in effect, from Florida. On the left was little me. I was representing the misguided, mis-treated green orange growers from Texas. And in the middle sat Judge Hutchinson just upholding the law.

Now, the big trouble was that—I haven't even started going through these papers; I don't know what is going to happen—the trouble was that if you don't put Red 32 on green oranges, they are green and they won't compete with orange oranges from California. So it was very important that we have this dye. Here were green orange growers who wanted their oranges to look orange to compete with orange oranges from California and the same from Texas, but in the middle of this case was a man from North Florida in a county located where the chlorophyll cycle, which is as close as you can get to the sex life of a biological plant, where of all things the chlorophyll cycle was such that they were *orange* oranges. Now he didn't want to disturb this Secretary's order. He thought it was fine, because he had an advantage over everybody, and he had had a brief filed *amicus curiae*.

Now, ladies, I've got to let you in on a secret. When we don't know what we are talking about we use a French-Norman phrase or a little Latin. That means "a supposed friend of the court" when they are really not friends of the court at all.

We had a Congressman Johnson who was representing one of these orange growers who had green oranges, and I said, "Congressman, it seems to me that the best brief here is the one filed by the *amicus curiae*. What do you say about the brief?"

"Well, Judge, let me tell you. That man's no more a friend of this court than I am."

I felt just about as popular then as I did when I got on a scale one day, a penny scale that told your fortune, and my wife, who has a great deal of doubt about my ability in anything and certainly in the law, reached out and grabbed the ticket and read it and said, "This thing says 'You are a leader with a magnetic personality and strong character. You are intelligent, witty, and attractive to the opposite sex.' It has your weight wrong, too."

It is no more deflating, though, than a sign in a department store which had on it in the perfume department, "There is no tax on this perfume. The type of man it attracts is not considered a luxury."

One of the problems lawyers have, and judges, too, is in making themselves understood. We try to write accurately and briefly and with some real completeness, too. It is a real problem. I don't know whether we do quite as well as the young girl did when she wrote to her boy friend, "I must explain that I was only joking when I wrote that I didn't mean what I said about reconsidering my decision not to change my mind. I really *mean* this."

But the law is not much better, because the other day I found this—I collect this material and I am always on the lookout for some learned opinion of some judge—from the Arizona Supreme Court, *Blackburn v. State*. "The trial court admitted evidence"—this is going to make sense to you ladies, now listen to this—"the trial court admitted evidence that a witness could find no hair on a blood spot." The defendant appealed, claiming that this evidence was wholly negative and that its admission was error. In disposing of this contention the court said—and they got paid for it, listen to this—"Positive testimony is entitled to more weight than negative testimony, but by the latter term is meant negative testimony in its true sense and not positive evidence of a negative, because testimony in support of a negative may be as positive as that in support of an affirmative."

Well, this sort of sent me, that and a desire for brevity, which I have never yet achieved in writing or in speaking—as you have just observed when we are not even to the prelude of this thing.

A journalism student was told by a visiting lecturer that the aim ought to be to make things brief, and in this West Coast newspaper they had put signs all over the editorial room: “Be brief, be concise.”

A young reporter, thoroughly indoctrinated, returned from an assignment and wrote this story: “Sam Jones, custodian at the Downtown Hotel, went into the elevator shaft between the fifteenth and sixteenth floors to see if the elevator was working. It was. He was fifty-six.”

Now occasionally, and this is straying from the point a little bit, such point as I had, but this is also a piece of helpful information because I know many of you ladies have called your husbands one of these three names if not all three, and you would like to know what it is you meant. This came from one of my friends called the Mole, Charles the Mole, who was one of New Orleans better—I am serious—revered winos. He finally passed away last year, and in the New Orleans paper was this long article about him and his life. One of the things that I thought ought to be preserved, certainly, for lawyers because this will win its way into a headnote some time I am sure, “Charles the Mole was asked to explain the difference between a tramp, a hobo, and a bum.” Now haven’t you called your husband those things, or thought about it?

“Well,” he said, “a tramp is a migratory worker. A hobo is a migratory non-worker. And a bum is a non-migratory non-worker.”

My desire to get clarity and some brevity and some real certainty into this speech led me to the newspaper. In New Orleans, then the *State’s Item*, now gobbled up in one other one, they have a person who writes a column that has become my constant companion and oracle. I go to her because she enlightens me, as you will soon see. You have no doubt at all about what she has to say. I was attracted to this lady of letters by this little letter that was written to her. I am talking now about Abigail Van Buren, known generally as “Miss Abby.” If your newspapers don’t carry her, demand that they do or refuse to subscribe any longer, because I thought, “Wouldn’t it be wonderful if lawyers could say things so pointedly, and better yet if *judges* could?”

I glanced at this paper and I saw this: "Dear Abby: What does it mean when a boy bites the tip of your ear? My boy friend is thirteen and I am fourteen. Signed, Ears."

"Dear Ears: It means he is either teething or would like to know you better."

Well, I got rather attached to my friend and I have been following her advice. I have some here that I thought we might share tonight. This is in print; it has passed that much of censorship anyway.

"Dear Abby: I know a lady motorman who has so much electricity in her that when she takes her clothes off the sparks start to fly all over. I would like to know if there is any danger of her catching fire. Signed, Close Friend."

"Dear Close Friend: No danger unless she has a conductor."

On another day when I was in a quandary and needed advice I saw this: "Dear Abby: What do you think of a married man who goes to mow an old maid's lawn at ten in the morning and comes home at twenty minutes to one the next morning? Do I have the right to suspect the worst? Signed, Jealous."

"Dear Jealous: Don't assume your husband thought the grass was greener on the other side of the fence; maybe there was just more of it."

This is one you can understand: "Dear Abby: What is your opinion of a forty-four-year-old man who always holds his wife's seventeen-year-old niece on his lap? I am sending you his picture. Please send it back. Signed, Wolf Wife."

"Dear Wolf: I am returning your husband's picture. Now if you send me one of the seventeen-year-old niece I could probably give you a better answer."

And here is one that touches deep to my heart. "Dear Abby: I am discontented. I have been married five months. My husband brings home a gallon of wine every night. We have some with supper and then he has some more. Then he stretches himself out on the living room couch and goes to sleep. He sleeps all the night through. I am fifty and he is forty-seven. Signed, Discontented."

"Dear Discontented: You need a bigger couch, a smaller jug, or another husband."

Then I saw this one, and this will sort of wipe up this division of our brief, point one or point counter one.

"Dear Abby: I have been married to a good-looking truck driver for ten years. I am not the suspicious type, but

listen to this: The other night he came off the road with two long scratches on his left hip. They were fairly deep scratches yet neither his shorts nor his trousers were ripped. When I asked him how it happened he said it was probably from a feather in the bed. Now, Abby, I love my husband and I am not looking for any trouble, but do they still have feather beds in modern motels, and could anyone get scratched like this from a feather? Signed, Not Stupid."

"Dear Not Stupid: It's unlikely that the scratches came from a feather; it was probably the whole chick. Keep your eyes open."

Well, don't you think we have really found a source of information? And we haven't taken more than twenty-five minutes. I just wish the law were that simple.

But I come back to this business. I told you I was going to talk about "Electronic Brains and the Legal Mind; Any Work for the Legal Machine?" I don't want to be serious for very long and I'm not going to be, but I came a long way and I'm getting a big suite up there that's lovely, and I ought to leave some word of wisdom, with a lot of information scattered in here and there a little bit later on, so we'll just talk about that for a little bit.

I got interested in this about a year or so ago when I saw a little announcement in the A.B.A. Newsletter about mull, m-u-l-l. I don't know whether any of the rest of you saw it but it intrigued me, and I sent the \$4.00 in, and I have been getting this literature which I can scarcely understand but I have tried to find out from others what it is all about.

I got intrigued in this business of the use of data computers in the law and data computers in legal research. Now I know instinctively you think, "Well, the day is either at hand when a machine supplants the lawyer, or probably wiser and safer, supplants the judge, but I don't believe that millennium is about to arrive."

But we do have a problem, and that is what I want to talk to you about for just a minute. It is not confined to the legal profession at all, because the nation's interest was focused upon what has been called this "monster of literacy which is sort of engulfing us." You just think about that a minute—"this monster of literacy which is sort of engulfing us." All of this was brought to light by Sputnik, and we found a national investigation was made by a congressional committee that our problem was not whether we knew something, but we didn't know what we knew, and as a result of these hearings and the testimony of

scientists and informational specialists all over the country, people started making a study about how to index, catalogue, abstract, and digest scientific information.

One other scientist called it "the self-suffocation of scientific literature." It was so bad that the testimony showed that when they set out on a new project if it involved under \$100,000 they didn't make a literature research because by the time they went through it they would find that they couldn't find it, or if they did, by the time they found it they could get the job done anyway. It was a wasteful process.

This resulted in the enactment of a bill that calls for the National Science Foundation and the appointment of a standing commission composed of informational specialists and scientists whose mission is to set up a system in which our government, with its whole security at risk, can have some assurance that we are able to use, assimilate, evaluate and exploit, then effectively use the information which we have developed. Scientists do so many research projects, they write so many papers, they publish so many books that there was no way to be certain that the nation could utilize that knowledge because it could not be found.

The predicament is illustrated in biological science where, incidentally, the law is regarded as an enviable sort of a profession because of the key number of the West system of digesting which we have had with all of its imperfections. Most of the scientific branches have not had digests at all, and they are just recently starting it. But for the biological sciences they compute that in the year 2000, if it grows at its present rate, the issue for that year in the biological sciences alone will be 120,000 pages long and will occupy thirty feet of shelf space. Now that is a pretty heavy book to hold in your lap.

So they decided they ought to do something about it, and the law is also concerned, and well it might be. As St. Paul said, "As chief of the sinners," I will offer myself as Exhibit A. I write long opinions and I write many opinions, and I put all the information I have found interesting and useful in a perpetual footnote because it is more accurate than my secretary's filing system. I know where I can find it. But this grinds on at an alarming rate.

The American Digest system, for example, from the original to the sixth decennial covers 235 volumes, seven and one-half million digest entries, and over half a million pages.

Now it is true we are not going to go look at all those pages, and a lot of it has to do with somebody. "If I put my hand on my sword at assize time what have I done?" And the answer is

you've committed assault or battery, whichever the answer is. It isn't likely we will use that but we might.

But what is happening today in the law is equally astounding, as you dues-paying, card-carrying members of a long-suffering bar know who have to buy those books because the judges keep asking you questions, "Have you read this recent opinion?" and it is always one they just happen to have written themselves.

In 1958 in the National Reporter System—this doesn't include the state reports, the official reports—but in the National Reporter System there were 108,000 pages in the year 1958, over 57,000,000 words by state courts of appeal, intermediate and final. Now you think you have troubles in Nebraska with just one Supreme Court with seven judges on it. What if you had a supreme court, a court of criminal appeals, and eleven courts of civil appeals like we have in Texas? It just comes out—well, I have been practicing since 1932 and it was Volume 44, S.W.2nd then, and it is now Volume 346, S.W.2nd right now. It is staggering! Fifty-seven million words come out of state courts, and the federal boys are not bashful either. We added another 18,000,000 in the inferior courts—that's what the Constitution calls us. And the Supreme Court, not counting last year, adds 1,400,000. They broke all the records last year because some of those things on Sunday closing took practically four hundred pages. I think there was a little uncertainty *somewhere* in that case.

Now in the Library of Congress there are a million legal publications right today, and it is growing by leaps and bounds.

In California, for example, 5,000,000 words are ground out every year, and it is going to get worse because, as you probably know, our population will be 230,000,000 in 1980; that's just twenty years away; it will be 300,000,000 without a doubt in the year 2000; that is forty years away. And we will have new judges, new courts, and lots and lots of opinions and lots and lots of words, and where we fail, the legislatures will come along and fill in the niches, because Congress has already enacted some 27,000,000 words in federal statutes, and the states do an average of 2,500,000.

Now what are we going to do with this "monster of literacy," because that is what it is. It is intelligence of a sort. It is not really salable to many people but we've got to have it. It is the thing we live by and what makes our law grow, but what are we going to do with it?

Well, there are a number of people in the American Bar who decided that something ought to be done to try to utilize the data computer. I don't understand the data computer and I am not

about to tell you how it works. It is a marvelous instrument, but it is not beyond the possibility at all that it will be harnessed for legal research. I am sorry John Satterfield is not here so he could have added some of this folklore to his collection, but I wanted to tell him that he was responsible for having started this because he was chairman of the committee, I forget the exact name of it, which was concerned with the efficiency of law office operation. This Subcommittee on Electronic Data Retrieval was a subcommittee of his.

Now where does it get the name "Electronic Data Retrieval"? EDR is the abbreviation, and you aren't in this business long in the federal judiciary but what you abbreviate everything. I know all the numbers now. Section 2255, 117, J341-E, whatever number you want, and I can assign you some statute or rule to it.

Electronic Data Retrieval means merely that it is a process of putting and storing in the machine legal literature so that it can be retrieved, that is, found and located and brought out so it can be studied. In a very gross sort of sense the way the thing works is this: The machine has two little words, that is all, one and zero. It is a binary sort of thing. Everything has to be translated into these figures. It has the capacity by putting this information on magnetic reels, like the IBM machine we used to see on television where they would ask a \$64,000 question and we thought it was so honest; well, the policeman was there and he looked like he was running an honest show and I think he was, but the trouble was he didn't know what was going on upstairs. That was a crude sort of card selector. Cards are used to cut the information, they put it on tape, and then this machine through a mathematical, logical system of questions—it is a comparative thing normally; you compare something with A and B or C—and it finally finds an answer.

Of course it is no smarter than the man who directs it, and that is called programming. That is something I don't understand at all, except that they have now gotten this machine to the point where from English to meta-language, they call it meta-English, the machine itself will contrive its own program. It is a weird-looking device at times. If you've ever seen an IBM 7090, which is their largest machine, at the console with a lot of little flashing lights, here is a typewriter that is apparently operated by some ghost, and all of a sudden it starts to click out like the keys on an old player piano, and on a typewriter, on paper, in English comes a message that there is a defect at such and such a station in the memory core. That is the brain. It finds its own errors. They type something back to that machine, "What is the error?"

and it has got enough sense by a program to answer back and tell them where the error is.

How do they utilize this in the law? Well, I couldn't begin to tell you how they do it mechanically through these programs, but there are remarkable strides being made in two specific sorts of experiments. It's a long-range sort of thing, and the bar has got to get interested in this so that it is developed along sound lines.

You should all read the article by Roy Freed of Philadelphia, absolutely the most indefatigable, peripatetic preacher, lecturer, and writer on this subject, in the August A.B.A. *Journal*, and by Professor Dickerson in the September *Journal*. And if you want to read some of my stuff, there is going to be something in *Yale Law Journal*, unless that editor changes his mind, and I am afraid he might. Coming out with Cardozo, we had to reach out a long way to get Cardozo on a computer but we did it.

The A.B.A. committee has had two experimental demonstrations in St. Louis and Washington. This is the kind of thing that can be done. John Harty at the University of Pittsburgh Health Center with a staff of six lawyers set out to write a textbook on hospital and public health law. He found that when they went through the statutes of all of the states, then just forty-eight, and covered one subject, then they had to go back when they wanted to cover another subject and practically had to repeat the whole process, because there is no digest of statutes, as you know, and the indexing is one of two extremes: It is so brief it doesn't tell you anything, or it is so detailed that it is easier to read the statute.

So he worked with the IBM people and said, "There surely must be a way." That fellow and his crowd put on these tapes all of the public health statutes of fifty states. By a program which asks this machine questions, it can on a given signal on, say, the tax-exempt status of a publicly owned hospital or publicly operated, or the ad valorem tax exemption of a hospital, a charitable hospital under lease but privately owned, by given signals it can go through and get you the citations to all the statutes that mention ad valorem taxes, tax exemptions, charitable deductions, lease, or any other kind of variation of less than full ownership.

On another given signal it can type out seven words on either side of that, so you have some idea of the text. On another signal it can type out the full text of all of those statutes and give you annotations which have been fed into that machine. And it does it at the alarming speed of 500 lines a minute, by a print-

ing machine. They can ask this machine questions, and if it has been programmed it is capable of answering.

You can see that in a society that we live in today with fifty states and big business operating all over the United States, for a law office to answer their problems this is going to be a tremendous sort of saving. Now it is a saving in what? It is a saving in the lowest order of legal research there is, and I say that with no disrespect. It is just trying to find the thing you want to look at on which to apply lawyer-judge judgment. The rest of it is just low order.

Another illustration that is even more spectacular is in the Patent Office. We've got a patent lawyer here in the audience because the Navy has made him a patent lawyer. If the Navy on his orders says he is a patent lawyer, he is one. I know that. He will understand all of what I am talking about. But in the Patent Office we have chaos, real chaos. There are over 3,000,000 patents now. Over 100,000 are applied for every year. The Patent Office is now four years behind times. And do you know that there is no digest of patents by claim? You have got to go to the Patent Office in Washington and make a search.

Now patent lawyers tell me that the best patent searchers are not lawyers. Lawyers are thinking too much, and they are confused and they start to make selections too soon, but for a low order search you get a trained, he might be an engineer or a fellow who has been raised in patent work, and he just looks at these and gets them out of what they call "shoes," which anybody else would call a box, and looks at this patent claim by claim.

Well, Commissioner Ladd has said that the Patent Office system of examination by examiners is right at a crisis. The system is either going to stand or it is going to have to be given up because it is impossible now. They can't make the physical search of 3,000,000 patents, many of which have fifteen and twenty claims, and all written in this obscure text that the patent lawyers use.

So the Patent Office with a limited budget has been undertaking a very intensive search and experimentation in the use of data computers, and they have managed to put on tape on a certain type of machine all of the 1,400 in the chemical steroids, whatever that is. I don't know. It has to do with some kind of medicinal compounds, colloids, etc. They can now make a machine search of those patents in a matter of a minute or two. These machines make 235,000 additions in a second and 39,000 subtractions. So you can see how fast they work.

This is so good in the Patent Office, even though they have so many real limitations, that the Pharmaceutical Manufacturing Association spent its money to have the Patent Office put on a similar tape all the patent literature of that same field, because as you all know—and this is an obvious dodge because when the minister tells you, “As you know, when Moses went into the wilderness,” you don’t know and that is why he is telling you; and you don’t know this either—but in the patent law the patent itself, as well as the literature, is important in determining whether there is any invention. These hardheaded businessmen have thought this sufficiently productive that they have put their money on it, and they can now make a complete search of the patents and the literature in this limited field.

This is a remarkable thing for lawyers, because a patent is a contract. It represents the highest but the weirdest form of draftsmanship. I have had occasion to remark that patent claims—I call it patentese—can be matched only by the internal revenue law. I have referred occasionally to a 346-word claim in a patent without any commas, without any punctuation of any kind, beginning with a capital letter and ending with a period, and if a man read it out loud he would die from asphyxiation.

It can be excelled only by such gems of draftsmanship as Section 341-E of the Internal Revenue Code, which is on collapsible corporations. It, I found, was written in the north woods, seriously, by a group from the American Bar Association Committee on Taxation and representatives of the Treasury Department. They took a case of whisky and a male secretary up to the north woods and came out with this sentence that is 573 words long with two commas in it. You try to read it some day—26 USC 341-E. It is a little difficult to understand, too.

It is an amazing thing how you can adapt this machine to this kind of a legal contract. How is it going to be used in legal research? I have to hurry through with this. All we can do is sort of dream and plan, but we ought to do it. West Publishing Company, incidentally if you haven’t made a tour through their plant you ought to do it; they welcome lawyers, as well they might, but they give you a real good show, but right now all of their type is set with a perforated tape, and it would be a simple matter to transfer that—on opinions there are some difficulties but it is not impossible—onto magnetic tape. The question then is, “How do you go about getting it back?” This presents some of the basic problems they are experimenting with now. Should we try to adapt the West type of digest indexing under various large headings, or should we find a way for the text itself to be

self-finding and self-revealing? Most of them are leaning in that direction, but there are difficulties.

You know, the trouble today when you use the Digest, if you have a problem about baby carriages you have to look under conveyances, transportation, vehicles, wheels, torts, approximate cause, evidence, contracts, and then my partner said, "and then appeal in error, too." And all the time there is this low order search. The machine, once this is set up, they have a random access thing now that looks like one of those old nickelodeons in a confectionery store or a drugstore. It can find 50,000 items a second and it searches simultaneously. Now there isn't any reason why material isn't finally stored in this magnetic electronic system so that on the proper question being fed into the machine you will be able to get all of the answers almost simultaneously. Instead of looking individually in each one of those subdivisions you look at it at one time, and it just puts it out.

Of course there are going to be lots of problems because it would be terrible if we put all of this material on this machine and you fed it the question and it fed it out to you at 500 lines a minute because you really would have just reams and reams of this wide paper coming out on an endless belt, and you would have some problems. You would really be immersed in a real glut if that came about, so we have to find some way. The people are working hard.

There is this Electronic Data Committee of the American Bar Association chairmanned by Reed Lawler, a patent lawyer in Los Angeles, who incidentally has been able on the machine to program a system of finding what is required to ride around; that is, to avoid literal infringement of some hypothetical patents. He tells me he is now working on a program which he says will predict the opinions, decisions, and the decisions of the individual justices of the United States Supreme Court in civil rights matters. He says, "I can even predict how Justice Frankfurter is going to decide."

This thing is 'way out, but it is not such a long way out that it won't be accomplished. All I can hope is that you are going to have enough patience and interest that you won't spoof it too much. Some of the stuff behind it is very weird. These symbolic logicians, Layman Allen at Yale University, and Reed Lawler, apply Boolean algebra. That is the basis of a computer. The whole thing is based on mathematical logic. It is based on a sort of a comparison. You compare things, you throw them out, you compare something one to the other. Of course that can produce some errors, but as you probably know, the machine is

used today for translation of Russian and any other foreign tongue. It is a little awkward at times and the colloquialisms are not very clear, but these machines translate and when there is not a word, you put a vocabulary on them and they don't get the meaning, it prints it in red so that the machine is adapted so that the machine expands its own brain.

This thing is coming to life in a very intimate way. You've read recently that the internal revenue system has succeeded in having Congress pass a law that would give all you non-social security holders a new number, a tax number, and our returns are going to be audited and processed on the basis of these machines. Think of it! You *have* to—94,000,000 returns last year; 36,000,000 refunds. When this thing is set up it is going to be able to analyze returns on the basis of informational returns filed by corporations paying dividends, interest, and the like, make test studies on ratios and relations of inventory to profits, bad debts to accounts receivable, depreciation to capital investment, and all sorts of things like that. Our income tax law is going to be run by this, and necessarily so, within the next four years. They are setting up this large system all over the United States, and a pilot operation is already under way in Atlanta. The main area will be in West Virginia, where I suppose some of these coal miners will now finally get a job.

The thing works sort of on a comparative basis. It compares things, it throws them out, knocks them back and compares them. It can produce some errors, and I am going to close with these two little illustrations. They put into the machine, "The spirit is willing but the flesh is weak." It came out of the computer, "The whisky is good but the meat is spoiled."

But a more apt one is this one: A salesman for one of these computer machines called on a woman client. She told him that they would no longer need any of these machines—he was selling another kind of office machine—because they had purchased a new electronic data computer which could answer all the questions and was infallible. Well, the salesman doubted that any machine could be so perfect, so the lady gave the salesman a card suggesting that he try out the machine by asking it any question he wished. The salesman approached the machine and wrote on a card "Where is my father?" He put the card in the machine, the wheels turned, the lights began to flash, the console typewriter started to buzz and the answer came out, "Your father is on a fishing trip in Canada."

The salesman said, "See, I knew the machine would make a mistake. My father has been dead for five years."

Well, the lady was not the least bit disturbed. She said, "Apparently the question was too simple for such a complicated machine." She suggested he try it again and this time try rephrasing his question. The salesman took out another card and wrote, "Where is my mother's husband?"

The wheels turned, the lights flashed and the answer came out, "Your mother's husband is dead, but your father is fishing in Canada."

I'll end this just where I began with my friend and oracle, because this is a fifth moral to any kind of an enterprise, whether it is arguing a case or briefing a case and, I suppose, writing an opinion, but it fits so well everything the lawyer does.

Dear Abby was written this disturbing question: "What do you do with a man who doesn't like to be kissed? He says he got fed up with it when he was a kid, as he was the only boy in the family with seven sisters. I am engaged to marry this man. I am 28 and he is 33. How can I change his mind? Signed, Not Kissed."

"Dear Not Kissed: Quit kissing him like a sister."

Thank you very much.

PRESIDENT McCOWN: Thank you very much, Judge Brown.

At this time, Ralph, will you step up here a moment? I want to present to your new President-Elect the gavel with his name on it marked as "President of the Nebraska State Bar Association, 1961-62."

It is with real pleasure that I give this to Ralph and assure him that if he receives the cooperation that I have received in the past year, he will have a thoroughly pleasant and enjoyable year as your President. Ralph, congratulations!

PRESIDENT-ELECT SVOBODA: Judge Carter remarked that this row was the top drawer. You figure out what he meant *that* row was. Thank you.

PRESIDENT McCOWN: Thank you, ladies and gentlemen. Good night to one and all.

FRIDAY MORNING SESSION**November 3, 1961**

[The Friday morning session of the Institute on Practice and Procedure was called to order at 9:40 o'clock by Chairman M. M. Maupin.]

CHAIRMAN MAUPIN: Ladies and gentlemen, we will commence the morning portion of this Institute. This morning's session, as you will note from your program, is given over to a discussion of "Appeals from Administrative Agencies to State District Court and Appeals from Administrative Agencies to Supreme Court," to be followed by the subject of "Appeals from Courts of Limited Jurisdiction to State District Court."

Without further ado or other announcements at this time I shall introduce to you Mr. Einar Viren of Viren & Emmert of Omaha. Einar called my attention a moment ago to the many years that have passed since we first met when he was practicing at Holdrege, and since that time, as probably you all know, he has come to the great city of Omaha and is, as far as specialists exist, I suppose, a specialist in his own particular field.

He was formerly Secretary of the Nebraska State Railway Commission. He has been an assistant city attorney of Omaha, and he is a member of the Omaha and American Bar Associations, and of the Motor Carrier Lawyers Association.

I am pleased to present my old and long-time standing friend, Einar Viren.

**APPEALS FROM ADMINISTRATIVE AGENCIES TO STATE
DISTRICT COURT, AND APPEALS FROM ADMINISTRATIVE
AGENCIES TO SUPREME COURT**

Einar Viren

Thank you, Mr. Maupin. Fellow members of the Bar: I prepared a written outline of this dissertation but did not get it to George Turner in time for reproduction, it being fifty legal-size pages. Before any of you become apprehensive, I do not propose to bore you with the entire fifty pages.

I do, however, wish to acknowledge the able assistance that I did receive from my newest associate in the research that went into the preparation of this document from the standpoint of the appellate procedure from administrative agencies to the district court. Mr. Vernon Ranne, whom I will ask to stand, is a recent acquisition in my office and is now practicing in Omaha, having

recently moved here from California and formerly was in practice in Omaha.

There are a number of state administrative departments from which appeals are provided to the district court. The Tax Commission provides for appeals to both the district court and the Supreme Court from properties that have been left off or undervalued by the State Board of Equalization and from rejection of claims against the state.

The Department of Agriculture and Inspection had a number of appeals to the district court from the rules, regulations, and orders covering eradication control measures of infested areas. There are four of those.

From the Department of Banking there are appeals directly to the district court. There are three of those.

From the Department of Insurance there are a substantial number of appeals directly to the district court.

From the Department of Motor Vehicles, the Department of Labor, the Department of Health, there are a substantial number.

The Real Estate Commission, the Department of Aeronautics, the Department of Water Resources, and Liquor Commission, there are eleven that we could find, state tribunals from which there are appeals directly to the district court.

I do not mean to imply thereby that we have found all of them. We have searched as best we can and we hope that is all of them. I think we have covered them in their entirety.

The epistle, when it is reproduced, will have the outline, and following the outline will be a dissertation on each of the procedural steps that are necessary.

When you get past the appeals that are permitted by statute you come to the petition in error in district court, and that is the catch-all by which you can get a semblance of review of something in the district court, and if you are not satisfied, obviously you can go to the Supreme Court.

It is completely inadequate, it is absolutely unfair, it does not in any respect propose to permit the court to review any of the facts, except such as may be set forth in the pleadings and in the final adjudication that was had by the tribunal appealed from, and should be subject by this Association and its appropriate committee and the Judicial Council, or whatever that tribunal may be that corrects or attempts to get the Legislature to correct those things, to permit the parties litigant in those particular instances to have their record reviewed instead of what they put before the court.

The reason therefor, of course, is quite obvious if you read the petition in error proceedings and you read the latest epistle from the Supreme Court in connection therewith. Those who are willing to admit what the factual situation was and what the findings were and what the reviewability was are all aware of the fact that it is wholly inadequate; and that is *Elliott v. the City of Auburn*, 172 Neb. 1, in which rehearing was had in 172 Neb. 515, in which the Supreme Court said, "Whether proceedings shall be taken by appeal from a tribunal clothed by the Legislature with power to decide in the first instance for review by the district court is fixed by statute creating such tribunal and giving it its powers. The right of appeal is purely statutory unless the statute provides for appeal in a specific instance under examination or at any time such right does not exist."

In addition to that it says that all we can review are the pleadings and the findings of that tribunal. Whether or not the factual situation will correctly sustain those findings is not there, and that is something that this Association should correct. I am certain that it can be done, and it can be done with expedition, and it can be done in a manner in which there could be uniform appeals. Uniform appeals should be had from all state tribunals to whatever appellate body that that appeal should be had, be it in the first instance the district court, or be it in the first instance the Supreme Court. I am only familiar with the appellate procedure from the State Railway Commission to the Supreme Court from personal experience, and have had a substantial amount of that, and I propose to dwell at quite some length on it.

There are appeals to the Supreme Court from the Department of Water Resources in connection with irrigation matters, and from the Tax Commission in connection with the State Board of Equalization in assessments and changes of evaluation.

The Nebraska State Railway Commission's appeal to the Supreme Court is the subject with which I am most familiar, and at an appropriate time I can reveal to you why I was asked to prepare this particular paper. It suddenly dawned on me yesterday.

The appellate procedure from the Railway Commission to the Supreme Court is one that is set up in the statutory provisions creating the State Railway Commission. They are simple, they are easy, they are readable, and I assume that they should be understandable, although there are times when those of us who practice before that Commission and go up to the Supreme Court are advised that apparently they are not, as far as we are con-

cerned. They are covered in four sections of the Statutes: 75-405, 75-406, 75-408 and 75-416.

The right of appeal was challenged when the Commission was created and the statutory enactments supplementing the constitutional creation were enacted, and the first case was *Hooper Telephone Company v. Nebraska Telephone Company*, in which the Commission for the first time enforced the statutory provision requiring physical connections between two telephone companies for the purpose of transmission of messages, both local and long distance. It was challenged on the basis that the Legislature had created, first, a court in the State Railway Commission; and, second, appellate proceedings that it had no right to create, and that it was unconstitutional.

The Supreme Court said in that case and has followed it ever since when it has been raised, and it has I believe on several occasions, "We conclude that under the power given to the Legislature to provide generally the appellate jurisdiction of this court, in view of the scope and purpose of the constitutional amendment which created the Railway Commission and the power given to the Legislature by that amendment, and general statutes enacted pursuant to that power, the amendments of the statute providing for appeal direct to this court is no violation of the constitution."

That is still the law, and it is good law, and I hope that by the use of the pronouncement there in the present constitutional provisions the Legislature can be persuaded to do the same thing with appellate proceedings in the future from other tribunals.

The procedure on appeal from the State Railway Commission is a relatively simple matter. You can appeal under two sections of the statute. You can appeal under Section 406, which provides for the filing of a motion for rehearing within ten days after the mailing of the order by the State Railway Commission.

Now those of you who have not practiced before the Commission, the Commission does make a record. They do have a reporter. It is provided for by the statute. That transcript has to be made available on appeal, so that you do have a record that you can take up.

The motion for rehearing is merely a reproduction of the motion for a new trial which it is my understanding is used for the purposes of giving the original tribunal the opportunity to correct its errors before you go up to the last word to find out whether they were right or wrong. If you want to follow those proceedings it is essential and necessary that you file within ten days of the date of mailing the order of the Commission, a mo-

tion for rehearing. That stays the appeal time, as it does in the district court, until that motion is ruled upon.

But when that motion is ruled upon, then is where the catch comes, because the statute in 75-406 says that the time for appeal shall be one month from the date upon which the Commission rules upon that motion.

That question is now before the Court. Next Wednesday we will present the argument on it, where the Commission has failed to notify both parties of its ruling, and the unsuccessful party found out about it some six or eight months after the entry of the order and long after his time for appeal had expired, but he nevertheless appealed.

So you have to watch yourself the actions of the Commission, unless the administrative procedure section, which I believe is 88-something, has modified it. In spite of the fact that I am the appellee in the case, there is some merit to the argument that it may have from the standpoint of enabling the parties to receive proper notice, because that is the one place where the Commission's statutory power is deficient, in that if—and I do not propose to say they so do because I do not believe they do—if they desire to be perhaps a little biased or dilatory, or if they desire to be downright mean, they could very easily just not say anything to anybody about what they did and the month would be gone and your right of appeal is out the window, because it is your obligation to find out the date that that entry was made. There is no statutory provision requiring them to give you any notice unless it is, as I say, contained in the Administrative Procedures Act, which has been a separate enactment of a few years ago.

The other procedure for appeal is a direct appeal under Section 75-405 which simply provides that you may appeal within one month after the entry of the order by the Commission. Therein hinges the reason, at least my personal reason, for having been given the opportunity to prepare this paper because I found out that if you could neither read nor count you were fit to be further educated, and the best way to do it was to have the Bar Association assign to you a subject such as this.

I had a matter before the State Railway Commission entitled *Ruan v. Peake*, 163 Neb. 319, in which the factual situation insofar as this subject is concerned was as follows: We had filed an appropriate motion for rehearing prior to January 13 of the year—I have long since desired to forget it—as I had filed the motion and then on February 14 I filed a notice of appeal because January 13 was the day upon which they had overruled the motion

for a rehearing. We took it to the Supreme Court. The matter that was involved before the Commission has since become moot, so my client didn't get too mad at me, except as was said yesterday he had to pay the cost of the appeal. No one raised it, but there is a peculiar rule in the Supreme Court that says that if there is error that is ascertainable on the record and nobody has called it to our attention, we can dispose of the case using that particular error of proceedings, and that is what the Supreme Court decided to do in that case because they said that the term "calendar month," whether employed in statutes or contracts and not appearing to have been used in a different sense, denotes the period terminating with the day of the succeeding month numerically corresponding with the day of its beginning, less one.

Well, I found out that apparently I couldn't count, because the 13th was the day I should have appealed and not the 14th, and I got tossed out unceremoniously without any arguments and without any decision on the merits. Hence I have found out that I guess you have to do two things: First, you've got to be able to read; and, second, you've got to be able to count before you can get up there. One month means just what it says. It says if it starts on the 13th it means, as I understand it, and perhaps I don't but since then I haven't waited until the last day; I've waited two days before I filed my notice of appeal because I still don't know what it means, what that "less one" means, whether I should have appealed on the 12th or the 13th.

That is the case which we now have before the court and which will be argued next week in connection with the failure of the Commission to notify the unsuccessful party in an application for a certificate before the Commission of their ruling on the motion for a rehearing, or even the final order. They never sent the final order to them. We admit it. I received it. I was the successful party. The protestant did not receive it. Whether or not, as I say, the administrative procedures section of the statute has changed that, I don't know.

What you decide on an appeal where you go the one route or go the other route, is one of the questions that was decided by this court—somewhere in here I have it—as to which way you appeal; in other words, what I am trying to say is this: If you go the route of having your motion for rehearing overruled, then you have given the Commission the opportunity to correct its error. In that proceeding you get a complete review of the entire record, including all of the evidence that was taken.

If you go the other route and appeal directly, the court will review the entire record and find out whether or not, first, the

Commission had jurisdiction; and, second, whether or not the record will sustain it. Now whether there is a difference between those two I have not as yet been quite able to satisfy myself in my own mind. I have followed the procedure personally of filing a motion for a rehearing, and have followed the procedure of a complete insistence that that motion for rehearing be argued, and have required my staff to do so.

The reason for that is this: It is my judgment—and apparently mine alone—if you file a motion for a rehearing or a motion for a new trial, and I think there is some law in connection with it—I can't recall the case but I believe Paxton-Gallagher Company were involved in it—and you go up and consent to the overruling of that motion, you have admitted, in my judgment, that they committed no error and you've got nothing to appeal from.

Whether or not from administrative tribunals the court is going to take that view that they took in my judgment in that particular case, I don't know. I have tried to raise it but I have not been successful because of failure of co-counsel in certain proceedings who would not go along with it.

We had an instance where an appeal was filed directly, and simultaneously with the filing of the appeal, or prior thereto, we were never able to ascertain, but permit me to say it was on the same date, they filed with the Secretary of the Railway Commission a motion for rehearing and a notice of appeal.

It is my feeling that until the Commission ruled on that motion for rehearing, they had no right to appeal, for they had to either admit that their motion for rehearing should be overruled or confess that they had no right for a motion for rehearing, and if they filed a motion for rehearing they should have given the Commission the opportunity to correct their error if there was any, and having abandoned it, in my judgment, they have affirmed the decision of the Commission by that particular proceeding.

We have raised before the Supreme Court the question: What can you appeal from, as far as the Railway Commission is concerned? The statutes are very, very, very plain, in my judgment, on what is an appealable order. The appealable orders of the Commission are set forth in Section 75-405, 75-406, and 75-411-415.

We had it before the court in Airline Ground Service in which the court said, "The legislature clearly did not limit the right of review to final order, but conferred the right and limited its exercise to any order upon which there had been a hearing before the Commission." The statute very specifically says

that there must have been a hearing before the Commission. The Commission must have issued an order based upon the record in that hearing before you have a right to review.

The court went on to say, "This affords convincing proof that interlocutory or procedural orders incident merely to the natural course of the proceedings do not constitute the subject matters of the proceedings and is not therefore reviewable," and have gone on in an additional case in which they attempted to appeal from a motion to dismiss a proceeding before the Commission and the Supreme Court said, "No, you cannot appeal from a motion to dismiss the proceedings before the Commission and a ruling thereon."

The question of whether or not you have an appeal from the minute entry of the Commission, the Commission is required by law and it is the secretary's obligation to keep a journal of the actions of the Commission. As in all judicial or quasi-judicial tribunals, the Commission makes their decisions in session, sometimes right from the bench and other times in executive sessions which they hold anywhere at any time that there are two of them there so that they may hold it.

We took to the Supreme Court in *Doerr v. Herman*, 159 Neb. 438, the question of whether or not the action taken by the Commission and the entry in the minutes of the Commission was an appealable order. The Supreme Court said that it was not, it was merely interlocutory, and that the transmittal of that information was solely for the purposes of procedure and that ultimately sometime when the Commission got around to it they would write an order in conformity therewith, so that you would have something to which you could ultimately appeal.

That case was taken up there purely for the purpose of getting that particular section of the statute clarified.

The record on appeal from the Railway Commission is slightly different in some respects than the record on appeal from district courts. The appellate statutes from the Railway Commission are special enactments. They make reference to the procedure to be followed in appeals from the district court. Where the subject matter is not covered in those particular appellate statutes, the procedure for appeals from the district court are of course the governing factor. The court has said in a number of instances that they are special procedural appellate sections and govern and rule in their entirety insofar as they cover the subject.

That goes likewise to the record on appeal, and the record on appeal constitutes one item, the pleadings before the Commission—the record made by the official stenographer and such other

documents and papers as you care to include in it. Now what such other documents and papers as are the official records of the Commission that you care to include in it has to my knowledge never been tested in the Supreme Court, but in view of their other pronouncements if you can directly relate any portion of it to the matter that you have, I am certain it can be considered on review.

It goes up as one packet, not as two, like you do from the district court, the bill of exceptions and the transcript on appeal. You file your appeal in the identical manner in which you file an appeal from the district court, except that you serve the Secretary of the Commission with notice of the appeal, you deposit the \$75.00 with him or the bond, if your clients can afford to tie up the \$75.00 the bonding company doesn't make the premium, the \$20.00. He then transmits forthwith that notice of appeal to the Clerk of the Supreme Court, and from there on it is up to the Secretary of the Commission to see to the preparation of the transcript on appeal. You in a praecipe tell him what you want in it.

Our general proceeding is to start in the beginning, go right on down through the entire file, and we put everything in there. Lots of times I am of the opinion that the only purpose therefor is to help defray the expenses of the Commission or the state by the payment of the modest fees that are involved, and sometimes I wonder after I start to read them the second time and see the same pleadings in there four times what in the world they are doing there, but it seems to be the easiest procedure so that you get everything up there in case you need it.

Yesterday someone here spoke of the record that you make. The record that we make before that Commission is no different than the record that you will make in proceedings in the district court if at some time you desire to get a portion of that record reviewed.

The reception of evidence before the Commission is far more liberal than it is in jury cases before the district court because they are prone to let anybody say anything and put anything in the record that they want to put in because they don't want to make anybody mad and they want everything there that is possible for them to consider, whether it is evidence or not.

The procedural steps before the Commission, in my judgment, are as vital as the procedural steps before the courts, and any attorney who practices before the Commission should safeguard every procedural step that there is there, with the appropriate motions at the appropriate time, whether the rulings on those

motions are favorable or not, so that if you have the opportunity you can present them for review to the Supreme Court.

The first lesson I got when I became Secretary of that Commission—and I can remember as though it were yesterday—was when a very able counsel in this state appealed a case in which the entire Commission's staff, its attorneys, the Commissioners themselves, at that time one of whom was a very competent and capable counsel, looked at him and thought, "What in the name of sense are you taking this to the Supreme Court for? You can't possibly be doing anything but wasting your time and your client's money." We didn't think there was a possibility that the Supreme Court could find anything wrong with the decision of the Commission in that case. It is *In re Kassebaum*. I would suggest you read it for the purpose solely of finding out that the lawyers that can give you the best lessons in this so-called specialized proceedings and specialized practice are the lawyers who don't very often practice in it.

The Supreme Court in that instance told the Commission that they were just as wrong as they could possibly be, and when the opinion came down and Harry Russell came walking into the office, the last laugh was on Harry, except he was gentleman enough not to laugh at us.

I found from that that the question of the things that you can take to the Supreme Court in appeals from the Railway Commission, and I hope when the time comes that they get this error proceedings corrected so that you can make records before other tribunals and take that record to the courts for review, the amount of litigation that is available to lawyers and the questions that can be raised for adjudication are far more than those that the average lawyer, particularly the so-called specialist in the field, thinks exist. It has been to me a rather nice feeling that those of us who practice in this particular field of law have been able to find many things that the court has not had an opportunity to rule upon.

I have digressed from the record on appeal. The record on appeal shall be filed and the transcript shall be prepared in the same manner in which a transcript is prepared in an appeal from the district court. The statute made no particular reference as to when that time ran for the preparation of that transcript, and the Supreme Court so decided that there was no particular time. So long as they got there before the case was submitted—and that was *Moritz v. State Railway Commission*, 147 Neb. 400—you got the thing up there in plenty of time. So there was no problem in that respect. That is now covered by Rule 7-G of the

Supreme Court in connection with the revision of our statutes giving the Supreme Court the right to govern transcripts on appeal, and in my judgment Rule 7-G hasn't changed it a whole lot, because it says "unless the statutes provide otherwise, this shall be the rule," and getting the record up there is not too difficult a task because in most instances, although it is not true in all instances, in most instances the transcript of the evidence has been prepared prior to the final submission of the case to the Commission and to the final argument on your motions for rehearing. So in that respect the record is there. There are times, of course, when that is not true.

There are special statutory proceedings for appeals in complaint cases, and complaints against carriers under the Nebraska Commission are governed by Sections 75-411 to 75-415, and pending a review as provided in Section 75-416, the order of the Commission is stayed, and that is the only proceeding unless you supersede a re order where the orders of the Commission are stayed pending an appeal. The orders of the Commission granting certificates of public convenience and necessity are effective ten days after the mailing of that order, or the entry of it, and unless an emergency is found to exist under certain proceedings it is effective forthwith. So if you are successful in obtaining certificates, you can commence operations under them lawfully, to your client's peril, pending a review. And there is where you have a very substantial question of how you advise your client as to whether or not they should or should not commence operations during that particular time.

There is one provision for supersedeas, and that provision for supersedeas is in its entirety the provision for superseding re orders from the Commission.

That covers what I have. If there are any questions they can ask them now, Mr. Maupin, or do you wish to defer them? There will probably be plenty of questions that I can't answer.

CHAIRMAN MAUPIN: If you have a question will you rise and state your name, please, and then submit your question. Does anybody have a question at this time concerning the procedure before the Nebraska State Railway Commission?

HERMAN GINSBURG, Lincoln: I would like to ask Mr. Viren one question. I took it from his statement that he is of the opinion that on appeal to the Supreme Court you get a hearing completely *de novo*, or am I mistaken on that?

MR. VIREN: You mean from the Railway Commission? I think the Supreme Court has said in a number of cases that they

will review the record to see whether or not, first, the Commission has jurisdiction; and, secondly, to see whether or not the order that they entered was arbitrary and unreasonable in view of the record that was there made. Whether that constitutes a hearing *de novo* or not is probably going to be one of the debatable questions and one of the things that probably only the members of the court could answer, if you get them to answer it.

I would say that the review of the record to see whether or not that order is arbitrary and unreasonable must in itself, insofar as that record is concerned and those pleadings are concerned, constitute a hearing or a proceeding in which they completely review it. How else they could make that determination without so doing, I would not know, for the simple reason that the question of arbitrariness and unreasonableness, in view of their pronouncement in numerous cases and in review of the record as those of us who were successful and those of us on the other hand who were unsuccessful in those cases are concerned, leads us to believe that they had to read the record, as long and voluminous and misunderstandable or understandable as the case may be, as your particular feeling on it may be, yet I have found that in most instances whether I was successful or not I would have to agree with the court that they probably had sufficient grounds to either sustain the Commission or to reverse it.

I may not agree with the court, Mr. Ginsburg, that their changing in the case that you and I had there was correct. I can't quite agree with that. Herman and I had a case up there, *Wheeler v. Ecker*, in which the court got themselves into quite an opinion-writing contest as to what should be the statutory application of convenience and necessity in various instances and what should not be. I went away from that particular case feeling wonderful because I said afterwards that I thought that was the correct law that the majority had pronounced, but in the next case going up on not quite the same situation but on a similar situation it was my feeling that the court had completely abandoned the case. We have since that time tried to steer them back to it if we were on the proper side of the proceedings. The question of course that goes up there is: Where do you use your judgment as to whether or not the Commission record as they view it constitutes arbitrariness and unreasonableness in the grants of certificates or the sustaining of complaints or whatever the particular thing is?

The greatest disturbance in the thing is where the discretionary power of the Commission is invoked in the granting of certificates of public convenience and necessity.

The record that goes up on that particular instance is a record that if the Commission has granted the certificate, or in other instances denied it, a review of it by the court can very easily sustain the Commission because, as they have said, they are only to review that record for the purpose of those two or three determinations, and to try to convince them that it is arbitrary or unreasonable sometimes gets to be kind of hard.

CHAIRMAN MAUPIN: Are there further questions concerning this field?

Mr. Viren, in the interest of time, did not take the occasion to spend any time on the appeals from other administrative agencies. That, however, does not preclude the entertaining of questions if any of you have questions concerning any of the other administrative agencies, and I think Mr. Viren is prepared to respond to questions in any of the fields that he covered. So do we have any other questions at this time on any of the various agencies he has covered here so briefly?

If not, I desire to take this occasion on behalf of the Association and the members that are here assembled to thank you for the time and the effort that you have devoted to this matter, Mr. Viren.

The next subject is that of appeals from courts of limited jurisdiction to the state district court. That field is to be covered this morning, and at the conclusion of the remarks of the speaker again opportunity will be afforded for the submission of questions from the floor by anyone who has a question that is germane to the subject under discussion.

Our speaker is Mr. Joseph P. Cashen of Omaha, a member of the firm of Kennedy, Holland, DeLacy & Svoboda. Joe is a former judge of the Nebraska Workmen's Compensation Court, serving a five-year term upon that court with a record behind him that I can't tell you anything about statistically; I don't know how his decisions stood up in the final analysis, but I do know from my personal experience and from visiting with numerous other lawyers who had occasion to appear before him when he was designated as "Your Honor" that he left with the bar of Nebraska who had the occasion to appear before him a very high professional standing as a conscientious judge.

It is therefore my pleasure at this time to introduce to you Joe Cashen, who will speak on the subject of appeals from courts of limited jurisdiction to the state district court.

APPEALS FROM COURTS OF LIMITED JURISDICTION TO STATE DISTRICT COURT

Joseph P. Cashen

Ladies and Gentlemen: I would like to discuss with you the procedures on appeal from inferior courts to the district court. This would include justice courts, municipal courts, police courts, county courts and Nebraska workmen's compensation court. Needless to say, a complete discussion of all of the possible incidents of procedures in each of these courts during the course of appeal would be impossible in the time provided. In view thereof, I will generalize to a certain extent on the procedures and attempt to point out some of the problems encountered. Initially, I will cover civil appeals from justice courts, municipal courts and county courts since the procedures are nearly analogous. I will then briefly cover probate appeals from county courts to district court; appeals in criminal matters from police courts and county courts to the district court and, finally, the appeals to the district court from the Nebraska workmen's compensation court, both prior to and subsequent to rehearing before the compensation court.

The statutory requirements relating to appeal from justice court may be found in Section 27-1301 to 27-1315, R.S. Neb. 1943 Re. 1956, which set forth, with some particularity, the procedure to be followed.

The statutory requirements relating to appeals from municipal court are found in Sections 26-104 to 26-117, R.S. Neb. 1943, Re. 1956. An examination of the sections of the statutes relating to the appeals from justice court and from the municipal court will reveal a very close similarity, section by section.

The appeals in civil actions from county court are provided for under Section 24-544, R.S. Neb. 1943, Re. 1956, which states that either party may appeal from the judgment of the county court "in the same manner as provided by law in cases tried and determined by justices of the peace."

There was no right of appeal at common law. Therefore, any right of appeal which exists must be by statute. It should also be pointed out that there is a distinct difference between the terms "appeal" and "error." The foregoing, upon the perfection of such appeal in the superior court or appellate tribunal, vests jurisdiction of all issues which have been previously tried in the lower court, and the matter is tried *de novo*. When the matter goes up on a writ of error, it is for review of the record—no new evidence may be adduced, and it is not *de novo* on the record.

The right of appeal from decisions of inferior tribunals is not universal, to the extent that in certain actions this right may be limited by waiver, by non-action, et cetera. For example, a justice court appeal may not be had from a judgment rendered on confession; in jury trials where neither party claimed a sum exceeding \$20.00; and, in trials of the right of property under the statutes, either levied upon by execution or attached.¹ There are other instances of specific proceedings where this right of appeal or review is limited, and I will attempt to point these out as we proceed.

The venue for appeal, as provided by the statute, is in the district court in the county where the municipal court, county court or justice court rendered the decision. An appeal does not confer jurisdiction on the appellate court when the body from which it was taken had none itself, as for example in *Jacobson v. Lynn*, 54 Neb. 794, 75 N.W.2d 243, which was an action to recover damages for trespass upon real estate. An action was brought in a county other than where the lands were situated, and the Supreme Court, on reviewing the case, dismissed same, holding that the reviewing court had no authority where the lower court had none.

As in all courts, it is necessary that there be a final order before an appeal will lie, but I am sure this particular point has been covered by other speakers having to do with the appellate procedures.

In all three of the aforementioned courts the appealing party is required, within ten days from the rendition of the judgment, to enter into an undertaking to the adverse party, with at least one good and sufficient surety to be approved by the justice, judge or clerk of the court, in a sum not less than \$50.00 in any case, nor less than double the amount of the judgment and costs, such undertaking to be conditioned on the prosecution of the appeal without delay, and to satisfy any judgment and costs if the appeal is lost. Such undertaking need not be signed by the appellant.² Provision has been made, however, that in municipal court the party appealing may, in lieu of said undertaking, deposit with the clerk of the court a cash bond, such cash bond to be accepted upon the same conditions and like effect as the undertaking set forth by sureties.

This particular provision, requiring the filing of the undertaking within ten days, or the posting of a cash bond in lieu thereof, is jurisdictional, and if the same is not filed within the time limit in the statute, the district court may dismiss the appeal. Since the giving of the bond is jurisdictional, the objection

for failure to give such bond or undertaking may be raised at any time in an appropriate manner.³ The only reason for extending the time within which the bond might be filed is that of delay which is caused by neglect of officers. The neglect of the officers must be such that it is in connection with their prescribed duties, and not one which they themselves had agreed to assume on behalf of the appellant, since in that event the officer is acting as agent of the appellant and not in his official capacity. The same is true if the bond is forwarded by mail, such act constituting the mails as an agent of the party, and delay in filing, caused by such agent, is not excusable and does not extend the time.⁴ In the event the bond is defective in some respects, this should be called to the attention of the court by the appellee. If the bond substantially complies with the requirement of the statute, and is amendable, then the appeal should not be dismissed, but the court should require that such bond be amended. Minor errors, which have been held not to defeat the filing of the bond, include errors in the naming of the obligee, where only one surety has executed the bond, or minor errors in the form.

The appropriate remedy in such an instance would be to file a motion for an order requiring the appellant to amend such bond, or to file a new bond with sufficient surety and, in the absence of doing so, request that the appeal be dismissed.⁵

No appeal bond for costs is required of the state or one of its officers if sued in their official capacity, as is true of counties, cities, and municipal corporations within the state.⁶

In addition to filing the undertaking, it is necessary that a transcript of the proceedings be filed in the appellate court.

The duty to undertake the preparation of such transcript falls upon the judge, justice, or clerk of the inferior tribunal. The transcript must be certified, and include the undertaking or cash bond for such appeal. The transcript, together with any depositions read on the trial of the cause in municipal court cases, is delivered to the appellant or his agent, and must be filed with the clerk of the district court within thirty days from the entry of the judgment.⁷ In cases of appeal from justice court and county court, the judge or justice shall deliver and transmit the bill or bills of particulars, the depositions, and all other original papers, if any, used in the trial before the court, to the clerk of the district court before the second day of the term. It should be noted that the duty to see that this transcript is on file is the duty of the appellant and not of the court, or the judge, or justice. The duty to prepare lies with the court, but the duty to file is that of the appellant or his counsel. This step, that is, the

filing of the transcript, is jurisdictional. In the absence of such filing within thirty days, a motion to dismiss the appeal is in order.⁸

If, however, the delay in the filing is brought about as the result of the failure of the justice, the judge, or the clerk to prepare the transcript in time, the right of appeal is not lost.⁹ The time in which it should be filed cannot be extended unless the delay is caused by the fault of the officers.¹⁰ This transcript must be filed within thirty days from the rendition of the judgment, and it should be kept in mind that this is not from the date of the filing of the notice of appeal, or the filing of the bond.

The justice, judge, or clerk, after preparing the transcript, need not undertake any further action such as the delivery of such to the appellant or his agent, or file the transcript with the district court and, in the event he is made the agent of the appellant for such purposes, any neglect is attributable to the appellant himself, and, if the same is not filed within time, the right of appeal is lost.¹¹

If the transcript contains extraneous matter, the appeal should not be dismissed if there is substantial compliance with the request. Upon receiving such transcript and other papers, the case is docketed and the appeal, in effect, perfected. All proceedings before the lower court cease, and the action is stayed from the time of the filing of the undertaking or cash.

The transcript when filed, properly authenticated, imports absolute verity and cannot be contradicted, varied or changed by oral testimony or extrinsic evidence.

If the record in the lower court is incorrect or incomplete, the remedy is an appropriate proceeding to secure correction thereof in the lower court.¹²

An appeal perfected by either party vests the district court with jurisdiction of all issues presented by the pleading, and the effect of the appeal is to eradicate the judgment which had been previously entered by the lower tribunal.¹³

While the case in district court is to be tried on the issues that were presented in the court from which the appeal was taken, slight variances may be allowed if the identity of the cause of action is preserved, and the ultimate facts relied upon are substantially the same and provable by the same evidence of the same character as in the lower court.¹⁴

Since the district court has the case before it the same as if it had been originally filed there, the plaintiff may dismiss his

appeal at any time prior to submission of the case to the court on appeal.¹⁵ However, such dismissal would affect only the plaintiff's right, and would not alter a judgment on a counterclaim of the defendant entered by the lower court. In the event there has been irregularity in the perfecting of the appeal to the district court, such should be brought to the court's attention by motion and, if the appeal is quashed by the court, the cause for quashing it must be stated in the order of the court and the transcript of such order sent back to the lower court, which thereupon becomes reinvested with jurisdiction to enforce the judgment.¹⁶

The appealing party may dismiss the appeal at any time prior to the rendition of a judgment by the district court, and the same may be done without the consent of the appellee.¹⁷ As previously pointed out, this, however, would not affect or defeat a set-off or counterclaim in favor of the defendant. If, after the appeal, the appellant fails to deliver the transcript to the clerk and have his appeal docketed within thirty days following the rendition of the judgment, the appellee, at the first term of the district court, after the expiration of thirty days, may file a transcript of the proceedings of the justice court, or county court, or municipal court and, on the motion of the appellee, the case is docketed and the court is authorized and required, on application, to enter judgment in the appellee's favor comparable to that entered by the lower court, plus the costs, and award execution on the judgment. Or, as an alternative, the court may, with the consent of the appellee, dismiss the appeal at the cost of the appellant, and remand the cause to the lower court to be thereafter proceeded in as if no appeal had been taken. If the plaintiff, in the action in the lower court, shall appeal from any judgment rendered against him and, after having filed the undertaking and the transcript within the proper time, fails to file his petition within the time set forth, unless extended for good cause shown to the court, or otherwise neglects to prosecute to final judgment, the plaintiff becomes non-suited, and the court then renders judgment against such appellant for the amount of the judgment issued against him by the lower court, with interest accrued, and the costs of the suit and awards execution therefor.

Since the cause is before the district court as if the action were started there, a petition must be filed; and in cases of civil actions in municipal court, county court and justice court, such petition must be filed within fifty days of the rendition of the judgment in the lower court.¹⁸

The answer is due the third Monday after fifty days from the rendition of the judgment. Failure to file the petition on the

part of the plaintiff may subject him to non-suit on the motion of the defendant, without notice to him.¹⁹

The necessity of pleadings may be dispensed with by stipulation of the parties.²⁰

The district judge may, in his discretion, allow a petition on appeal to be filed at a time later than fifty days if good cause is shown, and if, on appeal to the Supreme Court, such court will presume that good cause was shown for the failure to file the petition on appeal within the period.²¹

Where a hearing is had in the district court and the decision made that good cause has not been shown, the decision, generally, will not be disturbed on appeal.²²

If there is a material variance in the pleadings on appeal, the same shall be called to the court's attention by motion to strike from the petition those portions materially varying from the claims made in the lower court. In the absence of objections to variance, either in the petition or otherwise, they are deemed waived.²³

There is some authority to the effect that, in appeal from municipal court to the district court, the district court may permit amendments in furtherance of justice, such as increasing the amount of recovery sought, or adding a new party.²⁴

If the appellant fails to recover a greater sum in the appellate court than was rendered for him in the lower court, exclusive of interest and costs, then the appellate must pay the costs of the appeal. If, on appeal by the plaintiff from a judgment in his favor, he recovers less than \$20.00, exclusive of interest, since the rendition of the judgment before the justice or judge, he will be taxed with costs in the district court, including a \$5.00 attorney fee. If the defendant has demanded a set-off greater than \$20.00, and he appeals from a judgment in his favor and does not recover \$20.00, he shall, in like manner, pay the costs of the appellate court, including a fee for plaintiff's attorney in the amount of \$5.00.²⁵

When an appeal is dismissed, or when judgment is entered in the district court against the appellant, the dismissal or judgment shall have the force and effect of a judgment confessed against the surety, or sureties, and the clerk will index the same in the proper judgment book.

Appeals in Probate Matters

The right to appeal in probate matters is, like all appeals, based upon the statutes. Section 30-1601, provides:²⁶

In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment or decree of the county court to the district court by any person against whom any such order, judgment or decree may be made or who may be affected thereby.

The question as to what constitutes a final order in probate proceedings has been before the court on many occasions, and to attempt to include in this discussion what constitutes a final order would unduly lengthen the same.²⁷

The appeal from the county court must be taken within thirty days after the decision complained of is made.²⁸

The statute provides that every party appealing shall give bond in such sum as the court shall direct, with two or more good and sufficient sureties, to be approved by the court, conditioned that the appellant will prosecute such appeal to effect, without unnecessary delay, and pay all debts, damages and costs that may be adjudged against him. The bond shall be filed within thirty days from the rendition of such decision. An executor, administrator, guardian or guardian *ad litem* need not file a bond in order to enable him to perfect an appeal. If the court finds that the appeal was taken vexatiously, or for delay, the court shall adjudge that the appellant shall pay the costs thereof, including an attorney's fee, to the adverse party.

It will be noted that there are no required notices of appeal which have to be filed, simply the filing of the bond within thirty days of the decision, and the filing of the transcript. Section 30-1605 provides that when such appeal is taken the county court shall, on payment of the fees therefor, transmit to the clerk of the district court, within ten days after perfecting such appeal, a certified transcript of the record and proceedings relative to the matter appealed from.

When the bond is excused in an appeal by an executor, administrator, guardian or guardian *ad litem*, notice of intention to appeal must be given the court within thirty days. There is no prescribed manner of giving such notice, but the Supreme Court has indicated such should be done by filing a notice of appeal and making a request for the transcript to be prepared, or by filing a praecipe for a transcript, or by some other action clearly and unequivocally indicating the fact that an appeal was going to be prosecuted from the order in question.²⁹ In Douglas County the practice is to file a praecipe setting forth what you desire transcribed, omitting notice, etc.

In the absence of a transcript, the district court acquires no jurisdiction.³⁰ As can be seen by the statute, the duty to prepare and forward to the district court the transcript of the record and

proceedings is that of the county court, and the negligence of the court in the preparation or filing of such transcript will not deprive the district court of jurisdiction if it is shown that the party requesting same is free from fault.³¹ Where, however, the delay is brought about or induced by the attorney for the appellant, and the transcript is not filed within time, the court is without jurisdiction.³² In the event the county judge does not certify the transcript, or if the transcript is incomplete, but is filed in time, jurisdiction is acquired.³³ Where the transcript does not contain all of the proceedings, or contains extraneous matter, not necessarily required, the jurisdictional requirements are met, and the transcript may be amended at a later date.³⁴

The same might be said with respect to bonds which have been timely filed, that is, that in the event the bond does not entirely conform to the conditions required by statute, or has minor errors in the naming of the obligee, or where only one surety has executed the bond, jurisdiction still vests in the district court, and the bond may be corrected or amended to conform to the requirements.³⁵

The appeal bond must be in a sum which will reasonably assure payment of the entire debt, costs and damages. Where there are defects, it is the duty of the appellee to bring this to the court's attention, and the same should be done by motion in the district court to compel the appellant to give proper bond within a time to be fixed by the court, and upon failure of the appellant to comply with such, the appeal may be dismissed.³⁶

The transcript, as filed by the county judge, properly authenticated, imports absolute verity and cannot be contradicted, varied or changed by oral testimony or extrinsic evidence. If the record of the lower court is incorrect, or incomplete, the remedy is appropriate proceedings to secure correction thereof in the lower court.³⁷

Section 30-1606 provides that, upon the filing of the transcript in the district court, that court shall be possessed of the action and shall proceed to hear, try and determine same in like manner as upon appeals brought upon the judgment of the same court in civil actions. This section of the statute has been construed to mean that once the jurisdiction vests in the district court, the county court has no further jurisdiction over the issues removed to the district court on appeal. The court must try the case as though the same had originally been filed in such court and make determinations with respect to all of the issues of fact and law.³⁸

Section 30-1604 states:

After such bond has been filed, the appeal shall be granted, but shall not be supersedeas in any other matter relating to the administration of the estate, except that from which the appeal is specially taken.

A proviso in Section 30-1606 indicates that appeals from the probate, or denial of probate of wills, and the allowance or disallowance of claims filed against an estate shall be tried by jury as in actions for the recovery of money or of specific real or personal property, and all other appeals shall be triable to the court as a suit in equity unless a jury is waived in those instances where right to trial by jury is given.

Section 30-1606, R.S. Neb. 1943, Re. 1956, provides that the district court shall hear and try the same as any civil appeal from the county court.

In light of this, the pleading would be the same as in civil appeals, that is, a petition within fifty days from the date of the rendition of judgment, and answer day being the third Monday after fifty days, and reply on or before the fifth Monday after fifty days.

The furnishing of a bond, its approval by the county court, and the filing of the transcript in the district court in the manner and within the time provided by law, vests jurisdiction of the case in that court on an appeal from the county court, and the failure of the appellant to timely file a petition in the district court does not affect or defeat jurisdiction. If the petition is not timely filed, the discretionary duty is imposed upon the district court to determine whether or not good cause has been shown for the failure of a party to plead within the time required; and after the court has heard the reasons of the party in default for his failure to timely plead and, in the exercise of legal discretion, has decided that no sufficient cause has been shown, the supreme court will not ordinarily disturb the decision of the district court.³⁹

Condemnation

It is not my intention to cover in minute detail the procedure of appeal in eminent domain cases as this point has been most adequately covered in an issue of the *Nebraska Law Review*—"The Interstate Highway Symposium," March, 1959, Vol. 38, No. 2, page 460.

Either party may appeal from the assessment of damages by the appraisers to the district court, such appeal being filed in the same county where the petition to initiate proceedings was filed.

The appeal is taken by filing a notice of appeal within thirty days of the date of the filing of the report of the appraisers.⁴⁰ The appealing party must file an undertaking approved by the county judge, pay for and have the judge prepare and transmit to the clerk of the district court a transcript of the proceedings within thirty days from the date of the notice of appeal. Where both parties appeal only one transcript need be prepared. In all appeals the proceeding is docketed in the district court showing the condemnee as the plaintiff and condemner as the defendant. This changes the old rule that the first to appeal would be shown as the plaintiff. L.B. 407, passed in 1961, amends Sections 76-711, 76-717, and 76-19.01 and, in addition to the above, makes some changes with respect to allowable interest and should be checked in an appeal by either party. The statute⁴¹ then goes on to provide:

After docketing of the appeal, the issues shall be made up and tried in the district court in the same manner as an appeal from the county court to the district court in a civil action.⁴²

Section 27-1306, R.S. Neb. 1943, Re. 1956, provides that:

In all cases on appeal from the county court or a justice of the peace, the plaintiff in the court below shall within fifty days from and after the date of the rendition of the judgment in the court below file his petition as required in civil cases in the district court and an answer shall be filed and issues joined as in cases commenced in such appellate court.

In two decisions the Supreme Court has upheld the dismissal of the appeal in the district court where there was a failure to file the petition on appeal within the fifty-day period beginning with the date of the filing of the notice of appeal in county court.⁴³

There is a distinction to be noted between the appeal in condemnation cases and ordinary appeals as to the time when the transcript must be filed. In an ordinary civil action before the county court which is appealed to the district court, the transcript must be filed within thirty days next following the rendition of such judgment,⁴⁴ but in condemnation cases the thirty days for the filing of the transcript begin to run from the date of the notice of appeal.

The Supreme Court has held that while pleadings are required in a condemnation case the Legislature intended that the plaintiff appealing should have at least twenty days after the filing of the transcript in which to file his petition in the district court, and therefore the fifty day period in condemnation cases dates from the filing of the notice of appeal in the county court

and not from the date of the rendition of the order appealed from.

In appeals in condemnation matters where different properties belonging to the condemnee have been taken and assessments made, all may be joined in one appeal and may proceed in the appellate court as separate counts joined in one action for damages to such property.⁴⁵

In cases of condemnation involving school districts, any person with an interest in the land taken may prosecute an appeal in the district court within thirty days from the filing of the award in the same way as appeals in civil actions, that is, by filing a bond and transcript within the time provided. An award also may be reviewed on a petition in error, and in such case the award and finding of the appraisers is given the same effect as a jury verdict or on judgment of the court.⁴⁶

Appeal in Forceful Entry and Detainer

A party against whom judgment has been entered by a county judge or a justice of the peace in an action for forcible entry and detention, or forcible detention only of real property, may appeal therefrom to the district court. Within ten days from the rendition of such judgment, the party appealing must give an appeal bond with two or more sureties to be approved by the judge or justice, conditioned in case of appeal by the plaintiff that he will satisfy the final judgment and cost, and in case of an appeal by the defendant that he will satisfy the final judgment and costs and will pay reasonable rent for the premises during the time he shall unlawfully withhold the same.⁴⁷ Even though there has been an execution of an undertaking for superseas or appeal, the judgment may be enforced in the discretion of the court upon the execution of a bond with sufficient surety to the defendant as fixed by the court, conditioned that in case the plaintiff shall finally be defeated he will pay the defendant his costs and all damages he may have suffered by reason of the execution of the judgment, the bond to be approved by the court or the judge.⁴⁸

Right of Appeals—Criminal Cases

While the Constitution provides for appeals from county court to the district court in all criminal cases on application of the defendant,⁴⁹ the procedure is all statutory, and all jurisdictional requirements must be complied with. The general appeal statute, 29-611,⁵⁰ provides for appeals from minor offenses and the manner of taking such. The appeal must be taken immediately upon the rendition of the judgment, and it stays all further

proceedings on such judgment. The appeal is not to be granted unless the appellant, together with the surety, shall within ten days after the rendition of such judgment appear before the magistrate and then and there enter into a written recognizance to the people of the State of Nebraska in a sum not less than \$100, with surety or sureties approved by the court, such recognizance being conditioned for his appearance forthwith and without further notice of the district court of such county until final disposition of such appeal. An alternative method is provided whereby the party appealing may deposit with the clerk of such court a cash bond in a sum to be fixed by the magistrate but in any event not less than \$100.

As a practical matter, the usual procedure upon conviction is to immediately ask the judge to set the appeal bond, and the same is posted by cash or surety previously arranged for.

Upon the undertaking of the recognizance or a cash bond, the magistrate must forthwith make return of the proceedings had before him and certify the complaint or warrant together with all recognizances to the district court. He may require complainant and other witnesses to enter into written recognizances with or without security to appeal in the district court. This as a practical matter is rarely necessary. Upon the transcript and the recognizance being delivered to the clerk of the district court, it is then the clerk's duty to file the same, enter it upon the appearance docket, together with the date of such filing, and the amount of the recognizance, the names of the surety and the appeal shall then be considered as of record in the district court. The case then proceeds by process issued out of the court in the same manner as if such recognizance had been entered into before such court. In the event of forfeiture, the recognizance has the same force and effect of a judgment confessed by the surety or sureties and is to be entered in the proper judgment docket of the court as in the case of other judgments.⁵¹

The district court is to hear and determine the matter on the original complaint unless it is insufficient or defective, in which event the court may order that a new complaint be filed and the case proceed the same in all respects as if the original complaint had not been set aside.⁵² Amendments to the complaint may be allowed if the amended complaint does not essentially alter the original charge.⁵³

If, upon trial, defendant is convicted, the court proceeds to assess the punishment, and judgment shall be rendered against him accordingly which shall include the costs.⁵⁴

The right to appeal is lost where the assessed fine is paid or where a party confesses judgment. If a sentence is suspended, this also limits the right of appeal, since no final order is rendered until such time as the suspension is revoked.

In the past some have felt that a plea of guilty in the justice court could not be appealed to the district court. This thinking was engendered by the case of *Kissinger v. State*, 147 Neb. 938, 25 N.W. 829, which held that where there had been a conviction based on a plea of guilty, the factual question of guilt or innocence could not be inquired into in an error proceeding in the district court. In 1954 the Supreme Court rendered its decision in *Benson v. State*, 158 Neb. 168, 62 N.W.2d 522, wherein they held that where the plaintiff had pleaded guilty in a justice court, he had the right of appeal to the district court, such being provided by Section 29-611, R.R.S. 1943, which, in effect, provides the right to appeal without any specific limitations.

Appeals from police court are for the most part the same as those governing appeals in misdemeanor cases. The written recognizance must be filed within ten days, conditioned upon the defendant's appearance. The filing of the appeal stays all further proceedings on the judgment of the lower court.

Trial in the district court is a *de novo* proceeding upon the original complaint, and in the event of the loss of the original complaint the proceeding should be stayed until the complaint is found or a new one substituted therefor.⁵⁵ The right to a jury trial in all criminal appeals to the district court cannot be denied.

Judgments Reviewed on Error

In all criminal cases in courts inferior to the district court, where the accused shall be convicted of a violation of the law of the state or of an ordinance of any municipal corporation and fined or imprisoned, such judgment may be reviewed on error in the district court of the county in which such trial and conviction was had.⁵⁶

On application by or on behalf of the convicted person to an officer of the court before whom such trial and conviction was had and upon payment of the legal fees, the officer is required to make and deliver to such person or his counsel a complete transcript of the judgment and all docket entries made at the trial of such case, and on receipt of the summons shall forward to the clerk of the district court the original papers in the case.⁵⁷

The transcript is attached to the petition and also any original papers received by the clerk. When the petition and praec-

ipe are filed, a summons returnable in thirty days is issued by the clerk unless otherwise prescribed by the judge of the court, such summons being directed to the sheriff of the county and containing a description of the judgment, reciting that a petition in error has been filed and commanding the sheriff to notify the county attorney of the time the same will come on for hearing. In the event more original papers are required by the reviewing court, the summons will command the sheriff to notify the officer in whose possession they are to forward them to the clerk.

The filing of the petition in error does not suspend or stay execution until a recognizance is entered into before the clerk of the district court, conditioned that he will prosecute his petition without delay and in the event conviction be had in the appellate court, that he will surrender himself to the custody of the proper officers of the county.

A review on a petition in error, of course, is limited to examination of the errors committed in the lower court, and no new evidence may be introduced at the time of the hearing. There is a presumption in favor of the validity of the proceedings below, and the errors must be shown in the record. It must show in the record, also, that such error was prejudicial. As a practical matter, this method of review is not often used, since the defendant is not forewarned of the likelihood of error.

Review on Petition in Error

Sections 25-1901 to 25-1910 provide the procedure to secure a review by the district court of the final order made by the county court, or other inferior tribunal, board or officer exercising the judicial function. Section 25-1901, which provides for the jurisdiction and scope, also covers review by the district court by error proceedings of determinations by county superintendents, city board, county board, board of health, state banking board, etc. This same provision, however, covers the review of the final orders of the justice court, county court and municipal court. In order to obtain such a review, a petition entitled "Petition in Error" is filed, setting forth the errors complained of; and upon filing, a summons is issued and served, or publication made, as the case may be, as in the commencement of an action. Service on the attorney of record in the original case is sufficient. Such summons should notify the adverse party of the filing of the petition, setting forth the name, and that it shall be returnable in vacation, and twenty days before the commencement of the term if issued in term time, or within twenty days before the commencement of the term and shall be returnable on the

day named in said summons. Summons cannot issue until the petition in error and the transcript are filed.⁵⁸

The petition in error must set forth the errors complained of. Until the petition in error is filed, the district court has no jurisdiction. The summons is issued upon the written praecipe of the plaintiff in error or his attorney and is issued by the clerk of the court in which the petition is filed to the sheriff of any county in which the defendant in error, or his attorney of record, may be, and, if issued to a foreign county, the sheriff may return the same by mail to the clerk and shall be entitled to the same fees as if it had been returnable to the district court of the county in which the officer resides. The issuing of service of summons may be waived in writing by defendant or his attorney. At the time the petition is filed, transcript of the proceedings containing the final judgment or order sought to be reversed, vacated or modified must accompany the petition. The original orders cannot be made a substitute for the transcript, and the jurisdictional feature of the transcript is the judgment, decree or final order sought to be vacated. The filing of the transcript cannot be waived.⁵⁹ The transcript must be duly authenticated in order to confer jurisdiction on the appellate court.⁶⁰ The transcript, to be filed with the petition, must contain the judgment or final order of said courts, together with the transcript of all proceedings.

Compensation cases to the district court arise in two different ways—the first is the direct appeal from the hearing before one judge of the compensation court, requesting a hearing *de novo* before the district court. The second type of appeal is that which arises subsequent to a rehearing before the compensation court *en banc*, which is in the nature of a writ of error. Since the first type is closely akin to the rehearing before the compensation court *en banc*, I will briefly cover the procedural requirements where a rehearing is requested.

The orders issued by the compensation court subsequent to an original hearing become final and binding unless appealed from within fourteen days of the issuance of the order. It should be noted that the time for appeal runs from the date on the order, and not the date when such order is received by the party.⁶¹

The appealing party, or party who is dissatisfied with the award, has two avenues open. An appeal may be had directly to the compensation court, requesting a rehearing, in which event three of the judges of said court will hear the case *de novo*, and issue findings and judgment in connection therewith,

affirming, reversing, or modifying the decision of the single judge. Either party may appeal. When either party desires a rehearing, all that is required is a pleading filed with the compensation court requesting a rehearing, stating, in effect, that the party refuses to accept the findings, order, award or judgment of the court on the original hearing, and setting forth the errors upon which the party relies. This is a pleading, and the same should be verified.

It should be remembered that this request for rehearing must be in the hands of the compensation court and filed on or before fourteen days after the issuance of the order. Extra copies of the application should be forwarded to the court for additional parties. The compensation court then serves upon the other parties, by mail or otherwise, a copy of such application, and notifies the parties of the date on which such rehearing shall be held and the place and time of such rehearing. The rehearing is usually held in the county in which the accident occurred, unless otherwise stipulated by the parties.

While the statutes indicate that such rehearsings should come on within thirty days after receipt of such application for rehearing, this has been held to be directory and not mandatory. You will find for the most part, however, that the court will attempt to set rehearing within thirty days of receipt of the application for such rehearing.

At the time of rehearing, the procedure is substantially the same as an original hearing. However, a court reporter records all of the testimony and evidence for the compensation court, and three judges of the court are present for the hearing. The presiding judge rules on all evidence and other motions, etc., that are made during the course of the hearing. At the time of the rehearing, unless stipulated to by the parties, medical reports will not be received and the testimony of the doctor is required.

The case is tried on the original pleadings, and there is no provision for an additional pleading by the appellee.

An alternate procedure for the appeal from the order of the single judge is to file and serve upon the compensation court a waiver of rehearing before said court, and notice of appeal to the district court. The statute indicates that the appeal to the district court shall be taken and perfected in the same manner as provided for appeals to the compensation court, that is, by filing with the district court a petition, or application for rehearing plainly setting forth the errors upon which such party relies for reversal and modification.⁶²

It is noted that there are two separate filings to be made—one, a waiver of rehearing and notice of appeal, which must be filed with the clerk of the compensation court in Lincoln, and the petition on appeal filed with the clerk of the district court in the county where the accident occurred, or by stipulation of the parties in any other district court in the state. Both are jurisdictional, and in the absence of the same being timely filed, the petition on appeal is subject to dismissal.⁶³

It is not necessary that there be attached to the petition on appeal the pleadings, orders or findings in the compensation court.⁶⁴ However, if the petition for rehearing sets forth only the errors upon which the party relies, and does not set out facts and allegations, then the district court would have some difficulty in determining the issues.

While the statute indicates that such petition should set forth the errors upon which the party relies for reversal or modification, the court has held that such an assignment of error is not essential to a trial *de novo*. Neither does it have the effect of limiting the scope of the inquiry to be made. It is said that they merely serve to point out the question or issues which should be given particular attention on the retrial, and the district court, in any event, has the right to require that the issues be clarified in any necessary way, not as a matter of jurisdiction, but for purposes of orderly disposition.⁶⁵

It would appear advisable to set forth facts in the petition on appeal relative to the employment, the alleged injury, the date thereof, notice to the employer, and affirmatively show that the one-year statute of limitations is not applicable. In a recent decision, issued October 27, 1961, our Supreme Court held that where a plaintiff employee in a workmen's compensation case seeks to toll the statute of limitations, contained in Section 48-137, R.S. Neb. 1943, Re. 1960, by payments made by the employer, he must affirmatively show in his petition that the payments were made within the space of one year from commencing the action, in order to state a cause of action as against a general demurrer, and that, in absence thereof, a petition showing on its face that the cause is barred is subject to a general demurrer.⁶⁶

The hearing, in this instance, where there is a waiver of rehearing before the compensation court, results in a *de novo* hearing before the district court. Under the Compensation Act the court is not bound by the usual common law or statutory rules of evidence, or by any technical or formal rules of procedure, and, while there are no specific decisions holding that the

same is true in district court, it would seem that the same would be true of the hearings in that court.

A request for rehearing before the compensation court takes precedence over an appeal to the district court. If one of the parties has filed a notice of waiver of rehearing and a petition in the district court, and the other party later files a request for rehearing within the prescribed time, the request for rehearing will take precedence, and the district court is without jurisdiction to hear and determine the cause.⁶⁷ Even though a party may be satisfied with the order, it may be that they desire a rehearing rather than a district court hearing. In the request for rehearing the party will usually take exception to an alleged error such as a failure of the court to make a specific finding with reference to some portion of the order.

It will be noted that the only provision in the compensation statute for an answer is to the original petition, with no provisions for petitions on appeal before either the workmen's compensation court or the district court. However, it has been held that where no specific section in the law covers the point in question, then the code of civil procedure applies.⁶⁸

Section 48-176 provides for answers within seven days after receipt of the original summons, and, to be safe, probably answers should be filed in the district court within this time.

Once the appeal is perfected before the compensation court *en banc*, the case may not be dismissed by either of the parties unless by a joint stipulation that a dispute no longer exists.⁶⁹ There is authority that, in the district court, a plaintiff may dismiss without prejudice prior to submission of the case, and that such dismissal by the plaintiff does not reinstate the order appealed from.⁷⁰

Appeal After Rehearing

In the event of dissatisfaction with the ruling of the compensation court following a rehearing, either party may, within fourteen days thereafter, file with the district court in the county in which such cause arose, or upon written stipulation of the parties in the district court of any other county in the state, a verified petition setting forth the contentions upon which said party relies for reversal or modification, together with a transcript of the pleadings before the compensation court and the orders of such court certified by the clerk thereof.⁷¹ Within thirty days from the date of the issuance of the order appealed from, the appellant must file a transcribed copy of the testimony and evidence taken by the court reporter before the compensation

court, which transcript must be certified by the stenographer who made the record and must be settled by the compensation court, and as such constitutes the bill of exceptions. Usually the transcript of the pleadings before the compensation court and the orders of the court certified by the clerk can be furnished on fairly short notice since the same are not usually very lengthy. However, if one intends to appeal, sufficient time should be given the clerk of the compensation court to take care of the preparation thereof in conjunction with all other business of the court. The charge for such transcript is nominal. It should be remembered that the transcribed copy of the testimony and evidence certified by the reporter and settled by the compensation court must be filed, not within thirty days of the date of the filing of the appeal, but thirty days from the date of the order appealed from. In order to confer jurisdiction upon the district court in an appeal following a rehearing, it is only necessary that the verified petition be on file together with a transcript of the pleadings and orders of the compensation court.⁷² On appeal from the compensation court the bill of exceptions need not be served upon the adverse party or his attorney before it is filed in the district court.⁷³

Within seven days after the filing of such petition on appeal, a copy should be served upon the adverse party in the same manner as summons is served as provided by the other sections of the act, and return of service is to be made within five days thereafter.⁷⁴

The duty of serving a copy of the petition upon the adverse party within the time provided is imposed upon the clerk of the district court, and there is no requirement for a praecipe under the compensation law, and the failure of the clerk to carry out his duties does not deprive a party of his right to review.

The provision in the statute requiring hearing before said court within fourteen days is directory rather than mandatory, and the court retains jurisdiction even though the hearing is not had within said period.

The statute sets forth the grounds upon which a judgment, order or award of the Nebraska compensation court may be set aside:

- (1) The court acted without or in excess of its powers.
- (2) The order or award was procured by fraud.
- (3) The findings of fact by the court are not supported by the record.
- (4) The findings of fact by the court do not support the order or award.

It will be noted that the statute indicates the judgment, order or award of the Nebraska workmen's compensation court "shall be set aside" only upon certain grounds. It has been held by the Supreme Court that the appeal to the district court after rehearing is in the nature of an error proceedings and as such is not a trial *de novo* on the record. In *Miller v. Peterson*, 165 Neb. 344, the court stated:

the appellant contends that an appeal to the district court after a rehearing before the compensation court *en banc* is in the nature of an error proceeding and the district court is without authority in such a case to disturb questions of fact supported by the evidence. The previous holdings of this court support this contention. *Solheim v. Hastings Housing Co.*, 151 Neb. 264, 37 N.W.2d 212, and cases therein cited.

The court has indicated, however, that in the event the district court exceeds its authority with respect to the consideration of the case as a proceeding in error and tries it *de novo* on the record, since the Supreme Court hears the case *de novo*, it is error without prejudice.

It may also be pointed out that in the event the plaintiff is unable to secure funds with which to procure the transcript and bill of exceptions, a poverty affidavit may be filed with the workmen's compensation court, and the cost of such transcript and bill of exceptions is to be furnished and paid by the compensation court upon presentation of said affidavit.⁷⁵

The name of the insurance company may be included at any stage of the proceedings, and they may be made an additional party.⁷⁶

In the event the district court, in reviewing a case after rehearing, concludes that the compensation court *en banc* failed to make proper findings, or that the award was not supported by the evidence, it is felt that the proper procedure for the district court would be to remand the case to the compensation court with instructions.

Section 48-184 provides that the court shall hear arguments of counsel and "render judgment thereon according to the form of law; provided that a judgment, order or award of the Nebraska workmen's compensation court shall be set aside only . . ." upon certain grounds which are set out. The four grounds upon which a judgment can be set aside are the same grounds as shown in Section 48-185 which have application to the Supreme Court. The only difference is that the third ground, "The findings of fact are not supported by the evidence as disclosed by the record," has added to it, when applied to the Supreme

Court, "and, if so found, the cause shall be considered *de novo* upon the record"

The Supreme Court has indicated in view of this that the only time a trial *de novo* in the Supreme Court is authorized is on the third ground where the findings of fact by the tribunal authorized to make such determination are not supported by the evidence.⁷⁷ In the Peek case, a complete trial on the merits was had in the district court, but the district court had sustained a motion to dismiss and no findings of fact were made, such dismissal being on the basis of jurisdiction. The Supreme Court then reversed the dismissal and remanded the case back to the district court for further proceedings.

Once the district court has acquired jurisdiction and has issued an order or award, the court retains jurisdiction such that in the event, at a later date, there has been an increase or decrease of disability, the additional application should be made to the district court which issued the order, and not to the compensation court as a new proceeding.⁷⁸

In an appeal to the Supreme Court from a district court judgment in a compensation case, it is not necessary that there be a motion for a new trial in order for the Supreme Court to try the case *de novo* on the record, but in the event there are errors at law which the party desires reviewed, the motion for a new trial should be made and the errors assigned and discussed in the brief filed in the Supreme Court, or they will not be considered.⁷⁹

NOTES

- ¹ Sec. 27-1314, R.S. Neb. 1943, Re. 1956.
- ² Sec. 27-1302, 26-105, 24-554, R.S. Neb. 1943, Re. 1956.
- ³ Security Mut. Life Ins. Co. v. Gilliam, 143 Neb. 673, 10 N.W.2d 670.
- ⁴ Drier v. Knowles Van Lines, Inc. 144 Neb. 619, 14 N.W.2d 222; Larson v. Wegner, 120 Neb. 449, 233 N.W. 253.
- ⁵ *In re* Estate of Kothe, 131 Neb. 780, 270 N.W. 117.
- ⁶ McClay v. City of Lincoln, 32 Neb. 422, 49 N.W. 482; Sec. 15-842 and 16-729, R.S. Neb. 1943, Re. 1954.
- ⁷ Sec. 26-106, R.S. Neb. 1943, Re. 1956.
- ⁸ Linde v. Wertz, 147 Neb. 454, 23 N.W.2d 703.
- ⁹ Kates v. Spencer, 105 Neb. 599, 181 N.W. 520; Bree Bros. v. Firestone, 84 Neb. 126, 120 N.W. 935.
- ¹⁰ Welch v. Walla, 102 Neb. 84, 165 N.W. 895.
- ¹¹ Union Pacific R. v. Marston, 22 Neb. 721, 36 N.W. 153.
- ¹² Driver v. Knowles Van Lines, Inc., 144 Neb. 619, 14 N.W.2d 222.

- 13 Sec. 26-1104 and 27-1301, R.S. Neb. 1943, Re. 1956.
- 14 *Coleman v. Spearman*, 68 Neb. 28, 93 N.W. 983.
- 15 *In re Estate of Marsh*, 145 Neb. 559, 17 N.W.2d 471.
- 16 *Phelps v. Blome*, 150 Neb. 547, 35 N.W.2d 93.
- 17 *In re Estate of Marsh*, 145 Neb. 559, 17 N.W.2d 471.
- 18 Sec. 29-1109 and 27-1306, R.S. Neb. 1943, Re. 1956.
- 19 *Hess v. Hess*, 78 Neb. 347, 110 N.W. 999.
Rice v. McGrath, 162 Neb. 511, 76 N.W.2d 428.
- 20 *Traill v. Ostermeier*, 140 Neb. 432, 300 N.W.2d 375.
- 21 *Myers v. Hall County*, 130 Neb. 13, 263 N.W. 486.
Sec. 27-1306, R.S. Neb. 1943, Re. 1956.
Rice v. McGrath, *supra*.
- 22 *Jensen v. Omaha Public Power Dist.*, 159 Neb. 277, 66 N.W.2d 591.
- 23 *Grainger Bros. v. First Natl. Bank of Sutton*, 63 Neb. 46, 88 N.W. 121.
- 24 *Packer v. Snyder, Malone, Coffman Co.*, 133 Neb. 756, 277 N.W. 60.
Short v. Bollen, 130 Neb. 728, 66 N.W. 635.
- 25 Sec. 27-1310, R.S. Neb. 1943, Re. 1956.
- 26 R.S. Neb. 1943, Re. 1956.
- 27 See Chap. XL Appealable Orders Vol. 3 *Nebraska Probate and Administration*, Whitford.
- 28 30-1602 R.S. Neb. 1943, Re. 1956.
- 29 *In re Estate of Bednar*, 151 Neb. 242, 37 N.W.2d 195.
- 30 *In re Runyon's Estate*, 111 Neb. 635, 197 N.W. 417.
- 31 *Stewart v. Raper*, 85 Neb. 816, 124 N.W. 472.
- 32 *In re Estate of McShane*, 84 Neb. 70, 120 N.W. 1018.
- 33 *Estate of House*, 144 Neb. 870, 15 N.W.2d 56.
- 34 *In re Estate of Creighton*, *supra*.
- 35 *In re McLean's Estate*, 138 Neb. 752, 295 N.W. 270.
In re Estate of Hoagland, 128 Neb. 219, 258 N.W. 538.
- 36 *In re Estate of Kothe*, 131 Neb. 780, 270 N.W. 117.
- 37 *Drier v. Knowles Van Line*, 144 Neb. 619, 14 N.W.2d 222.
- 38 *In re Marsh's Estate*, 145 Neb. 559, 17 N.W.2d 471.
- 39 *In re Estate of Meyers*, 152 Neb. 165.
- 40 76-715, R.S. Neb. 1943, Re. 1958.
- 41 Sec. 76-717, R.S. Neb. 1943, Re. 1958, as amended by L.B. 407-1961.
- 42 Secs. 24-544, 27-1301 to 27-1315, R.S. Neb. 1943, Re. 1956, and Sec. 76-717, R.S. Neb. 1943, Re. 1958.
- 43 *City of Seward v. Gruntorad*, 158 Neb. 143; 62 N.W.2d 537 (1954).
Jensen v. Omaha P.P. Dist., 159 Neb. 277; 66 N.W.2d 591 (1954).
- 44 Sec. 27-1303, R.R.S. 1954, R.E. .

- ⁴⁵ Sec. 76-721, R.S. Neb. 1943, Re. 1958.
- ⁴⁶ Hoesley v. Dept. of Roads & Irrigation, 143 Neb. 387; 9 N.W.2d 523.
- ⁴⁷ Sec. 27-1416, R.S. Neb. 1943, Re. 1956.
- ⁴⁸ Sec. 27-1417, R.S. Neb. 1943, Re. 1956.
- ⁴⁹ Neb. Const. Art. V, Sec. 17.
- ⁵⁰ R.S. Neb. 1943, Re. 1956.
- ⁵¹ Sec. 29-612, R.S. Neb. 1943, Re. 1956.
- ⁵² Sec. 29-613, R.S. Neb. 1943, Re. 1956.
- ⁵³ Ruffing v. State, 80 Neb. 555, 114 N.W. 583.
- ⁵⁴ Sec. 29-614, R.S. Neb. 1943, Re. 1956.
- ⁵⁵ Lindley v. State, 117 Neb. 597, 221 N.W. 706.
- ⁵⁶ Sec. 29-617, R.S. 1943, Re. 1956.
- ⁵⁷ Sec. 29-618, R.S. 1943, Re. 1956.
- ⁵⁸ Richey v. Sealey, 68 Neb. 120, 93 N.W. 977; 94 N.W.972; 97 N.W.818.
- ⁵⁹ Record v. Butters, 42 Neb. 786, 16 N.W.2d 1019.
- ⁶⁰ New Home Sewing Machine Co. v. Thornburg, 56 Neb. 636, 77 N.W. 86.
- ⁶¹ Sec. 48-178, R.S. Neb. 1943, Re. 1960.
- ⁶² Sec. 48-181.
- ⁶³ Hansen v. Paxton & Vierling Iron Wks., 284 N.W. 352, 135 Neb. 867.
Duering v. Village of Upland, Neb., 251 N.W. 819, 125 Neb. 659. Jolliffe
v. City of North Platte, 297 N.W. 666, 139 Neb. 431.
- ⁶⁴ Sporcic v. Swift, 30 N.W.2d 891, 149 Neb. 246.
- ⁶⁵ Peek v. Ayres Auto Supply, 44 N.W.2d 321, 155 Neb. 233.
- ⁶⁶ Bame v. Lepsett, Inc., *Nebr. S. Ct. Journal*, p. 623.
- ⁶⁷ Light v. Nebraska Workmen's Compensation Court, 166 Neb. 548, 89
N.W.2d 833.
- ⁶⁸ Peek v. Ayres Auto Supply, 44 N.W.2d 321, 155 Neb. 233.
- ⁶⁹ Secs. 48-177 and 48-179, R.S. Neb. 1943, Re. 1960.
- ⁷⁰ Chilen v. Commercial Cas. Ins. Co., 283 N. W. 366; 135 Neb. 619.
- ⁷¹ Sec. 48-182, R.S. Neb. 1943, Re. 1960.
- ⁷² Geller v. Elastic Stop Nut Corporation, 147 Neb. 330, 23 N.W.2d 271;
Henderson v. Wilson, 137 Neb. 693, 291 N.W. 96.
- ⁷³ Wrede v. City of David City, 137 Neb. 194, 288 N.W. 542.
- ⁷⁴ Sec. 48-183.
- ⁷⁵ Sec. 48-182, R.S. Neb. 1943, Re. 1960.
- ⁷⁶ Peek v. Ayres Auto Supply, 44 N.W.2d 321, 155 Neb. 233.
- ⁷⁷ *Ibid.*
- ⁷⁸ *Ibid.*
- ⁷⁹ Oertle v. Oertle, 21 N.W.2d 447, 146 Neb. 746.

FRIDAY AFTERNOON SESSION

November 3, 1961

[The Friday afternoon session was called to order by Chairman John C. Mason at 2:10 o'clock.]

CHAIRMAN MASON: Gentlemen, for this afternoon's program we are fortunate to have with us Mr. Frederick B. Wiener of Washington, D.C., practicing attorney in Washington, who does a considerable amount of appellate work.

Mr. Wiener is a graduate of the Harvard Law class of 1930, practiced in Providence for three years and then went into government service both with the civilian and later the military end of the government. During the course of his service for the government he was Assistant to the Solicitor General of the United States. He is a lecturer at the George Washington University, a reporter to the committee of the Supreme Court of the United States on the revision of its rules in 1953 and '54. He has been in private practice in Washington since 1948.

He is the author of a very excellent book called *Briefing and Arguing Federal Appeals*. The latest edition is the 1961 edition which I hold in my hand. I believe it will be of interest to you to read one paragraph from the foreword to the book, which was written by a former justice of the United States Supreme Court, Sherman Minton, in which he says: "This book is a guide to handling of cases on appeal in the federal courts by one who is eminently qualified to instruct and direct in this field. The author is a distinguished and able advocate at the Bar of the Supreme Court of the United States with wide experience in appellate work stemming from his position as a former Assistant to the Solicitor General of the United States, and then from an extensive private practice."

I think it would be hard to find a better qualification and recommendation than one from a former justice of the United States Supreme Court.

Mr. Wiener is going to speak to us this afternoon in the general area of the techniques of appellate presentations. The first part of his presentation is titled "Avoidable Faults in Appellate Briefs," and the second part will be entitled "Curable Faults in Oral Argument." We will have a slight break between the two portions of the presentation and, as you know, the House meets at 4:00 o'clock immediately following this meeting.

It is my pleasure then to present to you at this time Mr. Frederick B. Wiener of Washington, D.C.

AVOIDABLE FAULTS IN APPELLATE BRIEFS

Frederick B. Wiener

Mr. Mason, Members of the Nebraska Bar Association: The question is sometimes asked in bars and over dinner tables, "Who is worse off, the patient with the poor doctor or the client with a poor lawyer?" The answer is that the fellow in the really tough spot is the client with a poor lawyer because the patient with the poor doctor at least has nature on his side.

Many a rich client, it has been well said, has a poor lawyer, because lawyers can be divided into three groups: the able, the unable, and the "lament-able." There have been unkind persons who have said that there are three stages in any lawyer's life: getting on, getting honor, and finally getting honest. What I have to say applies to all three stages.

I am going to discuss briefs first and then oral argument, but they are really related, and they are related to this extent, that we have developed over here in this country a very different technique from that which the British follow today or from that which lawyers in this country followed one hundred or one hundred and fifty years ago, and that stems from the shortness of time for oral argument.

In the English courts there is no time limit on oral argument. In the English Court of Appeal there are no written briefs. When you get a decision that you wish particularly to call to the attention of the courts you pull out the book, you read from it, and the judges get the books and the judge says, "Yes, but Lord Beaverbottom said so-and-so. What do you say to that?" Then you discuss that, and there is no time limit. At the end of this long discussion they are frequently able to decide the case orally from the bench.

That is the way it was in our courts one hundred or one hundred fifty years ago. You go through the old *Journals* of the Supreme Court and you won't find cases argued in October and decided in June; you will find them argued in October for three or four or five days, then decided about three weeks later. Because they were able to get the case from the oral presentation, they didn't have to look to the written brief.

Now, of course, it is different. The brief is very important with the shortness of time allowed for oral argument.

I will deal with the essentials and then accentuate the positive. I will point out what I consider to be the ten essentials and the avoidable faults if you ignore the essentials. As far as time permits I will illustrate with some cases.

Now, I don't have to tell you gentlemen that all cases are divided into two groups: the interesting cases and the other fellow's cases. I will, of course, discuss the interesting cases.

The first essential is to remember that a brief is an argument. It is a written argument; it is not an essay, it is not a law review article. I won't for a moment denigrate a law review article, but it isn't a brief. A brief must be a written argument. Any time a brief is a discursive essay, not only will the lawyer writing it risk the loss of his case but he may lead the court into serious error.

My prime example on that is the *Cramer Treason Case*, 325 U.S. 1, where the government filed a 472-page appendix which was a discursive essay, and then on top of that a rambling commentary which it called its brief. Rarely has a court made as demonstrable an historical error as the Supreme Court in the *Cramer* case, saying that the constitutional definition of treason was something new, whereas somewhere buried in this 400-odd-page commentary was the quotation from the works of Mr. Justice James Wilson who had written the treason clause in the Constitutional Convention and said, "We took over the old language in order to take over the old meaning." And that was lost because the lads wrote an essay instead of an argument.

I put this as the first essential because if you don't realize that a brief is a written argument, if you feel you must be impartial, if you must be discursive it would seem . . . but on the other hand, if that is your approach I strongly suggest that you stick to estate planning and holding the hands of wealthy clients, because you won't be writing a good appellate brief.

The second essential is compliance with rules of court. There are some courts where the clerk will not receive a brief unless it complies with rules of court, and you had better be there to comply with the deadline because there are some courts that will dismiss appeals when the briefs are late.

Court rules vary. Court rules vary considerably, and some lawyers are not always able to see the wisdom of the rules that the courts before which they practice have prescribed.

Please bear in mind that an appellate argument is an exercise in persuasion, that the rules represent the particular preferences of the tribunal you are seeking to persuade. If you want to persuade them to decide in your favor you had better cater to their prejudices or their predilections or their curious notions.

After all, if you are courting a sweet young thing in a bar or perhaps in a Thunderbird and she wants Scotch, don't try to

tell her how much more wonderful bourbon is; you are trying to persuade her. Let her have Scotch!

If the judges want their briefs written a certain way, comply with their preferences.

Also watch out for obsolescence. Don't follow somebody's form of a brief just because he was a great man a generation ago. Don't follow the Sears, Roebuck catalog of form. Briefs that were good and that complied with the rules a generation ago may not comply today.

Third essential: effective statement of facts. Once you are within the framework of the rules, that is the most important part of any brief. It is told that Mr. Justice Brandeis, who would let his law clerks write drafts of opinions, never let them write the draft statement of facts. He would write his own statement of facts, dug out from the raw material of the record, because he felt that until he was sure of the facts he had no right to be fascinated by legal principles that might not be applicable to the facts before him.

The two greatest shortcomings in most statements of facts are at the extremes. On the one hand, many statements are too dry. I remember a good many years ago when I first came to the bar—and it was so long ago that I hope the younger members will permit me to speak from those old days when following the last law school examination we had to go to a bootlegger to get some whisky; you people don't remember that; I told Dan Stubbs that he and I were at the awkward stage of a military career: we were too old for active duty and too young to draw retirement pay—when I first came to the bar my chief said, "The great mistake that the lads here make is that they write a beautiful brief on the law and then just before they send it to the printer they toss in a very dry short statement of facts—all wrong." And it is all wrong. The first part of any brief to be written is the statement of facts. Follow Justice Brandeis on that. Write your statement of facts first before you start on the argument on the law, and any time you think you can do it otherwise you'll find you were wrong. So the first error at one extreme is that your statement is too dry. It doesn't make the most of the facts that you have in the record. It doesn't bring out the juicy bits of testimony, it doesn't juxtapose them in order to create on the part of the court a feeling of indignation that such a thing should have befallen your client.

The extreme on the other hand is editorializing. Editorializing has no part in the statement. Argument belongs under argument. There you can wring all the changes, but the state-

ment must be factual, purely factual. Get all you can out of it but don't editorialize.

Other difficulties: too many footnotes. A footnote is a signal to stop. The footnote should be held to a very small minimum, just very incidental explanations. Don't argue your case, don't state your case in footnotes.

Another great mistake is either insufficient or inaccurate record references. That is the test of a lawyer. Any time a court reads a brief where the record references are nonexistent or, even worse, where the record references don't support the statement, look out! "*Falsus in uno, falsus in omnibus*," and if the court finds you are taking liberties with the facts and the record, they aren't going to believe you.

Fourth essential: good, clear, forceful English. A lawyer of my acquaintance says, "Emphasize the importance of style." Well, it is a little bit like saying to a Plain Jane, "Honey, if you were beautiful you would be so much more attractive." If a lawyer knows how to write well he will be a more effective brief-writer than if he doesn't know how to write well. Now how can you develop a style as opposed to merely grammatical writing? And I am not underemphasizing grammatical writing either.

Well, I suppose the thing to do is to look at the examples of persons who can write or who have written good argumentative prose, and I would suggest as a starter the opinions of Charles Evans Hughes, particularly on those rare occasions when he was moved to dissent. You read those pounding, pulsating sentences, moving forward to a conclusion, and you will see what good argumentative writing can be. Not epigrammatic. Epigram is a luxury allowed only to the bench. When you are arguing, when you are trying to persuade them, you've got to be clear, and you've got to be argumentative.

That brings me to the next essential: argumentative headings. The difference there is between the American newspaper headline and the English newspaper headline. Turn to the sports page: "Bums Down Braves." That at least is assertive. The British would be very topical: "Test Match at Lords." Tells you nothing!

To take an example, the topical would be the question of laches. The assertive would be, "This suit is barred by laches," and the argumentative would be, "This suit is barred by laches because brought more than twenty-five years after the issuance of the original certificate." So make your headings argumentative and stick to that when you get to the reply brief.

Now the worst kind of heading for a reply brief would be "Replying to Appellant's Point One." That's no good, that's not argumentative, that doesn't tell the court what your position is. You should again use argumentative headings in your reply brief so that the court will know what your position is.

Further, never let the other side write your brief. Put your own strongest foot forward. Don't just follow the other side. One of the ablest of our solicitors general once asked at a conference, "How is the government's brief in the Schmaus case coming along?" And when the reply was, "Well, we haven't started it; we haven't had the brief on the other side," he said, "What's the matter? Haven't we got a case?"

Write your own brief. Write it affirmatively, and put your strongest foot forward. Now to illustrate from some interesting cases.

In the Chandler treason case—he was the Paul Revere of the Nazi radio network—he had been indicted in the District of Columbia. The plane bringing him from Newfoundland couldn't retract its landing gear, so instead of landing at Bolling Field it had to set down at Westover in Massachusetts. He was then re-indicted in Massachusetts and brought there for trial.

The first point that Chandler's court-appointed attorneys—and they did an awfully good job—put was that he was brought into the wrong district. Well, of course that was fundamental to their case, but it was only a trifle to the government's case. The important point for the government was that what this monkey had done constituted the crime of treason. So Chandler said first that he was tried in the wrong district, and the government said broadcasting propaganda for an enemy constitutes an act of treason. Don't let the other side write your brief!

In *Reed v. Colvert*, the case involving the trial by court martial of two self-made widows—they were civilians and they had killed their husbands—the government on rehearing concentrated on what it thought to be the practical necessities of trying biddies like this by court martial. The women put forward the constitutional issue that civilians cannot be tried by court martial in time of peace, and relegated the so-called practical consideration to the end.

And it is the same in any kind of a case, ladies and gentlemen. Put your own strongest foot forward and don't, if you are for the appellee or respondent, don't follow the other side's order simply because they put first a point that they think is more helpful to them.

Sixth essential: appealing formulation of the questions presented. That comes up mostly on certiorari or if you have a situation in state courts where there is a discretionary review. Try to make your questions appealing. Try to make them induce an affirmative answer. I can't usefully in the short time here take up many examples. I can only say that you must phrase the question as sympathetically as possible but make a fair formulation, because if your formulation is unfair it may explode in your face.

Seventh essential: sound analysis of the legal problem in argument on the law. I'll deal first with the problems of analysis and then certain problems of technique.

The first problem of analysis is to clear away the underbrush. What are and what are not the important issues? Let me recur once more to *Reed v. Colvert* and the self-made widows. There was some suggestion in the original opinions that the foreign countries, Japan and England, had ceded jurisdiction to the United States. Well, that has a nice ring to it. They ceded jurisdiction to us: why shouldn't we exercise it? So the problem was to analyze that concept, and the analysis finally made was this (while it didn't find its way into the opinion, there was no more talk about cession of jurisdiction): The analysis was that jurisdiction is a question of power.

It was dealt with first by a series of law school illustrations. Supposing a ship of one country, the personal sovereign, at anchor in the territorial waters of another country, the territorial sovereign. One case was Wildon Hughes' case in 120 U.S. 1—incidentally, if you have a memory for citations it will go a long way, because even if the judge doesn't remember the case or if you don't remember it, at least when you cite the case with confidence and assurance they will nod and figure you must know it, otherwise you wouldn't remember the citation.

Wildon Hughes' case was a Belgian ship at anchor in Jersey City, and one member of the crew "did in" another member of the crew. The Belgian consul asked that the guilty person be extradited to Belgium for trial. The outraged authorities of the State of New Jersey whose sovereignty had been violated by this homicidal act said, "No, we are going to try him." The court said, "Yes, the territorial sovereign's jurisdiction is primary; therefore New Jersey can try Wildon Hughes."

All right, let's take the converse of that. An American ship was 250 miles up the Congo River in what was then the Belgian Congo—that is when Belgian law governed and it wasn't a question of who had the right to eat the tender pieces—and a mur-

der was committed by one member of the American crew on another. Under American law we could try the accused, provided the Belgians waived their sovereignty. The Belgians weren't interested in what happened on an American ship 250 miles up the Congo River, so Flores was sailed back to Philadelphia and put on trial in the U.S. District Court for the Eastern District of Pennsylvania, which held in *U.S. v. Flores* in 289 U.S. that the personal sovereign had jurisdiction. Again no question of cession of jurisdiction; it was a question of which sovereign was to try him.

Then we have the case in the Fifth of Wheaton; I can remember the citations but not the name. That was a case where an American ship was in a Chinese river in 1819 and one member of the crew killed another one. Well, the Chinese weren't interested. After all, these were foreign devils killing each other. What did they care? So this bird—and I wish I could think of his name—was sailed back to Philadelphia and tried. He said, "Well, there is no statute of the United States reaching manslaughter on an American ship abroad." And the court said, "Yes, he goes free."

So where the statute of the personal sovereign doesn't make criminal what the man did, the prosecution fails, notwithstanding the consent of the territorial sovereign.

Oh, that was *U.S. v. Wilberger*. The names will come to you after a while—*U.S. v. Wilberger* in the Fifth of Wheaton.

Finally there was the Toff case, 350 U.S. 11. Toff was an American airman who killed a Korean. The Koreans weren't interested. Toff was sought to be tried by court martial, held that the court martial didn't have jurisdiction of the person. Toff went free.

So there again the consent of the territorial sovereign which in *Wilberger* didn't confer jurisdiction of the offense, in Toff didn't confer jurisdiction of the person.

Therefore we said in order to try these women, consent of the foreign sovereign is immaterial. You must show that the court, the particular court of the personal sovereign, has jurisdiction. And we went on from there and dealt with it as a matter of the Constitution of the United States: Did the U.S. Constitution confer on courts martial the right to try civilian women in time of peace?

This has been a little long, but I think the lesson is there. You must clear away your underbrush in your preliminary anal-

ysis in order to get to the heart of the question on which the case will turn and on which you will win or lose.

Avoid weak propositions, because no matter how many good propositions you may have in a case you will dilute every one of them if you leave a weak proposition in there.

Some time back I was delivering a similar talk to a law school group and one bright lad said, "How do you know when a proposition is weak?"

The only honest answer I could give him was, "You've just got to be a good enough lawyer to know." And there isn't any other answer.

There may be some weak propositions that you think are weak and that every other lawyer with whom you discuss the case thinks is weak, and the court will take it. Well, that is one of the inescapable vicissitudes of litigation, but by and large you ought to hold up your points at arm's length and decide for yourself, "Is this proposition worth anything, or will it hurt?"

Again, two examples: There was the DeRay case. DeRay was a question of the search of a man in a suspicious-looking automobile. I was then still feeding at the public trough. I felt we had a pretty good case, that there was a right to search this suspicious-looking gentleman. But there was also another point about the right to search the persons in the automobile and I had doubts about it. Notwithstanding those doubts it was left in and it colored the whole case, and we took an awful shellacking. So if you have any doubts about a proposition, if you don't feel you can make a convincing argument on it, then it is a weak proposition and you had better toss it out and rely on the strong ones.

Another case, *Williams v. Lee*. That was a question involving the right of the Arizona state courts to entertain a suit against reservation Indians in respect to the commercial transaction taking place on the reservation. The first point made on behalf of Lo—you know, Lo, the poor Indian—the first point made on behalf of the Indians was that there was a general immunity going back to *Wooster v. Georgia*. The second point was that it was bad under a regulation which said that the Department of the Interior wouldn't enforce claims by licensed traders against Indians where the sales were made on credit.

That was the non-constitutional point, and of course there was the duty to make it. Then in the course of writing the brief we learned that this regulation originally had said, "Sales on credits are made at the trader's own risk because the Depart-

ment is not going to lend its efforts to make the Indians pay," and that the latter clause had been eliminated from the regulation at the request of the traders' association which said, "Sure, we don't want the Interior Department to act as a collection agency for us, but at least you ought to use some moral suasion to teach the Indians the peculiarities of the white man's credit card system, namely that sometime Hilton *carte blanche* expects to be paid, so persuade them to pay their debts."

So the Interior Department said, "All right, we will do that," but they kept in their regulations that it is made at the trader's own risk if it is on credit.

Well, obviously that didn't make the transaction legally unenforceable so we frankly dropped that out of the brief because we thought it was too weak, and the proof of the pudding was that in the case of *Williams v. Lee*, which I think is somewhere in 357 U.S., the court decided the case on the broad constitutional ground and held that the Indians couldn't be sued in the state courts.

Another caution: Avoid arguments of last resort. After a long and complicated criminal trial with a record this long (two feet) that is standing up, it is really not very helpful to say that the indictment was duplicitous or that you should have got the motion for a bill of particulars. That is an argument of last resort that is labeled, carries its own built-in label of an argument of last resort. By putting in arguments like that you simply weaken what you have.

And finally, don't evade issues. There is a prevalent habit, I think, in government circles among people who have been at the trough too long that if you are faced with an embarrassing precedent there are only two things to do with it: One is to reply to it in a footnote, and the second is if it is *really* embarrassing don't mention it at all, and I believe this is called the sophisticated approach.

Now unless every member of the court is hopelessly obtuse—and that is a very unlikely possibility even if the other fellow and not yourself got the vacancy—unless everybody is hopelessly obtuse you're just not going to fool the court, because the other side is going to be screaming, and when you are up on your feet someone is going to say, "Well, Mr. Schmaus, what about this case that you don't mention in the brief?" By not mentioning it, you simply accentuate it for your opposition.

Only yesterday I had an argument. I said, "If your Honor please, these two in my view are the most important cases on this point, and my view seems to be shared by my opponents be-

cause they don't mention them at all." You just make it hard for yourself.

Another thing that ought to be treated very delicately is a request to overrule cases. If you can win, after all your job is not to restore the pristine symmetry of the law, your job is to win the case, and if you can find a convenient way around a precedent, don't make it hard for yourself by asking the court to overrule it, particularly when they are not ready to do so.

In that connection the last and best-known overruling, *Map v. Ohio*, which outlaws illegally-seized evidence in state prosecutions, was the result, not of a request by counsel, but of a feeling on the part of the majority of the court, "Let's stop this nonsense once and for all. Let's not have any illegally-seized evidence admissible in any case."

All right, let me talk something about evaluation of cases. Bear in mind that appellate courts are collegiate courts. There are several members, three, five, seven, or nine, and the opinion that appears is in a sense the least common denominator, and in most courts it represents a series of compromises. You mustn't be too easily taken in by what appears to be unanimity or a solid facade. You can get into some real difficulties if you take all majority opinions at face value.

Let me go back to the Toff case and the Hershberg case. Who was Hershberg? Hershberg was a Navy chief who had been taken prisoner by the Japs on Bataan, and from what some of his fellow prisoners told me he figured the Japs were going to win the war, and he decided he was going to be in on the winning side when it was over. So he mistreated some of his fellow prisoners, and after he was repatriated and the facts came to light, he was tried by court martial.

Meanwhile his enlistment had expired, the enlistment in which these offenses were committed, and he had re-enlisted. The question was, "Did the termination of the enlistment terminate the jurisdiction of the court martial to try him for the offenses committed within the terminated enlistment?" In the Hershberg case in 336 U.S., the Supreme Court said it did terminate it. This is statutory. One difficulty was that the Navy *Courts and Boards* and the Army's *Manual for Courts Martial* were different and this made it very difficult to argue that a different result flowed from the same statute. And the court said this is statutory. Well, Congress believed the court, took it at full face value, and when they enacted the Uniform Code of Military Justice in 1950 they put in Article 3-A designed to

catch cases like Hershberg later on with a recapture clause, and that was what was involved in the Toff case.

Toff had been discharged, was back in Pittsburgh shoveling coal at the steel mill before his participation in the murder of this Korean was discovered. The Air Force took him back to Korea from which he was recalled by a writ of habeas corpus, and then lo and behold to everyone's surprise it appeared that the deficiency was constitutional. So be careful about how you evaluate cases.

Certiorari denied and rehearing denied: Well, certiorari denied means nothing on the merits. There is a difference of opinion whether you should put it in a brief. I generally do just to prove to the court that I have used Shepard's *Citations*, but it doesn't add anything to the value of the case. And the rehearing denied on top of that adds nothing.

There is current in Washington a famous law clerk's story. The new law clerks—the term has only been going for two weeks, and Joe goes in to see what Charlie is doing and finds him reading a document. He takes it out of his hand and says, "My God, are you still reading petitions for rehearing?"

Petition for rehearing hasn't much of a chance so you don't have to cite that.

When you are in the law school and you are writing a brief for a moot court and you think that Justice A is a finer man and a sounder lawyer and a greater jurist than Justice B and you need his views, you can cite a dissent by Justice A. But suppose you have graduated and you are before a court, the Supreme Court specifically. Here is a dissent by Justice A which, if it could have five votes, would win the case but it has been written three or four times and it never got more than four. How do you suppose you are going to get another vote by citing that? The answer is, you're not.

You may find a passage in a concurring opinion that you like very much. Well, if it didn't appeal to the court before—most of the judges are still on the bench—you are not going to persuade the people you need to make a majority. Personally I do not decry the existence of concurring opinions, and the reason is that they give me a much better insight into how the judges are thinking than does the single prettied-up majority opinion to which all can subscribe, but I am not going to quote from a concurring opinion to a bench which hasn't accepted it.

Remember, it is an exercise in persuasion. If Susie doesn't like Scotch give her bourbon, don't argue with her. You are trying to persuade.

And don't think you are going to do any good by fawning on some member of the bench by citing his concurring opinions or referring to his law review articles or bar association dinners. Judges don't like to be fawned on. And besides, if you please one you might displease the eight, six, four, or two others.

All right, how do you distinguish cases? Distinguishing cases, ladies and gentlemen, is not something new invented in the twentieth century with the jet plane, television or even the motor car. Distinguishing cases goes back 650 years to the days of the year books. They were distinguishing cases then. And how do you distinguish cases? There is only one way to do it effectively, and that is to go on a very broad ground, and if you can't think of a broad ground you had better think about it some more until you can work out a broad ground. I haven't got time for illustrations.

One other thing, particularly if you are litigating with the government, remember it is written in the Book of Job, "Behold, my desire is that mine adversary had written a book." Look to see what they said the last time the case was up. Look at their old briefs. There is nothing as deadly as quoting a lawyer's earlier cases against him, particularly where he is representing the same client. After all, if I represent one client one day and say that a pump affixed to the ground is realty and the next day for another client I say it is real property, it is very different if I am the U.S. attorney or the solicitor general and have made a different statement in the same kind of case on behalf of the same client. So always go back to see what the monkey said last time, and you will always find it most rewarding.

If I may recur to my favorite obsession, the self-made widows, there was a footnote in Toff which said, "Indeed we think the case for the court martial of Toff is far stronger than that for the court martial of accompanying civilians." Oh boy, did I make mileage out of that a little later in the term and in the next year.

You have to use administrative rulings and materials. There is only one way to use them, and that is as admissions against interest. Remember on every flyleaf of the attorney general's opinions there is written in invisible ink the motto, "We strive to please." Every administrative ruling is written with an eye to, or perhaps because of, the direction from executive preferences, so use those only as admissions against interest.

And finally in respect of law reviews, remember the lads on the law review are still full of eagerness and high purposes. The judges on the court are older. As Mr. Justice Holmes once said,

"I don't object that the boys on the law review say I am wrong; what I object to is when they say I am right."

So use your law review materials as case finders. They are a very good cross check against the vagaries of the West Publishing Company's indexing and key number system. But don't cite a law school note as authority.

The eighth essential: convincing presentation of the evidence and argument on the facts. This is a very important subject. I can only outline the essentials. Basically you start by assertion, you follow it by documentation, you wind up by conclusion.

The ninth essential: careful attention to all portions of the brief. If you have an appendix of statutes, be sure that the statute you print in the brief is the statute as it stood when the transactions in question took place. If there have been amendments, illustrate them by the usual typographical aids, square brackets, italics, footnotes, what not, but always let the court see the statute at the time in question.

I remember once being up on my feet when a chief justice of the United States said, "I don't like the way these statutes appear in the appendix." This is not a very comfortable situation. What happened was that the brief was written and we let the secretary copy the section as it appeared in the pocket part at that time, which was not the way it was when the case arose. So don't trust that to your secretary, don't trust it to your law clerk, check it yourself. Remember old Professor Wambold's story about the precious gift given by a dying professor to his favorite pupil, the advice to verify citations.

Be sure to put in the relief desired. There have been some awfully red faces in awfully high courts because somebody submitted that the judgment should be reversed when all they meant was that the judgment on counts one and two should be reversed.

Then there are the things you can't afford to do, inexcusable inaccuracy, unsupported hyperbole, unwarranted screaming, and the worst of all, personalities in scandalous matter. It may well be that your opponent's disbarment is overdue. It may well be that the trial judge is known locally as "Old Man Necessity," because of course necessity knows no law. If so, the appellate court has seen more of his judgments than you have and they know it full well. Avoid personalities; the court has a hard enough time deciding the controversy before it without going into collateral controversies on whether counsel or the trial judge was the servant of brotherhood.

Citation forms: use the forms that the court uses and stay away from that abomination, the uniform system of citations as now put forward by the law reviews. Remember it is an exercise in persuasion. You are trying to make your audience feel comfortable and decide your way.

And the final essential, an impression of conviction that allays the reader's doubts and satisfies his curiosity. There are plenty of cases in which a judge reading both briefs will be left in doubt as to the result, but suppose he only reads *your* brief. If he is left in doubt after reading just *your* brief, it is not a very good brief.

Well, that concludes it. I think I am within the time limit. I conclude that briefs are more of a chore and not as much fun as oral argument, but they are very important whenever your time for oral argument is limited, and they are particularly important in close cases, and of course in any kind of a close case whether it is common law, whether it is statutory interpretation, and of course above all if it is a constitutional question. It is a very important document. You cannot afford to give it a once over lightly.

This concludes the first lesson.

[Recess.]

CHAIRMAN MASON: Gentlemen, we will resume our program, the second portion of which will be devoted to a discussion of the oral argument under the title of "Curable Faults in Oral Argument." Mr. Wiener.

CURABLE FAULTS IN ORAL ARGUMENT

Frederick B. Wiener

Mr. Mason, Ladies and Gentlemen: We now get to the part of the appellate process that for me, at least, is the most fun. That is the oral argument. It is more than fun, however. It is a great mistake for any lawyer to think that oral argument is unimportant, even under the restricted time limits that American courts of appeal under the ever-mounting pressures of their calendars have been required to impose.

In the Supreme Court of Nebraska you get half an hour. In the Eighth Circuit you still get an hour on most matters. In the Supreme Court you get an hour on cases on the regular calendar and thirty minutes on cases on the summary calendar, and there are an awful lot of cases on the summary calendar. So you have got to prepare.

You remember the comment of Dr. Samuel Johnson, who said, "When a man knows he is to be hanged on the morrow it concentrates his mind wonderfully." Well, if you have only thirty minutes for an argument it should concentrate your argument wonderfully, because otherwise your time is going to expire before you even get into it.

It is important, because judges without exception say that the oral argument makes a tremendous impression on them even when it is short, because that enables the advocate to make his point to the court in a way that a written argument simply cannot do. It is terribly important; it is very important. It is not something to be neglected. It is not something to be tossed off, and it is not something to be left to the office boy.

The importance placed on oral argument by the Supreme Court is shown in one of its new rules: "The Court looks with disfavor on the submission of cases on briefs without oral argument and therefore may, notwithstanding such submission, require oral argument by the parties."

In the first case that was submitted after the new rules went into effect, instead of the chief justice saying, "It may be submitted," he said, "The submission will be taken under advisement," and on the next order day they came out with an order for argument and they appointed amicus curiae to argue for the lawyer who couldn't pay the fare.

Now I am going to talk about curable faults. This time I phrase my admonitions negatively. You remember that when Woodrow Wilson in 1918 proclaimed his fourteen points, Clemenceau cynically said, "Why, good Lord, God was content with only ten commandments!" Mr. John W. Davis, who certainly was perhaps the last of the giants, has a classic article on the argument of an appeal. He has only ten points. Negatively, perhaps you will forgive me if I take twelve.

The first curable fault is obliviousness to the purpose of advocacy. What are you trying to do? Are you trying to show what a wonderful fellow you are? Are you trying to let the courtroom know how mellifluous your syllables sound? Are you trying to tell off the court? Are you trying to put on a show for the client? Or are you trying to win his case?

There is an old story about the Yankee gambler down South before the wounds of the Civil War had quite healed—I am not sure whether they have healed yet, after a trip to New Orleans; I would say that some of the centennial re-enactments in Alabama have been a little bit too realistic—but this was a number

of years back and the Yankee gambler cleaned out the talent in a sleepy Southern town, and as he was raking in the money his associates whom he had cleaned out gathered around and said, "Well, now, stranger, we've played poker with you, now we'd like your opinion on a military question. Who was the greater general, Ulysses Grant or Robert E. Lee?"

The Yankee gambler looked up at this circle around him and he said, "They paid off on Grant." Clients "pay off" on cases you win.

Some time back a very promising young man who had been one of Justice Frankfurter's law clerks died 'way before his time, and in the obituary remarks this is what the Justice said, and although it is a little long I am going to read it to you because I know of no short passage anywhere that better expresses what oral argument is supposed to do:

"From the first he showed that the stuff of the advocate was in him, and by the time he left the government he had fashioned himself into an accomplished practitioner of the art of persuasion. When he appeared at the lectern, erect and handsome, with an agreeable voice, serene rather than self-confident, tactful but firm, and always master of his case, the Court increasingly was assured of an argument that gave pleasure as well as enlightenment. He respected the traditions of the Supreme Court as a tribunal, not designed as a dozing audience for the reading of soliloquies, but as a questioning body, utilizing oral arguments as a means for exposing the difficulties of the case with a view to meeting them. He held up his share of the probing process, and members of the Court were kept alert to observe the responsibilities of the questioners. It is fair to say that in a few short years Stanley Silverberg had attained a stature as an advocate matched by few lawyers coming before the Court, including the most eminent and experienced members of the bar."

That is what you are trying to do.

Second curable fault: inadequate oral delivery. When you are before an appellate tribunal you are not indulging in oratory. You want to establish rapport with your listeners, and therefore you don't read to them because to read raises a veil between you and the audience.

Here is another of the Supreme Court rules: "Oral argument should undertake to emphasize and clarify the written argument appearing in the briefs theretofore filed. The Court looks with disfavor on any argument that is read from a prepared text."

What a commentary on the stuffed shirts who have been hired to read what someone else has written!

With respect to emphasis, again it is not oratory, it is not a Fourth of July address, it is not a jury speech. I remember a chief judge of a state court of last resort who was speaking about an argument he had just heard. It was a personal injury case. He said, "This lawyer made the same jury speech three times: once before the jury at the trial, once to the trial judge on motion for new trial, and the third time to us on appeal."

It is not oratory, it is not a jury speech, but you must have some emphasis. You've got to avoid the monotone. What is a monotone? Monotone is oral language without punctuation marks. You couldn't possibly read a book that wasn't punctuated. Well, an oral statement without punctuation is a monotone! "And then the committee asked the witness whether he was invoking his privilege against self-incrimination and the witness said he was not and when they asked what was he relying on he said due process of law and then they said do you contend that due process of law includes the privilege against self-incrimination and he said he didn't know." Pretty hard to follow, isn't it?

You've got to have some kind of emphasis. And then you've got to avoid what, for want of a better phrase, I will call the ministerial cadence where your voice goes up and down: "And so we say to the court if these practices which we have exposed on this record are permitted to remain in effect and be continued, then this article of our glorious Constitution will have been made a dead letter. Let us pray."

And then there is the mumble where the lawyer says, "Now this case involves the uh-validity of a uh-decision by the uh-Secretary of the Interior denying the uh-plaintiff's claim for a uh-patent to certain mineral shale uh-entries."

Finally, use the pause. After all, a pause is punctuation. You use a short pause for a comma, a longer pause for a semicolon, longer pauses for periods, and still longer pauses for paragraphs. When you get to the end of a new subject, since it would not be decorous to wave a red handkerchief, saying, "I am now coming to Point 2," perfectly simple! You finish Point 1 and you are ready for Point 2, you want to indicate the pause. [Takes a drink.] "I now come to my second point." There you are.

Then suppose the court isn't paying attention, and this does happen. Suppose they are not paying attention. Just stop. There is a sudden silence, they all look up and then you can give them your big point. It is an old dodge, but it is a sure way of recapturing their attention.

Also in addition to not reading, don't tie yourself down too closely to notes, because the more detailed your notes are the more apt you are to read them. It is inevitable. So don't tie yourself down to notes. Have topical outlines of notes before you.

Third curable fault: insufficient first impression. An oral argument, if you are topside, is not like a "whodunit." An oral argument is like a well-written newspaper story—you give away the heart of your presentation in the first paragraph. Let the court know at the outset what the case is about. Don't just say, "This is an appeal from the District Court for the District of Nebraska." I mean, "This case involves the validity of an order by the Interstate Commerce Commission." All right! Let them know what the case is about. Then if you are bottom side, if you are bottom side you must make some kind of an impact, because if you are for the appellee or the respondent the court has had its collective mind poisoned for twenty or perhaps fifteen minutes by your opponent, and they will be thinking, "What is the answer to this? Is there any answer?" You have got to take it right at the outset, and you have got to make some kind of an impression. You can't just say, "I would like to review very briefly the facts out of which this case arises." That has got all the impact of a lukewarm dish towel from last night's dishes. And you can't go up and say, "I want to correct a misstatement made by my opponent. The petitioner was not the president of the company, he was only a vice president."

No, you've got to say something that will rock them. There was one case—it was an alien property fraud in World War I and it was argued in World War II, so you can see that it supported at least two generations of lawyers while it was wending its weary course through the bureaus and through the courts. This was a case where the basic issue was whether the claimant had made fraudulent representations in getting back his property after the end of the first war. The case arose when his estate tried to get some more. Never go back and try to defraud the government on the same case twice running. It is very bad!

The last question asked counsel for the claimant was, "Were there any facts before the department at the time the claim was allowed that weren't known to the department at that time?" And counsel for the claimant said, "No."

And how did counsel for the government open up? "If the court please, this case involves very interesting questions regarding the scope of judicial review of administrative action." Oh boy, that's got real sex appeal, hasn't it?

Now what he could have said was this: "I'll answer the question that counsel was just asked. Yes, there were many facts not known to the department when they returned his money. They didn't know that in 1912 the claimant had said under oath that he was a German subject and not an American citizen. They didn't know that in 1913 he paid income taxes as a nonresident alien. They didn't know that in 1914 he traveled between Hawaii and San Francisco carrying an alien certificate. Those were facts they didn't know." My God, your case is won right there!

One other example: I had the Knauer denaturalization case, and this was my opening: "The question in this case is whether a good Nazi can be a good American." You will find it in 328 U.S. They decided he couldn't be. I regret to say there was a dissent.

The fourth curable fault: fuzzy statement of the facts. There is an old saying that the great power at the bar is the power of clear statement. If you are from New England you attribute that to Rufus Choate. If you are from the Deep South, you attribute it to Judah P. Benjamin. I suppose here you could attribute it to Roscoe Pound. At any rate, whoever your local forensic hero, you will find him quoted as saying, because it is eternally true, "The great power at the bar is the power of clear statement." State your facts clearly, tell the court what the case is about.

How do you formulate it? Well, suppose you are having lunch with somebody and he says, "Charlie, what's this next case of yours all about?" And you tell him. Well, if he can understand it, the court will be able to.

You state the case. You start with the trunk and go out to the branches. You don't start with the individual leaves. You tell the story chronologically, because chronologically is the way it happened.

You can't cross-reference by ear. In other words, you can write your brief, the facts on Point A, then the facts on Point B, then the argument on Point A, then the argument on Point B, but you can't cross-reference by ear. When you argue it orally you have got to give the facts first on A and then argue it, and then the facts on B and argue that, because nobody, nobody can cross-reference by ear.

Of course if you run up against a judge whose intake by ear is slow and whose mind moves as rapidly as the hour hand on the clock, he is going to be completely befuddled, and he will take up your precious time trying to get squared away and straightened up.

You eliminate the unessential facts. You get your dates down to round figures. You eliminate everything that seems unessential. What did the defendant wear? Well, if it is a contract case it doesn't make any difference what he wore. If it is a will contest and the question is mental capacity, then the fact that the testator came to the lawyer's office in pajamas and a straw hat may be very material. And in a criminal case if the witnesses say that they saw a man in blue overalls and your client, the defendant, was wearing blue overalls, I would say that was material. But in an I.C.C. case or a tax case or the ordinary case it doesn't make any difference. So go over your facts, decide what is essential, and unless it is very essential eliminate it, because you have only thirty or sixty minutes and you won't be able to give a complete *Esquire* or *Vogue* description of what the parties wore.

Fifth curable fault: sketchy knowledge of the record. If I were to reveal the advocate's secret weapon it would be complete knowledge of the record. I say "secret weapon"; it is still a secret to many of them.

I am going to be dogmatic about this, not because I can talk about years ago when we drank bootleg gin in law school instead of the fine bourbon that you can buy at the liquor store, but because like the old farmer back home in a rural county of Rhode Island who was asked one day, "Do you believe in baptism?"

"Oh," he said, "hell, yes, I've seen it done!"

Well, I have seen cases won and lost on oral argument because counsel didn't know his record. In going up before a court you have to bear in mind in framing your argument, "Do the judges read the briefs in advance?" In the Eighth Circuit, so Judge Gardner wrote me, the practice there is with the individual judge. In the Supreme Court of Nebraska, so I am advised, the practice there is with the individual judge. So it does in the U.S. Supreme Court, although I am inclined to think that more judges now read the briefs than not, and certainly more than did, say, twenty years ago.

The other thing you have to remember is: when do they consult? When do they make up their minds? Well, if you are interested in what it is the Supreme Court of Nebraska does, there is an article by Chief Justice Simmons in the *Nebraska Law Review* for December '43, and he tells the practice. They have a conference after each argument. The Eighth Circuit does the same. In the Supreme Court the conference is on Friday, after the first four days of argument.

Well, now you can imagine that the oral impression on those first few days will carry over, and particularly is this so in the Supreme Court of Nebraska or in the Eighth Circuit where they have their conferences right after the argument. So it is very important, and the impression you make orally is going to carry over. That is why you cannot afford to do a once over lightly on the record on the train or the plane going from where you are to where the court sits. So know your record.

How do you learn a record? The best way, ladies and gentlemen, is to read it and then re-read it, and if you have the famous flypaper memory where everything sticks you are that much ahead. If your memory is a little slower you have to work at it, but the thing to do is to tab your record so you can turn to the complaint and there is the answer, there is the testimony arranged by witnesses, there is the opinion below, and the exhibits. You learn the record and you make a point of learning it. You make a point of never getting up to argue a case unless you know the record. Any time, any time you think you can argue the case without studying the record, then hardening of the forensic arteries has set in and you had better move over and make room for the next generation.

Suppose you are arguing an I.C.C. case. The judge says, "Where in the record is the report of the Commission?"

You fumble and you can't find it, and your opponent stage whispers, "Page 28." Is that going to help your argument? Is that going to help your case?

I remember listening to a very involved antitrust argument in the Supreme Court some ten or fifteen years ago. There were numerous parties, eminent members of the bar, and I suppose that the fee of this gentleman I am now about to refer to for that argument, at least the fee to his firm, must have been more than most lawyers in this state make per year. He started in by saying, "If the court please, in the division of the case that we have agreed upon, I am going to discuss paragraph 3-D of the final decree."

"Where is that in the record?"

You never saw such a fumble match in your life. Oh, he fumbled and his juniors fumbled and the third echelon who didn't have enough seniority to sit up at counsel table fumbled, and finally they came up with it. My question is: how much confidence do you suppose that start created for the rest of what he was going to say?

You've got to know your record, and you've got to be able to put your finger on the essential points. If there are juicy

quotes or something on which the case may turn, have that especially tabbed too so you can turn to it at once.

Sixth curable fault: material misstatement of fact. Well, the two easiest ways to lose an appeal if you are the appellant is to move to dismiss it, or if you are the appellees, to file a confession of error. And the next easiest way to lose an appeal is to make a material misstatement of fact in open court that is exposed.

I remember once arguing a case against an eminent member of a metropolitan bar. He had done a once over lightly because he had attained such eminence where study of a record wasn't necessary. I had ten minutes of rebuttal time. That was a very close case. It could have gone either way. I was able to expose that misstatement, and you could see the judges' faces harden, and right on the basis of that, I won a case that was very much touch and go throughout. It is fatal.

Oh, I suppose it can be done safely once in a while. After all, sometimes you can pass a car on a curving hill and still not be in the traffic statistics the next morning, but it is awfully risky. And if you don't know, it is much better to say to the court, "I'll have to check that and submit a memorandum to the clerk" than to try to "bull it through."

Seventh curable fault: insufficient preparation. I don't suppose that there is anyone who would file with the clerk of the appellate court his first draft of a brief. Why, then, file with the appellate court your first draft of oral argument?

I was once talking at a law school, which shall be nameless. When I asked for questions during the question period and a budding young barrister asked, "Just where do you file this first draft of oral argument?" the only answer I could honestly give him was, "Not with the court."

That means that you go over and rehearse your argument. Don't be ashamed to rehearse. Justice Jackson said that, after all, Caruso, who was tied down to a fixed libretto and a fixed score, would rehearse even though he had sung the aria one hundred times. Now why should a lawyer be ashamed to rehearse? You've got to rehearse if only for one reason. You've got to know how much time you are taking, because when the time expires you sit down.

There is a story about Chief Justice Hughes which I suspect is not entirely apocryphal that he once stopped an eminent member of the New York bar right in the middle of the word "if."

There is another story. In those days you could still ask the chief justice how much time you had remaining. Chief Justice

Hughes had a large old turnip gold watch that his law students at Cornell had given him years before. When Counsel said, "How much time do I have left, your Honor?" He said, "Fourteen seconds."

You are not like the lawyers in the court of appeals where you can go on for four days, or the House of Lords where they will give you a week while you are reading what was said in all the cases. You have a time limit, and when the time is up you are through. Therefore you had better go over your argument first to find out how much time you are taking, and second to iron out the infelicities. In the first draft there are bound to be infelicities.

All right, eighth curable fault: failure to plan. That isn't a facet of preparation, but it has to do with the matter of elimination. Remember you have thirty or sixty minutes so you have to eliminate and eliminate and eliminate. You've only got thirty minutes. You've only got sixty minutes. Some of that time is going to be taken by questioning. Some of it, if you are topside, has got to be saved for rebuttal. So go over your argument to eliminate the repetition, eliminate the harping on the obvious, eliminate the minor points, and don't ever be ashamed to say, "My failure to discuss point so-and-so is simply due to the shortness of time. We covered that very fully in our briefs and I refer the court to that discussion."

Ninth curable fault: unnecessary complexities. That is related to the other, but whereas the last point was the failure to plan, this has to do with the unsound plan. Don't be too complicated. Remember you are getting it across by ear. The judges can't go back. In a brief, yes, they can turn back to what you said five pages ago. Orally they can't turn back to what you said five minutes ago, so you must leave a definite impression, and there again, as in briefs, you must eliminate your weak points. I mentioned that on briefs, but here are two quotations which are really worth while. One is by William D. Mitchell, who was a solicitor general and attorney general of the United States and a tremendously able advocate: "Some lawyers of course do not have enough confidence in their own judgment or are not competent to select weak points, but the most effective advocate is the one who has the courage to eliminate such arguments."

Judge Learned Hand, who finally died last summer full of years, honors and wisdom, said this of a patent lawyer, Charles Neeve: "With the courage that comes only of justified self-confidence he dared to rest his case upon its strongest point and so

avoided that appearance of weakness and uncertainty which comes to a clutter of arguments. Few lawyers are willing to do this. It is the mark of the most distinguished talent."

Remember that the next time a colleague says, "Are you abandoning this point?" Of course you are abandoning it if it is weak and if you've got any sense.

There are some lawyers to whom the concept of abandonment, of abandoning a point that they once made below, is like Adolph Hitler, that great military genius who wouldn't let his troops abandon a single strong point. Look what happened to him!

Tenth curable fault: wrong attitude toward the court. I remember a lawyer saying to me of the court after an argument, "They will show us our errors." Well, that is all right to say of the pastor or the village priest, to have that respectful attitude, but if you expect to win a case in court you can't expect the court to show you errors. They can find errors only as errors are pointed out to them.

I remember one colloquy engaged in by a government counsel and Mr. Justice Jackson. The justice asked, "How far does this power extend?"

The lawyer said, "That's for this court to say."

"I am asking for guidance."

You've got to give a court guidance. You must tell them.

Back in the late '30s and early '40s when governmental immunities were taking quite a beating, I can go with you and thumb through the reports and show you how the losing cases were argued for the government by lawyers who were so scared of the court and so lacking in confidence in their points that they just meekly surrendered and lost the cases. You can't do that, you can't be afraid of the court. You can't have a litter of intellectual kittens just because some judge says, "Now I don't know about that." You've got to stand up to the court.

You can't talk down to them. I remember one lawyer who was a very learned fellow in his field, and not unaware of his learning. He would talk to the Supreme Court as though he were the teacher and they were a class of nine not very bright pupils. Remember, you are trying to persuade the court. You don't persuade a man by talking down to him. So what is needed is an attitude of respectful intellectual equality.

If you are talking to the senior partner, or to the minister, or you are in the military service talking to someone much senior to you, respectful, yes, but firm. Remember you are a

practitioner of the art of persuasion, and you cannot persuade an audience of whom you are frightened.

Eleventh curable fault: inflexibility. You've got to be flexible. You can't have a set speech. If you are dedicating a memorial to old lawyer Schmaus who was the darling of the bar, and you are going to have for him the great memorial, the trap door in the appellate court which enables the juniors who have labored long and lovingly on the briefs to beat an unobtrusive exit from the court room while their seniors are murdering the cases, when you are dedicating that memorial trap door or any other dedication, of course it is a set speech. Every word counts, you polish your sentences.

But that isn't an appellate argument. An appellate argument is a conversation trying to persuade people about a question of law. When they ask you questions, that comes out of your time. There is no compensation for time taken by judicial eminent domain. You've got to be prepared to vary your argument on the basis of the response that it gets. A point won, everybody nods. Don't elaborate the obvious. You've got them on your side! Go on to Point B where you are going to have difficulty. The same way, if you are bottom side and the appellant has taken an awful battering on Point 1, don't recur to it. You don't have to. Go to the other point where he seemed to have clear sailing. In other words, you've got to be flexible, you've got to adjust your argument to the response. Don't waste your time on the immaterial points. Use your time on the difficult points. Never, never say to the court when they ask you a question, "I am coming to that." They are interested now.

There is a famous story of that assiduous but not entirely lovable character, the late Mr. Justice McReynolds. One day counsel said, "I'm coming to that, your Honor."

"You're there *now*."

Remember, remember always it is an exercise in the art of persuasion. If the judge asks the question now, he is interested now, he deserves an answer now. If you can't give him the full answer you can say, "Well, the answer to that, your Honor, is 'yes' and I'll develop it later after I've sketched in the legislative history, or after I have stated more of the facts," etc. Give him at least a stopgap answer and move on.

Twelfth curable fault: emphasis on the wrong questions. Don't hit the unnecessary points too hard. The old military maxim about the decisive force at the decisive point cost millions of lives wasted in frontal attacks. In this respect law is like war and even love. The frontal attack against a prepared

and well-defended position is rarely successful. Flank your difficult points. Don't make it too hard for yourself. Don't make it too hard for the court. Give them some kind of logical, defensible answer that will enable them to reach the result that you want. By the same token, don't duck the difficult topics simply because they are difficult. Face up to them.

Well, this is my duo-decalogue. I have two additional comments. One is that you can't make any argument without regrets. I vouch to warranty what Justice Jackson said, and Mr. Justice Brandeis said about that. Jackson ought to be Solicitor General for life. "I used to say that as Solicitor General I made three arguments for every case: First came the one I planned, as I thought logical, coherent, complete; second was the one actually presented, interrupted, incoherent, disjointed, disappointing; the third was the utterly devastating argument that I thought of after going to bed that night."

You can't win them all either. You can't win them all, and fortunately you can't lose them all.

Samuel Williston, who this year reached his hundredth birthday, said in his autobiography, "I may add in reference to the frequency with which my aid was unavailing to lawyers who sought my assistance, that it was not generally sought unless the case was one of some desperation. In cases that are easily won, lawyers generally prefer to keep the labor and the compensation entirely to themselves."

Then there was old Augustus P. Garland. He was a man who argued, I suppose, nearly 140 cases in the Supreme Court and he came to his end, I suppose, in the most appropriate way for a Supreme Court lawyer. He suffered a stroke while he was right in the middle of an argument and died in the clerk's office. This is what he said in his reminiscences: "On one occasion on opinion day the tide ran so heavily against me, losing about five cases and gaining not one, I was quite ill at ease and moody. Coming out of the court I got in with Judge Harlan"—that is the grandfather of the present Justice Harlan—"and passing the civilities of the day, he asked me how I felt. I told him 'Quite badly,' and the reason for it, and that I did not believe I could even get an attorney enrolled in that court any more, and recalled to him my fate on that day. He chided me somewhat and remarked that it was not unusual with the very best lawyers, and told me of his observation here and elsewhere, that bad or difficult cases fell to the lot of good lawyers, and they were sought for to deal with just such cases."

Well, you know the old story about the fellow who used Listerine for six months and then found out he was unpopular anyway? I hope that these few remarks will help you avoid forensic halitosis. Thank you very much.

CHAIRMAN MASON: Mr. Wiener, we thank you so much, sir, for coming to visit with us about these matters and for your excellent advice.

Gentlemen, we stand adjourned as far as the Institute is concerned, but the House will meet in ten minutes in this room.

[The final session of the Institute on Practice and Procedure adjourned at 3:55 o'clock, to be followed by the final session of the House of Delegates.]

FRIDAY AFTERNOON SESSION

November 3, 1961

[The Friday afternoon session of the House of Delegates was called to order by Chairman Ginsburg at 4:00 o'clock.]

CHAIRMAN GINSBURG: There being a quorum present, we will reconvene the third and 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, Mr. Franklin Pierce.

REPORT OF SECTION ON REAL ESTATE,
PROBATE AND TRUST LAW

F. L. Pierce

Mr. Chairman, Members of the House of Delegates: The significant activities of the Section on Real Property, Probate and Trust Law for the 1960-1961 year are:

I. The organization of a subcommittee on abstract standards to work with a similar committee of the Nebraska Title Association. Lowell C. Davis is chairman of that committee. Clement B. Pedersen, Carson Russell, William A. Sawtell, Jr., and Willis R. Hecht accepted appointment as members of the committee. Walter Huber, a member of this association, is chairman of the committee of the Title Association.

The two committees met on June 3, 1961, at Lincoln, Nebraska. They discussed the problems involved and the procedures that might be followed, made a preliminary survey of the possibilities, and are now engaged in the study of the problems as outlined.

II. The section meeting held in conjunction with the mid-year meeting on June 2 was devoted to the problems of reorganizing the work of the Section to conform to a pattern of section meetings at a midyear meeting of the Association rather than the annual meeting.

John R. Fike and Fred H. Richards were elected to three-year terms on the Executive Committee of the Section commencing November 3, 1961. The continuing members of the Executive Committee are Lowell C. Davis, C. M. Pierson, Albert T. Reddish, and George Skultety.

George A. Skultety is chairman of the Executive Committee; Albert T. Reddish was elected as secretary; C. M. Pierson, vice-chairman.

III. The Section Committee on Drafting Trusts has under consideration attendance by a member of that committee at the tax institute to be held in December of this year to see if they can coordinate the work of drafting the trust instruments with the work of that committee.

SECRETARY TURNER: Who is the head of your Probate Division?

MR. PIERCE: The head of the Probate Division is Richards.

CHAIRMAN GINSBURG: Are there any questions concerning the report of the Section on Real Estate, Probate and Trust Law? I don't recall anything in the report that required any action on the part of the House, and therefore the report will be ordered accepted and placed on file.

At this time, somewhat out of order, I will recognize Mr. Richard A. Knudsen, chairman of the Committee on Public Service. This Committee informs me that they met in extraordinary session yesterday and they have some business they want to present to the House. Mr. Knudsen.

REPORT OF COMMITTEE ON PUBLIC SERVICE

Richard A. Knudsen

Mr. Chairman, Members of the House of Delegates: On our report in writing I want to call attention to two activities of this year. One is the annual Law Day activity. This was carried out by fifty-five counties in the state. We have just a few comments on that.

We are short of all the counties, which of course we wanted to have, and we feel there are areas of improving our Law Day observances and that we could get more or better help from the judiciary. We are going to work on this for the coming year. We would appreciate the assistance of the House of Delegates on that point.

Another thing, we are going to try to emphasize Law Day activities at the college and junior college level.

We have also started a new feature this year through a publication of articles in the *Nebraska Farmer*. There have been two published so far and we have provided them now with a year's supply of articles. This will run every two weeks. The *Nebraska Farmer* comes out and it is entitled "This Is the Law in Nebraska," and indicates sponsorship by the Nebraska State Bar Association. It is a little early yet to see how well this is

going, although we are getting some letters from people who want articles on other subjects; that is, through subscribers to the *Farmer*. We hope that this project will get off the ground well and perhaps get coverage in other newspapers.

The matter that we had a meeting about yesterday was with two public relations men in Lincoln, Thomas Carroll and Carroll Thompson, called the Carroll Company. These men are in public relations work there and they submitted to the committee a proposition that they felt they could be of service to the Nebraska State Bar Association in an advisory capacity whereby on a six months' trial period they would investigate and survey the needs of the lawyers in Nebraska and of the Association in the public relations field, that they would submit a report to us which they felt would be of value in future programming of public relations work.

In addition to that they would perform certain services, such as the writing of press releases, releases for television, and other news media for areas of Nebraska where we haven't been getting what we think is satisfactory coverage, such as the activities of Law Day and the activities of our annual Bar Association meeting. We have observed that this gets good coverage in the Omaha and the Lincoln papers, but our members from Scottsbluff, Nebraska City, Beatrice, and other towns out in the state say there is nothing in those papers about our Bar Association activities.

These public relations men attribute this to the fact that the editors of these papers are getting loaded with articles from associations and different specific groups and they just don't have room for them. They say there is a way of writing up these articles, of presenting them to the editors so that they will publish them, and they assure us that they can guarantee in six months, results in this field which we can observe and which we think will be satisfactory to us.

The Committee, based on this report, in meeting yesterday adopted a resolution which we would like to submit to the House of Delegates and also to the Executive Council. This is as follows:

RESOLVED: That the Committee on Public Service recommends to the House of Delegates and the Executive Council of the Nebraska State Bar Association that the public relations firm of Thomas Carroll and Carroll Thompson, Lincoln, Nebraska, be retained by the Nebraska State Bar Association for a period of six months commencing January 1, 1962, at a fee of

\$100 per month for the purpose of making a survey, investigation and report of areas of need in the field of public relations by Nebraska lawyers, and to also perform services regarding dissemination of publicity and news events to the public through various news media on behalf of the Association.

We would like to see this program go into effect and we urge the House of Delegates and the Executive Council to consider our recommendation seriously, and I am sure if they would like to have any further conferences or talks with these men before deciding or committing ourselves to anything, they would be happy to appear before you.

CHAIRMAN GINSBURG: You move the adoption of your report?

MR. KNUDSEN: I move the adoption of our report of the Committee on Public Service.

CHAIRMAN GINSBURG: Is there a second?

[The motion was seconded.]

CHAIRMAN GINSBURG: As I understand the rules, and Mr. Turner will correct me if I am wrong, as far as the actual appropriation of funds is concerned, that is a matter for the Executive Council. Is that right?

SECRETARY TURNER: That is correct. This is a recommendation to the Council.

CHAIRMAN GINSBURG: That is what I wanted to bring out, that this motion now on the floor will consist of a recommendation by this House to the Executive Council. Is there any discussion on the motion?

MILTON R. ABRAHAMS, Omaha: Mr. Chairman, without raising any question at all as to the competency or qualifications of this public relations firm, I am wondering what their competency and qualifications are and what other firms of similar standing have been approached and considered.

CHAIRMAN GINSBURG: Can you answer the question, Mr. Knudsen?

MR. KNUDSEN: I can answer the second part first. We have not talked to other firms about this. This firm did come to us. They initiated it and made the proposal to us.

As to the first part, this is a fairly new firm in Lincoln. I think the first I heard of them was during the Lincoln centen-

nial. I believe that Thomas Carroll, and I guess also Mr. Thompson, was in on that. They were generally recognized as doing a good job, a great job for Lincoln on this centennial program two years ago.

Since that time they have formed this firm and they have had several accounts. I think one of them is a wheat association for which they have done a good job in the past year in this field of public relations.

The other is that they have been recently retained by the Nebraska Safety Council, not only as advisors but I think they are actually directing the program of the Safety Council.

Other than that I don't know anything else, except that the two individuals have a background of university study in this field and they seem to be pretty well qualified.

MR. ABRAHAMS: Mr. Chairman, without knowing more about the background of this firm, I would greatly hesitate to pinpoint this particular firm as the one that should be selected for that type of service, although I recognize that in principle there is much to be said for the thought that we need public relations counseling and services.

CHAIRMAN GINSBURG: Is there any further discussion? Does anyone else have anything to say?

RALPH E. SVOBODA, Omaha: Do I understand that the Executive Council will be confined to only this one firm?

CHAIRMAN GINSBURG: Well, that apparently is your motion, is it not?

MR. KNUDSEN: This is the motion, yes, although I don't feel that we intend to limit the Executive Council to that. We are interested in the program. This is the only firm that has come to us on it, and it is the only proposal in the way of a fee of \$100 a month for a six-month period with a definite reappraisal and an opportunity to call the whole thing off at that time if we aren't satisfied. We have not talked to other firms, but I don't think we should necessarily be limited to this particular firm.

MR. SVOBODA: Mr. Chairman, I have this feeling: I understand we had a sorry experience with this problem when somebody was hired to handle our public relations work and it turned out quite unfavorably. That of course does not mean that we should not pursue the program. I think maybe we ought to be given a little more latitude in the Executive Coun-

cil as to the proficiency of this firm and whether or not we should consider others in the project. I know nothing about this firm at all. I am relying on my colleagues to bring some information to the Executive Council on that point.

CHAIRMAN GINSBURG: Would anyone care to offer an amendment to the motion?

MR. SVOBODA: I will offer an amendment that the Executive Council be given more latitude, not only in the main question of having or not having the survey, but also of selecting the personnel to do it.

CHAIRMAN GINSBURG: Is there a second to the amendment?

[The amendment was duly seconded.]

CHAIRMAN GINSBURG: You understand that the amendment is that the Executive Council be given more latitude in arranging the person or the firm with whom they are to deal and also other details thereof.

Are there any questions, or further discussion on the amendment? Mr. Wright.

FLAVEL A. WRIGHT, Lincoln: It seems to me that the amendment is in order for this reason: we also have the program with reference to the judicial selection, and we will be working with some type of public relations firm in that regard. It may be that the Executive Council would tie the two together to more advantage. Therefore I would favor the amendment.

DWIGHT GRIFFITHS, Auburn: As I understand the motion, there would be a limitation of \$600. I wonder if it might be better to add to that amendment "such amount as they deem reasonable"?

MR. SVOBODA: I will accept that.

CHAIRMAN GINSBURG: That was my understanding of the intention of the amendment, that the Executive Council be given latitude in arranging the amount.

Is there any further discussion? If not, all in favor of the amendment say "aye"; contrary. Carried.

Now all in favor of the motion as amended please say "aye"; contrary. Carried. Thank you, Mr. Knudsen.

The next matter of business is the report of the Section on Corporations, Mr. Bert L. Overcash, chairman. Is Mr. Overcash

in the room? Is there anyone here to report for the Section on Corporations? If not, we will pass to the next item of business, the report of the Section on Tort Law, Mr. James A. Lane.

REPORT OF SECTION ON TORT LAW

Daniel Stubbs

I will report for Mr. Lane.

The Section had a meeting, and a program is in the process of formulation. The officers of the Section have been chosen and will have to be filed with the Secretary because I failed to get them from Mr. Lane. The report needs no action and may be placed on file.

CHAIRMAN GINSBURG: The report of the Section on Tort Law will be received and placed on file.

The next item of business is the report of the Section on Taxation, Mr. Warren K. Dalton, chairman. Is Mr. Dalton in the room?

REPORT OF SECTION ON TAXATION

Warren K. Dalton

At the midyear meeting of the State Bar Association held in Lincoln in June, Roger V. Dickeson and John W. Stewart were elected as members of the Executive Committee of the Section on Taxation. A change in the beginning and ending dates of the terms of members of the Executive Committee was adopted by the Section during the year, and Messrs. Dickeson and Stewart will begin their three-year term on January 1, 1962.

The present members of the committee whose terms end at that time are Harry B. Cohen and Flavel A. Wright. These gentlemen have freely given their time, their knowledge and experience, and their ingenuity and will be sorely missed by the committee.

The officers of the Section for the calendar year 1962 were chosen today. They are Frank Mattoon as chairman and Roger Dickeson as secretary.

The Section conducted an annual Institute on Federal Taxation in December, 1960. Sessions were held at Scottsbluff, Kearney, and Omaha.

For the first time a charge was made for registration at the Institute, primarily to cover the cost of printing the outlines which are distributed to the persons in attendance. Since there

was a general feeling that the registrants should receive their money's worth, if possible, a great deal of time and effort was spent in preparing the outlines with suitable citations and references, with the hope that the result would be a useful reference work.

At the midyear meeting in June of 1961, the Section presented a panel discussion on recent developments in Nebraska property tax law. The panel consisted of Richard E. Hunter, Charles E. Oldfather, Homer G. Hamilton, and Edmund D. McEachen. These same men formed a committee of the Section which cooperated with the Bar Association Committee on Legislation by reviewing the tax bills which were submitted during the 1961 session of the Legislature and reporting to Herman Ginsburg, the chairman of the Committee on Legislation.

As it turned out, the operation was not entirely successful, mainly because the review took so long that the bills got passed before the report was made. This was not the fault of the committee, I am sure; the Legislature moved pretty fast at times.

At the 1960 Bar convention, the House of Delegates approved the sponsorship of a tax institute jointly by the Nebraska State Bar Association and the Nebraska Society of Certified Public Accountants. This project was referred to the Committee on Continuing Legal Education, which delegated the task of arranging the institute to the Section. Some exploratory planning was done looking to such an institute being held in the spring of 1962. It appeared that previous commitments made it impractical for the accountants to join in a program at the time mentioned, and planning is under way for such an institute to be held at the Kellogg Center in Lincoln in May of 1963.

The Executive Committee of the Section is hopeful that, if the joint institute proves successful, it will be possible to divide the areas of coverage of tax problems between the State Bar Tax Institute which we have had for many years in December and the joint institute in the spring. For example, the December institute may be devoted primarily to the day-to-day problems which arise in the preparation and audit of tax returns, while the joint tax institute can provide for a more detailed study of general questions arising in the tax field.

I might also say that there has been some investigation of the possibility of joining with bar associations in neighboring states to conduct such an institute separate from our usual December tax institute. Whether this will result in anything we don't know at this time.

The Section will conduct an Institute on Federal Taxation in December of 1961. The institute will be given at Alliance on December 11 and 12, at Grand Island on December 13 and 14, and in Omaha on December 15 and 16. One day will be devoted to a panel discussion and demonstration of procedures before the Internal Revenue Service, and in the tax court, and in refund cases in the district court. A half day will be devoted to the new Form 1040 and a discussion of some problems with respect to the preparation of returns. A half day will be used for a question-and-answer session, covering questions of general interest submitted prior to, or at the time of, the institute.

I might say that if any of you gentlemen or anyone whom you know has a question of general interest which you would like to have covered, or like to have the panel try to cover, if you could get that question to Keith Miller next week, not later than Friday a week from today, we will try to include it in the program and see that it is covered.

I believe the report does not require any action and I ask that it be received.

CHAIRMAN GINSBURG: Thank you, Mr. Dalton. Does anyone have any questions on the report?

MR. SVOBODA: Who was the new chairman?

MR. DALTON: Frank Mattoon, and Roger Dickeson as secretary.

CHAIRMAN GINSBURG: Are there any further questions? There being no further questions the report of the Section on Taxation will be ordered received and placed on file.

The next item of business is the report of the Section on Practice and Procedure, Mr. M. M. Maupin, chairman. Mr. Maupin.

REPORT OF SECTION ON PRACTICE AND PROCEDURE

M. M. Maupin

Mr. Ginsburg, Members of the House of Delegates: This Section held one meeting during the year at the time of the midyear meeting of the Nebraska State Bar Association in Lincoln. Complete minutes of that meeting were prepared and filed with the Secretary of the Nebraska State Bar Association by the secretary of this Section.

Decision having been taken to present a program on appellate procedure to the membership at the annual meeting as a

part of the Association's activities in the field of continuing legal education, this Section, in cooperation with the Committee on Continuing Legal Education, undertook the preparation and presentation of such a program. At the time of submission of this report the results of such efforts will be known to the House of Delegates. Further comment thereon is not presently indicated.

This Section, however, wishes to give recognition to the unusual efforts of the chairman of the Committee on Continuing Legal Education and to the secretary of this Section in their material and time-consuming assistance in obtaining and preparing the program presented to the annual meeting of the Association.

The following officers of the Executive Committee of this Section have been elected:

Chairman	Robert A. Barlow (1962)
Vice-Chairman	Fred M. Deutsch (1963)
Secretary	Donald P. Lay (1963)

and the following are continuing or newly elected members of the Executive Committee:

John E. Dougherty (1962)
Robert D. Mullin (1964)
Warren K. Urbom (1964)

The Executive Committee recommends the continuance of this Section of the Association.

Respectfully submitted,
M. M. Maupin, Chairman, North Platte
Robert A. Barlow, Secretary, Lincoln
George B. Boland, Omaha
Frederick M. Deutsch, Norfolk
John E. Dougherty, York
Donald P. Lay, Omaha

Since no action is indicated, I move that it be filed.

CHAIRMAN GINSBURG: Before you take your seat, Mr. Maupin, may I ask if any members of the House have any questions of Mr. Maupin. I believe that I can say, as far as I could tell, the program which was arranged was very well done, very well received. There were some very interesting sessions.

Does anyone have anything to ask of the chairman of the section? If not, the report will be ordered received and placed on file.

The next item of business is the report of the Junior Bar Section, Mr. Robert D. Moodie, chairman. Mr. Moodie.

REPORT OF JUNIOR BAR SECTION

Robert D. Moodie

On September 22 and 23 the Junior Bar Section presented its fifth annual institute for practicing attorneys sponsored in cooperation with the University of Nebraska College of Law. The institute presented the subject of "Municipal Corporations and Governmental Subdivisions" to approximately 100 lawyers from 46 towns in Nebraska. Once again the materials were presented to each registrant in a permanent binder designed to become a part of each attorney's library.

The Junior Bar Section has undertaken a program to help stimulate interest in the legal profession among high school students. A "Law Career" pamphlet has been prepared by Robert E. Johnson, Jr., with the cooperation of Dick Harnsberger of the University of Nebraska College of Law and A. Lee Bloomingdale of the Creighton University College of Law emphasizing the general aspects of the practice of law and the outstanding features of the two law colleges in this state. A Junior Bar member is being contacted in each city throughout the state to act as a representative in that community. Each representative will contact the local school superintendents and offer to be of assistance for the presentation of this material in the high school Careers Day program. The pamphlet will be used as a guide for the representatives and will then be distributed to those high school students showing an interest in the legal profession. It is hoped that this program will be helpful in attracting high caliber students to the study of law.

The Junior Bar Section has this year established a committee to consider initiating a placement service. It is our feeling that a number of positions are presently available to young practicing attorneys but that prospective employers have no means of contacting interested attorneys. The legal placement service would act as a confidential clearing house for employment inquiries. A great deal of study is needed in this area before such a program can be established.

Preliminary groundwork has been undertaken by the Junior Bar Section for a project which we consider to be of utmost importance. The idea was first developed by the Committee on Continuing Legal Education of the American Bar Association and recommended to the Junior Bar Section by the same committee

of this Bar Association. It is a program designed to give recent law school graduates a course on the practical aspects of the practice of law. This "Bridge-the-Gap"—bridging the gap between the theory of law school and the actual practice of it—this "Bridge-the-Gap" program has been successfully conducted in several states, and the recommended procedure is to conduct it in a three-day session after the bar examination and before the admissions ceremony.

Tentative reservations have been made to conduct this program at the Kellogg Education Center in Lincoln in June of 1962. In considering the cost of this program it is our sincere hope that it can be made to pay for itself by a registration fee of \$15.00 to \$20.00 per registrant. Other problems which must be worked with include (1) Who is to participate? and (2) What subjects are to be covered? Mr. Jerrold L. Strasheim has undertaken the chairmanship of this program and will no doubt be calling upon the Bar Association as a whole to lend assistance for the successful completion of this project.

The annual meeting of the Junior Bar Section was held on September 22, 1961. The two new members elected to the Executive Committee were David Downing of Superior, Nebraska, and James Hewitt of Lincoln, Nebraska. They replace Robert E. Johnson, Jr., and Robert D. Moodie, whose terms have expired.

The new Executive Committee held an organizational meeting on Thursday, November 2, 1961, and elected D. Nick Caporale of Omaha chairman; Alfred Blessing of Hastings vice-chairman; and David Downing of Superior secretary-treasurer.

That completes my report, and I wish only to add this, that we think the Junior Bar has had a very successful year. We are undertaking some very large projects for our upcoming year, and we want to give credit where credit is due, and certainly we would not have been able to perform and to successfully complete the things we started without the very welcome assistance of the Executive Committee of the Bar Association.

CHAIRMAN GINSBURG: Are there any questions concerning the report of the Junior Bar Section? If not, the report will be ordered received and placed on file.

Is there anyone present to report for the Section on Corporations? If not, the next matter of business on the calendar is the presentation of any matters any section or committee wishes to bring before the House of Delegates. Is there any such business? There being none, we go to unfinished business, and the Chair recalls that we have a committee on a proposed amend-

ment of the bylaws, chairman of which is Mr. Ellick. Is that committee ready to report?

REPORT OF SPECIAL BYLAWS COMMITTEE

Alfred G. Ellick

Mr. Chairman, Members of the House of Delegates: The committee appointed by Chairman Ginsburg for the purpose of suggesting changes in the bylaws is ready to make its report. The committee consists of Mr. Charles Oldfather, Mr. Daniel Stubbs, and myself.

The reason for making recommendations for changes in the bylaws is that as presently written Article IV of the bylaws requires the various sections to meet at the annual meeting of the Association and to conduct their elections at the annual meeting. Also it provides for other matters to be undertaken by the sections at the annual meeting of the Association.

You may recall that this last year we did have a midyear meeting of the Association and that some of the sections met at that time. Because of the present program where at the annual meeting only one section is handling the program, we need some changes to permit the other sections to hold meetings at other times so that they can conduct their business and elect officers.

I will make this real short and then if you have questions you can ask them afterwards. Article IV of the bylaws is the article that deals with the various sections. Section 1 of Article IV simply names the sections. Section 2 of Article IV says the House of Delegates may create new or different sections, etc. Section 3 says that any member of the Association may enroll as a member of any section, except for the Junior Bar Section, where a person cannot be over thirty-five. We propose no changes in Sections 1, 2 or 3.

Section 4 as presently written says: "Each section shall meet during the period of the annual meeting at such time as the Executive Council may direct."

It then goes on and says that the Executive Council, however, upon request may excuse a section from meeting. We are simply changing that to say as follows: "Section 4. Each section shall meet at least once each year at such time as the Executive Council may direct."

We are leaving out the provision that they can be excused from meeting because we think it is implied from the fact that the Council directs the meeting of the section that the Council can also excuse the meeting of a section.

Now Section 5 of Article IV: We are leaving unchanged the first three sentences in substance, and I will read those so you will understand what they say. It presently says: "Each section shall have an executive committee of six members. No member of the Association shall serve on the executive committee of more than one section at the same time."

Then it says: "At the annual meeting following the adoption of these bylaws"—we are changing that simply to read "of the *original* bylaws"—"each section which meets at that annual meeting shall elect six members of an executive committee, two for a term of three years, two for a term of two years, and two for a term of one year."

Then it presently says: "Thereafter at each annual meeting two members of the executive committee shall be elected." We have changed that to read: "Thereafter two members of the executive committee shall be elected in the manner hereinafter provided, for a term of three years or until their successors are elected."

It now says: "Members of the executive committees of the sections shall serve until the adjournment of the next annual meeting." We have provided here that they simply serve until their successors are elected.

And we have kept the last sentence which says: "No member of the executive committee shall be elected for more than one successive term."

So we have, in effect, then said that instead of having to elect these people at the annual meeting of the Association, they can be elected each year at a meeting.

Section 6: There is very little change, one or two words. I will read it and indicate the changes. It presently reads: "Nominations for members of the executive committee shall be made by petition signed by twenty-five members of the Association and filed with the secretary of the association at least thirty (30) days prior to the annual meeting." We have added so that it reads: "Prior to the annual meeting of *the Section*."

Then it goes on to say: "In the event there are not at least two nominations for each member of the executive committee to be elected, the Executive Council may make additional nominations." That is unchanged. "The members of the executive committee shall be elected *at the annual meeting of the section* from the candidates nominated in the manner herein provided. The election may be by voice vote unless any candidate requests a vote by ballot." So that section is simply changed to indicate

we are talking not of the annual meeting of the Association but the annual meeting of the section.

Section 7 presently says: "If any section fails to meet at an annual meeting"—and we have changed it to read: "If any section fails to meet during the year"—then it goes on as before—"the Executive Council shall elect the members of the executive committee to succeed those whose terms expired, and the Executive Council shall fill any vacancy among the executive committee until the next annual meeting," and we have added "until the next annual meeting of the section." So if there is not an election at the section meeting and the Executive Council fills the vacancies, they hold office until the next annual meeting of the section.

Section 8 is left unchanged. I will read it so you will follow the picture here: "The organization of any section which does not meet at the annual meeting following the adoption of these bylaws shall be provided by the Executive Council." That is more or less history. You really wouldn't need it in now but we decided to leave it in because it doesn't do any harm and gives a picture of how this thing started working.

Section 9 we have changed slightly. It presently reads: "The executive committee"—remember this is the executive committee of the section, not the Executive Council of the Bar Association—"the executive committee shall elect from among its members a chairman, a vice-chairman, and a secretary, who shall be the officers of the section until the adjournment of the next annual meeting." So there again we have changed it so it reads: "Who shall be the officers of the section for the ensuing year or until their successors are elected." The rest of the section is unchanged: "In case any executive committee fails to elect any of such officers with reasonable promptness, the Executive Council shall designate such officers from the members of the executive committee."

Section 10 is left unchanged: "The chairman shall be ex officio a member of the House of Delegates unless the section shall at its annual meeting elect a delegate other than the chairman to serve for a term of one year."

And the last section we have changed is Section 11, and I will indicate the change. It presently reads: "The work of the section shall be in charge of the executive committee of the section. At least sixty (60) days before the annual meeting of the Association, the chairman of the section shall report to the president of the Association the proposed program to be held at the next annual meeting." We have changed that to read: "shall

report to the president of the Association the proposed program *for the ensuing year.*" Then it goes on as before—"and at the annual meeting of the House of Delegates the chairman of the section shall submit a brief report of the work of the section."

Section 12 is left unchanged, Administrative; Section 13 I will read, if you wish, but it is left unchanged; Section 14 unchanged; Section 15 unchanged.

Our Committee feels that with these changes we now have bylaws which will permit the sections to meet at a midyear meeting or any other type of special meeting that the Executive Council may permit or direct and to elect officers at those meetings and conduct their business as they were heretofore permitted to do at the annual meeting of the Association.

To get the matter before the floor, Mr. Chairman, I move the adoption of the Committee's report and that the bylaws of the Association be amended as set forth therein.

MR. SVOBODA: Will you read the second section that you are amending, the way it is now and the way it will be?

MR. ELLICK: All right. That is the one that I think has the most changes. You are talking about Section 5. Do you want me to read how it will read when amended? I think that is the easiest way.

This is the way it will finally read:

"Section 5. Each section shall have an executive committee of six members. No member of the Association shall serve on the executive committee of more than one section at the same time. At the annual meeting following the adoption of the original bylaws, each section which meets at that annual meeting shall elect six members of an executive committee, two for a term of three years, two for a term of two years, and two for a term of one year. Thereafter, two members of the executive committee shall be elected in the manner hereinafter provided, for a term of three years or until their successors are elected. No member of the executive committee shall be elected for more than one successive term."

I think the major change was that the old section said that they should be elected at the annual meeting of the Association and we simply said, "shall be elected as hereinafter provided," and then later it says, "They are elected at the annual meeting of the Association or at any special meeting that they may have."

CHAIRMAN GINSBURG: Is there a second to the motion?

[The motion was duly seconded.]

CHAIRMAN GINSBURG: Is there any discussion on the motion?

WARREN K. DALTON, Lincoln: I would like to raise one question. The Section on Taxation elects the members of its executive committee probably somewhat illegally for a term beginning January 1. This is done because the primary function of this Section has been to conduct the Tax Institute in December and it was felt that that should be completed before the executive committee membership and the officers were changed.

It may be that the amendments as proposed won't prohibit this, and if they don't then I have no amendment to propose. If the bylaws as amended would prohibit it, then I would like to suggest that somehow we be given the leeway to go on doing what we have been doing.

MR. STUBBS: I see no difficulty with what Bud raises with respect to the officers. It is provided in Section 9 that the executive committee shall elect from among its members a chairman, vice-chairman, etc., who shall be the officers of the section for the ensuing year. Well, the ensuing year in that case commences January 1 because they say so. I see no trouble with it.

MR. DALTON: My point is, if we elect new members of the executive committee at the midyear meeting, the new members of the executive committee so elected would not take office until the following January 1.

MR. STUBBS: Well, that is when their ensuing year commences.

CHAIRMAN GINSBURG: Does anyone else want the floor on the question? Is this all clear to you?

I noticed this, and you correct me, Mr. Ellick, if I am wrong. As you propose this Section 5 to now read, "At the annual meeting following the adoption of the original bylaws each section which meets at that annual meeting . . .," does that mean that the section as provided by Section 4 can meet at other times, then their officers would be elected for periods commencing at the other time? Isn't that right? It wouldn't all run from the date of the annual meeting.

MR. ELLICK: I think the answer to that, Mr. Ginsburg, is that actually that sentence is not now applicable because when the original bylaws were adopted at the first annual meeting, after that they elected six members on staggered terms, but henceforth, and since they have already had that meeting, the

first annual meeting after the adoption of the original bylaws, that sentence you read is really inapplicable. So as we see it now a section can have its officers commence their term actually whenever it wishes.

CHAIRMAN GINSBURG: That is what I was thinking. Does that answer your question, Mr. Dalton?

MR. DALTON: Yes.

CHAIRMAN GINSBURG: Anybody else have any questions? You have heard the motion that the bylaws be amended as set forth in the report of the special committee. Are you ready for the question? If so, all in favor say "aye"; contrary. Carried. Thanks very much, Mr. Ellick and the members of the committee.

As you notice whenever you get into this problem of amending anything you think you can do it real simply and it turns out to be quite a job. Therefore I want to express my thanks and gratitude to the members of the special committee for the work they did. It wasn't something that could be done just in a moment's time.

Now is there any other business to come before the House? Mr. Turner.

SECRETARY TURNER: Mr. Chairman, in view of the fact that the report of the Committee on Tort Law was not complete in that it did not name the newly elected officers, and in view of the fact that there was no report from the Section on Corporation Law, would it be appropriate for some member of the House to move that the Secretary be authorized to receive such information from the two sections involved and, for record purposes only, include it in the proceedings of this annual meeting?

MILTON R. ABRAHAMSON, Omaha: I move to that effect.

CHAIRMAN GINSBURG: Is there a second?

[The motion was seconded.]

CHAIRMAN GINSBURG: Do you understand the motion? Is there any question? Any discussion? If not, all in favor say "aye"; contrary. Carried.

Is there any other business to come before the House?

Before we adjourn I then will rise to a point of personal privilege. It is my understanding this concludes my service as Chairman of the House. When the House meets again you will have a new Chairman. I want to say that I have certainly en-

joyed the opportunity to have been of service. I feel that it has been very educational to me. I have really enjoyed it, and I want to thank all the members of the House for having given me this opportunity.

Now if there is no further business I will entertain a motion to adjourn.

DEAN R. SACKETT, Beatrice: I move we adjourn.

CHAIRMAN GINSBURG: Any discussion on the motion? If not, we will declare the session adjourned until next year.

[The Friday afternoon session of the House of Delegates of the Nebraska State Bar Association adjourned sine die at 4:45 o'clock.]

ADDENDA**REPORT OF THE SECTION ON CORPORATIONS****Bert L. Overcash**

At the business meeting of the above section on June 2, 1961, Ralph D. Nelson was reappointed to the executive committee of the section and Clarence E. Heaney, Jr., of Omaha was appointed to fill a vacancy. The present members and officers of the executive committee of the section with the dates of expiration of their terms are as follows:

Bert L. Overcash, Chairman	1962
Ralph D. Nelson, Vice-Chairman	1964
Ward W. Minor, Secretary	1962
Clarence E. Heaney, Jr.	1964
William J. Baird	1963
Vance E. Leininger	1963

REPORT OF SECTION ON TORT LAW**J. A. Lane**

The Section on Tort Law held a business meeting at the mid-summer conference of the Nebraska Bar Association held in Lincoln, Nebraska, June 2, 1961. The new members elected to serve on this committee for the coming year were Robert D. Mullin of Omaha, Nebraska, and Bernard B. Smith of Lexington, Nebraska. At the same meeting Albert G. Schatz was elected chairman of the committee for the coming year, and Robert D. Mullin was elected secretary.

It was agreed that the full membership of this committee should meet at Omaha in the month of July to plan for further activities. This meeting was held on July 31 with the majority of the committee members in attendance. Arrangements were made for research by this committee into the field of products liability law in the State of Nebraska. The committee plans to present the results of this work at a clinic planned for this coming year. The committee also agreed to cooperate to the fullest extent with the NATA program which is to be presented to this annual Bar Association meeting.

In accordance with the rules for programming the annual State Bar Association meeting, this Section did not prepare a special program.

NEBRASKA STATE BAR ASSOCIATION

Statement of Cash Receipts and Disbursements
Year ended August 31, 1961

Receipts:

Active members' dues	\$39,350.00
Inactive members' dues	5,140.00
Reinstatements	142.00
Sale of United States securities	9,945.22
Interest	207.78
Football tickets, 1960 season	120.25
State <i>ex rel.</i> Nebraska State Bar Association recovery Fisher and Jensen	1,767.13
	<u>56,672.38</u>

Disbursements:

Salaries	\$ 6,850.00
Payroll taxes	411.00
Printing and stationery	578.04
Office supplies and expense	794.55
Telephone and telegraph	215.88
Postage and express	1,619.99
Directory	964.60
Officers' expenses	1,253.81
Executive Council	2,389.10
Judicial Council	541.34
<i>Nebraska Law Review</i>	4,823.62
Bill Digest	3,037.19
<i>Nebraska State Bar Association</i> <i>Journal</i>	\$1,822.75
Less receipts for advertising	<u>642.00</u>
	1,180.75
Public service	5,155.19
Less receipts for pamphlets and racks	<u>260.00</u>
	4,895.19
Midyear meeting	80.85
American Bar Association and House of Delegates meetings	7,660.31
Annual meeting	5,419.35
Less reimbursements and exhibit space	<u>855.00</u>
	4,564.35
Committee on Medico-Legal Jurisprudence..	10.00
Committee on Inquiry	923.22

NEBRASKA STATE BAR ASSOCIATION

Commission on Uniform Commerce Code....	64.60	
Committee on Cooperation of Attorneys and Accountants	77.30	
Committee on Uniform Rules of Evidence....	96.12	
Advisory Committee	315.68	
Committee on County Law Libraries	182.71	
Real Estate, Probate and Trust Law Section	19.87	
Committee on Revision of Corporation Laws	57.00	
Aid to local bars	505.17	
Committee on Legal Education	71.76	
Tax Institute	2,109.49	
Taxation Section	253.29	
Committee on Judicial Selection	37.75	
State <i>ex rel.</i> Nebraska State Bar Association—Butterfield	874.86	
Institute on Business Enterprises	186.15	
Insurance	87.01	
Maintenance expense	224.83	
Auditing	225.00	
Dues and subscriptions	340.00	
Purchase of United States securities	9,945.22	
Miscellaneous	94.40	58,562.00
Excess of disbursements over receipts	1,889.62	
Cash balance at beginning of year	6,628.44	
Cash balance at end of year deposited in the First Continental National Bank & Trust Company		\$ 4,738.82

Note: The cash balance at August 31, 1961, is stated exclusive of United States savings bonds owned by the Association at cost and maturity value of \$4,000.00.

The receipts and disbursements do not reflect the bequest from the estate of Daniel J. Gross which was transferred to a trust fund. A schedule of the cash transactions of this trust fund is included herein.

NEBRASKA STATE BAR ASSOCIATION

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

Schedule of Cash Receipts and Disbursements
Year ended August 31, 1961

(Unaudited)

Balance at beginning of year		\$26,615.28
Receipts:		
Interest	\$ 537.50	
Dividends	662.00	1,199.50
		<u>27,814.78</u>
Disbursements: Safe deposit box rental		4.40
Balance at end of year		\$ 27,810.38
Balance at end of year consists of:		
Cash in bank		\$ 1,431.36
Deposit with First Federal Savings & Loan Association of Lincoln		1,000.00
Securities (market value at August 31, 1961, \$27,264.75)		25,379.02
		<u>\$27,810.38</u>

Note: The board of trustees shall have the right, power and authority to disburse and distribute for welfare and assistance purposes, from either income or principal or both, such amounts, on such occasions and to such active practicing Nebraska lawyers, their wives, widows and children, as they, in their sole discretion, determined by a majority vote of the members of said board of trustees, may determine.

ROLL OF PRESIDENTS

1. 1900	*Eleazer Wakely	Omaha	32. 1931	*Fred Shepherd	Lincoln
2. 1901	*William D. McHugh	Omaha	33. 1932	*Ben S. Baker	Omaha
3. 1902	*Samuel P. Davidson	Tecumseh	34. 1933	*J. J. Thomas	Seward
4. 1903	*John L. Webster	Omaha	35. 1934	*John J. Ledwith	Lincoln
5. 1904	*C. B. Letton	Fairbury	36. 1935	*L. B. Day	Omaha
6. 1905	*Ralph W. Breckenridge	Omaha	37. 1936	*J. G. Mothersead	Scottsbluff
7. 1906	*E. C. Calkins	Kearney	38. 1937	*C. J. Campbell	Lincoln
8. 1907	*T. J. Mahoney	Omaha	39. 1938	Harvey M. Johnsen	Omaha
9. 1908	*C. C. Flansburg	Lincoln	40. 1939	*James M. Lanigan	Greeley
10. 1909	*Francis A. Brogan	Omaha	41. 1940	E. B. Chappell	Lincoln
11. 1910	*Charles G. Ryan	Grand Island	42. 1941	Raymond G. Young	Omaha
12. 1911	*Benjamin F. Good	Lincoln	43. 1942	Paul E. Boslaugh	Hastings
13. 1912	*William A. Redick	Omaha	44. 1943	*Robert R. Moodie	West Point
14. 1913	*John J. Halligan	North Platte	45. 1944	George L. DeLacy	Omaha
15. 1914	*H. H. Wilson	Lincoln	46. 1945	Virgil Falloon	Falls City
16. 1915	*C. J. Smyth	Omaha	47. 1946	Paul F. Good	Lincoln
17. 1916	*John N. Dryden	Kearney	48. 1947	Joseph T. Votava	Omaha
18. 1917	*F. M. Hall	Lincoln	49. 1948	Robert H. Beatty	North Platte
19. 1918	*Arthur C. Wakely	Omaha	50. 1949	*Abel V. Shotwell	Omaha
20. 1919	*R. E. Evans	Dakota City	51. 1950	Earl J. Moyer	Madison
21. 1920	*W. M. Morning	Lincoln	52. 1951	Clarence A. Davis	Lincoln
22. 1921	*A. G. Ellick	Omaha	53. 1952	George B. Hastings	Grant
23. 1922	*George F. Corcoran	York	54. 1953	Laurens Williams	Omaha
24. 1923	*Edward P. Holmes	Lincoln	55. 1954	J. D. Cronin	O'Neill
25. 1924	*Fred A. Wright	Omaha	56. 1955	John J. Wilson	Lincoln
26. 1925	*Paul Jessen	Nebraska City	57. 1956	Wilber S. Aten	Holdrege
27. 1926	*E. E. Good	Wahoo	58. 1957	Barton H. Kuhns	Omaha
28. 1927	*F. S. Berry	Wayne	59. 1958	Paul L. Martin	Sidney
29. 1928	*Robert W. Devoe	Lincoln	60. 1959	Joseph C. Tye	Kearney
30. 1929	Anan Raymond	Omaha	61. 1960	Flavel A. Wright	Lincoln
31. 1930	*J. L. Cleary	Grand Island	62. 1961	Hale McCown	Beatrice

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
2.	1900-08	Andrew J. Sawyer	Lincoln
3.	1900-02	Edmund H. Hinshaw	Fairbury
4.	1903-06	W. H. Kelligar	Auburn
5.	1904-07	John N. Dryden	Kearney
6.	1905-08	F. A. Brogan	Omaha
7.	1907-10	S. P. Davidson	Tecumseh
8.	1908-09	W. T. Wilcox	North Platte
9.	1909-11	R. W. Breckenridge	Omaha
10.	1910-12	Frank H. Woods	Lincoln
11.	1910-10	Charles G. Ryan	Grand Island
12.	1910-19	Alfred G. Ellick	Omaha
13.	1911-13	John A. Ehrhardt	Stanton
14.	1911-11	Benjamin F. Good	Lincoln
15.	1912-15	C. J. Smyth	Omaha
16.	1912-12	William A. Redick	Omaha
17.	1913-15	W. M. Morning	Lincoln
18.	1913-16	J. J. Halligan	North Platte
19.	1914-14	H. H. Wilson	Lincoln
20.	1915-17	Edwin E. Squires	Broken Bow
21.	1916-16	John N. Dryden	Kearney
22.	1916-17	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. Devove	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. Devove	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. Reguarte	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. Motherhead	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.	1950-60	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-	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-	William H. Lamme	Freemont
138.	1958-	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-	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