

1959

## Proceedings of the Nebraska State Bar Association House of Delegates Meeting, 1958

Paul L. Martin

*Nebraska State Bar Association*

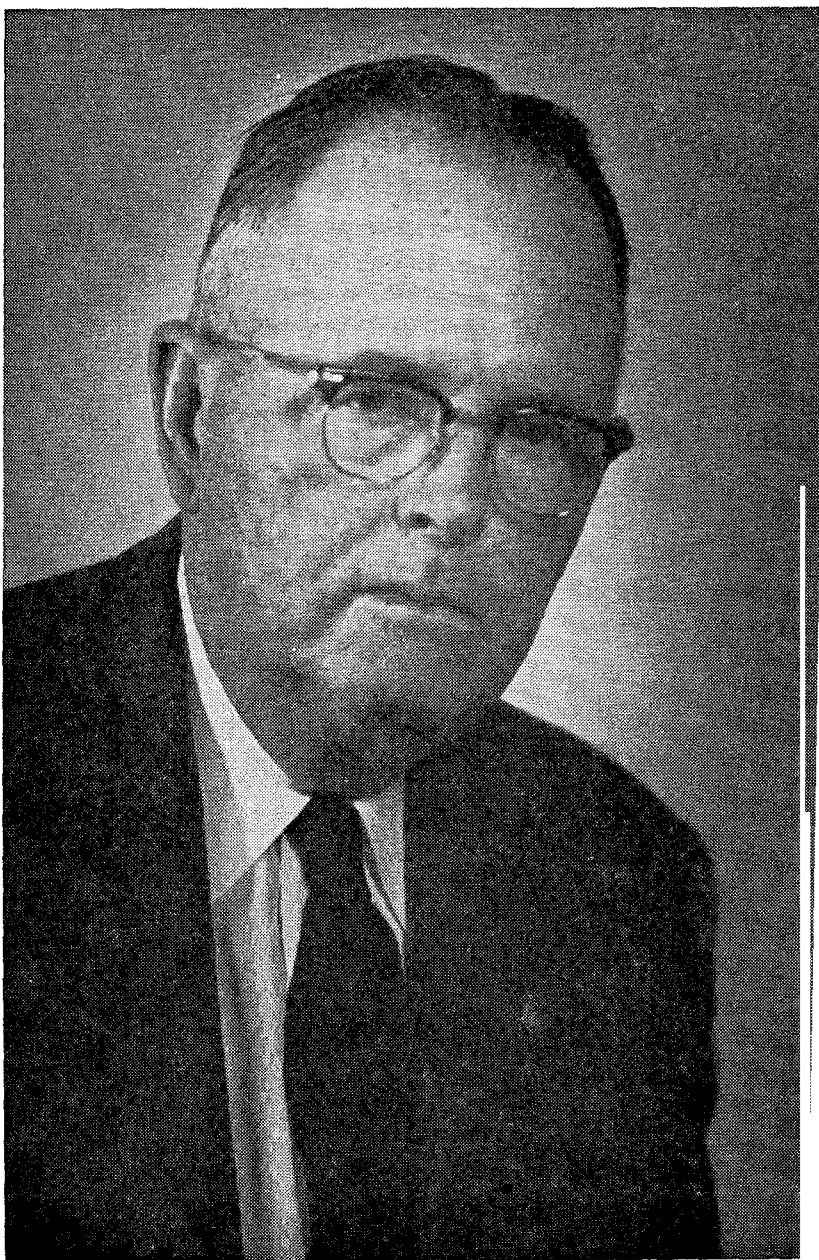
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**PRESIDENT PAUL L. MARTIN**

1958 OFFICERS OF THE  
NEBRASKA STATE BAR ASSOCIATION

*President*

PAUL L. MARTIN

Sidney

*Chairman of the House of Delegates*

RICHARD E. HUNTER

Hastings

*Secretary-Treasurer*

GEORGE H. TURNER

Lincoln

EXECUTIVE COUNCIL

Paul L. Martin .....	Sidney
Paul H. Bek .....	Seward
Thomas F. Colfer .....	McCook
Frederick M. Deutsch .....	Norfolk
Alfred G. Ellick .....	Omaha
John R. Fike .....	Omaha
Clarence E. Haley .....	Hartington
Richard E. Hunter .....	Hastings
Barton H. Kuhns .....	Omaha
C. Russell Mattson .....	Lincoln
Harry A. Spencer .....	Lincoln
Robert R. Wellington .....	Crawford

HOUSE OF DELEGATES

EXECUTIVE COUNCIL MEMBERS

Richard E. Hunter .....	Hastings
Paul L. Martin .....	Sidney
Paul H. Bek .....	Seward
Thomas F. Colfer .....	McCook
Frederick M. Deutsch .....	Norfolk
Alfred G. Ellick .....	Omaha
John R. Fike .....	Omaha
Clarence E. Haley .....	Hartington
Barton H. Kuhns .....	Omaha

C. Russell Mattson	Lincoln
Harry A. Spencer	Lincoln
Robert R. Wellington	Crawford

## SECTION DELEGATES

Keith Miller	Omaha
Fred H. Richards	Fremont
Harold W. Kauffman	Omaha
Harold Rice	Neligh
Robert Berkshire	Omaha

## EX-OFFICIO MEMBERS

Clarence A. Davis	Washington, D. C.
John J. Wilson	Lincoln

## ELECTED DELEGATES

### FIRST DISTRICT

Frank A. Hebenstreit	Falls City
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### SECOND DISTRICT

Bernard M. Spencer	Nebraska City
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### THIRD DISTRICT

Henry M. Grether, Jr.	Lincoln
C. M. Pierson	Lincoln
Elmer M. Scheele	Lincoln
Flavel A. Wright	Lincoln

### FOURTH DISTRICT

Milton Abrahams	Omaha
Robert K. Adams	Omaha
R. M. Crossman, Jr.	Omaha
Oscar T. Doerr	Omaha
Margaret Fischer	Omaha
James F. Green	Omaha
Edson Smith	Omaha
Ralph E. Svoboda	Omaha
Joseph Vinardi	Omaha

### FIFTH DISTRICT

Phil B. Campbell	Osceola
Maynard Grosshans	York

### SIXTH DISTRICT

L. F. Otradovsky	Schuyler
W. H. Lamme	Fremont



SEVENTH DISTRICT

Clarence C. Kunc .....Wilber

EIGHTH DISTRICT

Mark J. Ryan .....So. Sioux City

NINTH DISTRICT

Ralph S. Kryger .....Neligh

Donald D. Mapes .....Norfolk

TENTH DISTRICT

Howard S. Foe .....Red Cloud

L. R. Stiner .....Hastings

ELEVENTH DISTRICT

Arthur O. Auserod .....Bartlett

Ernest A. Ondracek .....Greeley

TWELFTH DISTRICT

Ward W. Minor .....Kearney

THIRTEENTH DISTRICT

Milton C. Murphy .....North Platte

William A. Stewart, Sr., .....Lexington

FOURTEENTH DISTRICT

Daniel E. Owens .....Benkelman

FIFTEENTH DISTRICT

William L. Brennan .....Butte

SIXTEENTH DISTRICT

W. E. Mumby .....Harrison

SEVENTEENTH DISTRICT

Robert J. Bulger .....Bridgeport

EIGHTEENTH DISTRICT

Dean R. Sackett .....Beatrice

# NEBRASKA STATE BAR ASSOCIATION

## HOUSE OF DELEGATES

OCTOBER 1, 1958

The opening session of the House of Delegates at the fifty-ninth annual convention of the Nebraska State Bar Association, convening in the Paxton Hotel, Omaha, was called to order at 9:45 o'clock by Chairman Richard E. Hunter of Hastings.

CHAIRMAN HUNTER: Will the 1958 session of the House of Delegates of the Nebraska State Bar Association please come to order.

Mr. Secretary, will you call the roll.

(Roll call by Secretary Turner.)

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

CHAIRMAN HUNTER: I have two changes on the calendar for the morning session. Immediately following Item No. 5, which is Report of Committee on Administrative Agencies, will be Report of the Committee on Revision of Corporation Law. Immediately following that as Item No. 7 will be Report of Special Committee on Joint Conference of Lawyers and Accountants, which is listed as Item No. 14. With those two changes, I will entertain a motion for approval of the calendar of business.

RALPH E. SVOBODA: I so move.

OSCAR T. DOERR: I second the motion.

CHAIRMAN HUNTER: It has been moved and seconded that the calendar of business as amended be approved. All in favor say "aye"; opposed, same sign. The motion carried.

The next item of business is the report of the President of the Nebraska State Bar Association, the Honorable Paul Martin.

## STATEMENT BY THE PRESIDENT

Paul L. Martin

Mr. Chairman and Members of the House of Delegates: There is little cause for a statement by the President at this time

because of the fact that the program of the Association is so broad and so thoroughly brought to all of the members of the Association that any statement is pure surplusage.

I am very happy to see so many of you here. It shows a genuine interest in the Association on the part of its members. More and more I am impressed with the wisdom of the establishment of the House of Delegates for the purpose of handling the legislative portion of the Association meeting so that the time of the members at large can be devoted to sectional meetings and other gatherings interesting to everyone.

An excellent program has been prepared for you for the next two days, and no member of the Association needs to go home with a feeling that the meeting was not worthwhile. If any one fails to benefit, he has no one to blame but himself.

In passing, however, I want to mention just a few things.

First: The insurance program. Last fall we completed arrangements with the John Hancock Insurance Company for a plan of group insurance. I am informed that we have over 900 policies now in force. This spring the Executive Council approved an extended and enlarged health and hospital plan to take care of catastrophe situations. The response to that has been excellent, and we are now in a position where the members of our Association can get the best of health, life and accident insurance at the minimum of costs.

Second: Committee reports. I am very proud of the work of the committees the past year. Some of the committees have made a marked contribution to our Association and I know you appreciate the efforts of the members. I do feel however that our committee appointments are too short and that when their work is just well started, the year ends. I think all committee appointments of continuing committees should be for a three-year period with staggered terms so that there would be enough holdover members to carry on worthwhile endeavors.

Third: I want to mention our institutes. They give the members so much, and the panels devote so much untiring effort to make them really worthwhile. I would like to see the plan enlarged by closer cooperation with the law schools to carry on a larger program of continuing education. At the Iowa Bar workshop which I attended there were at least seven members of the faculty of the University of Iowa and Drake University on the program. There were over 800 in attendance and I enjoyed it. I wonder if perhaps we are not using our law faculties as much as we should.

Fourth: Last year a special committee presented to your body a plan for the establishment of the office of President-Elect to automatically succeed to the office of President, providing that this officer would automatically become a member of the Executive Council and qualify such member for membership in the House of Delegates. That committee will report again to you today with the proposed amendments to the Rules regulating the Nebraska State Bar Association. I recommend the adoption of the amendments. No one knows better than I how impossible it is to go into the office of President of the Association cold, not even being a member of the Executive Council, and how much more one could give to the Association if he served for the previous year on the Council preparing himself to carry on the planned program of the Association.

I do not want to close without paying tribute to the work of our Secretary, George H. Turner. He is responsible for carrying on the details of a really worthwhile program. For the successes of the past year I give credit to George; the mistakes have been my own.

I will close and let you get started on an interesting meeting.

CHAIRMAN HUNTER: Thank you very much, Paul.

The Rule change which was mentioned by the President in regard to the creation of the office of President-Elect will be taken up this afternoon after it has been considered by the Executive Council at noon. That procedure conforms to the motion last year before the House of Delegates.

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

## REPORT OF SECRETARY-TREASURER

George H. Turner

Mr. Chairman and Members of the House: As you know, this is more or less an informational report since the detailed report is made to the Executive Council and to the Assembly tomorrow, but I put the item on the calendar with the thought that the House of Delegates is vitally interested in knowing the financial condition of the Association, but not so much interested in the exact details as the Executive Council and Assembly would be.

You will be interested to know that the total income for the Association for the year, principally of course from the dues

but also some from the sale of pamphlets and things of that kind, was \$46,806.59. We had an excess of receipts over disbursements of \$2,643.95. In addition, following the directions of the House given me at the last annual meeting, I invested another \$2,000 in government bonds. So our financial condition at the close of this audit, which please bear in mind had to be closed two weeks early because of the early date for the annual meeting, covering the period from October 1, 1957, to September 15, 1958, was cash on hand and in the bank, \$5,937.47, and the \$6,000 in bonds.

CHAIRMAN HUNTER: I will entertain a motion that the report of the Secretary-Treasurer be received and placed on file.

ELMER M. SCHEELE: I so move.

HARRY A. SPENCER: I second the motion.

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

It is an extreme pleasure, George, to be associated with an organization that is that solvent—for a change.

It has been the custom of the House in regard to resolutions which may be brought before it by individual members of the Association to appoint a Committee on Resolutions which will meet sometime over the noon hour. I will appoint as Chairman of the Resolutions Committee Barton Kuhns, and as the members: Flav Wright and W. E. Mumby. Is Mr. Mumby here?

SECRETARY TURNER: No, he has not come in as yet.

CHAIRMAN HUNTER: As an alternate to Mr. Mumby, if he is not here, I will appoint R. L. Stiner. That committee will meet at 1:00 o'clock in Room 714. Mr. Kuhns, you might meet with your committee to make specific arrangements for that following this morning's session.

If there are any members who have any resolutions which they want the Resolutions Committee to consider, you can get in touch with Mr. Kuhns and the committee in Room 714 at one o'clock. Is that satisfactory?

The next item of business is the report of the Committee on Administrative Agencies, Tracy J. Peycke

JAMES H. ANDERSON: For the record, my name is James H. Anderson and I am appearing on behalf of Tracy Peycke who was forced to be out of town today.

Mr. Chairman, House of Delegates: The Nebraska State Bar Association has in fact on two separate occasions approved a bill for an Administrative Procedures Act for state agencies. Following such approval of a specific bill by the 1956 session of the Bar Association, a bill entitled L.B. 133 was introduced into the 1957 session. By some maneuver - I am not familiar with it - the bill which was being considered by the Nebraska Legislative Council, which as you know is another name for the Nebraska Legislature on vacation, relating to provisions for review of such orders of state agencies was combined with the Bar Association's bill.

This particular bill which the Nebraska Legislative Council had been considering had of course not received the approval of the Nebraska Bar Association, but there was little the Bar Committee could do and the matter went before the Nebraska Legislature, not only as an Act for Administrative Procedures but containing the proposed provisions of the Nebraska Legislative Council for review. It went through the Legislature, however, without a dissenting vote, but because of review provisions which turned out to be simply cumulative in nature and not in lieu of existing review provisions, the Governor vetoed it.

The present committee conducted something of an investigation to see what lay back of the veto, aside from what was stated in the Governor's message. It was found that because of the fact that the review provisions were cumulative and not in lieu of existing procedures, certain of the administrative agencies had felt that such a bill would only cause confusion and a great deal of trouble in determining what was the proper procedure for review. Accordingly the entire bill was vetoed.

Our investigation also indicated that if only the provisions for an Administrative Procedures Act had been embodied in L.B. 133 there would have been no difficulty in securing approval of the legislation. The committee therefore feels that a new bill should be introduced into the Nebraska Legislature embodying only provisions of the original L.B. 133 as approved by the Association in 1956, and that no provisions should be permitted to be attached thereto, if possible, having to do with the matter of review other than to the limited extent that they are already included in the bill.

I therefore, Mr. Chairman, move that the recommendation of the Special Committee on Administrative Agencies that a bill for an Administrative Procedures Act in the form of L.B. 133, omitting any provisions for review, be supported in the Legislature.

After discussion, the motion to adopt the report of the committee was carried and the report adopted.

The formal report of the committee follows:

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

The Association in 1956 upon the recommendation of this committee approved a bill for an Administrative Procedure Act for presentation to the 1957 session of the Legislature. As introduced the bill contained provisions for judicial review of administrative orders. This had not been considered or approved by the Association. The bill, L.B. 133, was passed but was vetoed by the Governor because of objection to these review provisions.

Upon these events being reported to the House of Delegates by this committee in 1957, the committee was continued with instructions to consider "the question of procedures for judicial review of administrative decisions and to make recommendations as to whether a bill for an Administrative Procedure Act to be introduced in the next session of the Legislature should include provisions for review, or whether, if changes are thought desirable, a separate bill should be proposed."

It is apparent from this history that, laying aside for the moment the question of judicial review, the Association has twice approved an Administrative Procedure Act. Such a bill should therefore be a part of the 1959 legislative program.

Your committee readily reaches the conclusion that such a bill should *not* contain provisions for judicial review. No objections have been made to the bill as previously proposed by the Association; all its provisions were unanimously approved by the Legislature and the Governor's veto related solely to the review provisions. It appears desirable therefore again to submit this bill in the form previously recommended. There is no reason why desirable reforms to which no objection is made should fail or be postponed as a result of raising other possibly controversial issues.

The question then remains whether a separate bill relating to judicial review should be proposed. It is our conclusion that this should not be done at this time.

Even a separate bill, if it should turn out to be controversial, might have a tendency to be associated with and perhaps imperil the bill which we wish to support. After the experience in the 1957 session, a step at a time seems like the part of wisdom.

On the merits of the question of judicial review there are a great many problems not easily resolved. The Governor vetoed

L.B.133 because instead of affording a uniform procedure for review, it provided an *additional* method, leaving existing procedures intact. Your committee agrees that thus multiplying methods of judicial review is undesirable.

It is true that there exists considerable variety in the procedures for review of administrative decisions in Nebraska. The statutes relating to particular administrative proceedings in many, and perhaps in most, cases provided specifically for an appeal to the district or Supreme Court. An "appeal," as the term is thus used, has a special meaning and exists only by virtue of a specific statute. In its absence the right to review the decision of a tribunal exercising judicial or quasi judicial functions is by petition in error. Neb. R. S., sec. 25-1901, 1943.

Appeals from the Railway Commission and the State Board of Equalization are directly to the Supreme Court. The provisions of L.B. 133 did not apply to these cases. It seems to be the view of those most familiar with these procedures that the existing provisions should not be disturbed.

The more common method is by an appeal to the district court. Here the variations relate to venue, to the procedure for perfecting the appeal and to the scope of review. L.B. 133 looked to standardizing all this by an appeal to the district court of Lancaster County and spelling out the procedure for and scope of the review.

No doubt there would be an element of convenience in a standard procedure for review. However, we should not lose sight of the enormous variety of matters with which we are dealing. Some are of great gravity and importance, others of little consequence even to the parties involved. Some decisions, though made by a state department or board, deal with matters very local in nature and perhaps far removed from Lancaster County.

The question under consideration relates only to decisions by agencies at the state level. There would remain the matter of review of decisions in great number and variety by authorities at the county and municipal level.

While the Administrative Procedure Act which we advocate contains important provisions for uniform procedure before the agencies, it also provides for each agency to adopt rules relating to its own practice and procedure. Anyone having a matter before an agency will have to consult these rules as well as the applicable statutes. Here also will be found whatever provisions there are as to appeal.



The committee would not be understood to suggest that a larger measure of uniformity in these review provisions might not be desirable. It is not satisfied that a single method of review is suitable for all the great variety of administrative decisions handed down at the state level. Nor has it been shown that the present system is attended by any serious evils or inconveniences.

*It is recommended that a bill for an Administrative Procedures Act in the form of L.B. 133, omitting any provisions for review, be supported in the Legislature.*

Tracy J. Peycke, Chairman  
James H. Anderson  
Frederic R. Irons  
Barlow Nye  
R. E. Powell  
Edson Smith

CHAIRMAN HUNTER: The next item of business is the report of the Special Committee on Revision of Corporation Laws, by Bert Overcash.

BERT L. OVERCASH: Mr. Chairman, Members of the House: Our report begins on page 18 of the program.

I might volunteer to the House, since I was Chairman of the Administrative Section last year when this bill was prepared and did considerable work on it, that there was opposition by certain state agencies to the adopting of any administrative procedures act whatsoever. Our committee worked out the bill, worked in conjunction with the Legislative Council, and we thought we were working in cooperation with all the state agencies, but we became aware that there were certain agencies that were opposed to the adoption of any kind of a bill whatsoever—period. While the reason given for the veto of the Governor was with reference to the review provisions, I am convinced that those agencies did have some effect on the whole matter, and I would anticipate that they would continue to do what they could to oppose any such act.

Referring to the Committee on Revision of Corporation Law, I think the members are probably familiar to some extent with the activities of this committee, due to the fact that we have written a number of letters and sent to you certain information.

This committee was appointed to some extent as a result of an article in the *Law Review* discussing the situation as to our corporation laws. After some study it became evident to the committee that the prime problem, the first problem that needed

attention was the matter of a satisfactory nonprofit corporation act. It became evident that it would be impossible for this committee to do the whole job in one year. We therefore first concentrated on what would be a satisfactory nonprofit act to overcome the numerous problems that have been raised by the Secretary of State and members of the Bar. We solicited suggestions from the Bar and received a number of good suggestions.

We then gave study to the Model Nonprofit Act adopted by the American Institute and revised in 1957 and prepared an adaptation of that Act for use in Nebraska. That was circulated among the Bar generally. Probably all of you received the pamphlet.

After that was transmitted to the Bar we have now received a number of technical and clarification proposals with reference to amendment. The committee feels that the adoption of this Nonprofit Act, or some act of that type, is a first step in a needed revision of our corporation laws. We suggest on a long-term basis the possibility of reducing the number of special acts which we have. As you know, in Chapter 21 there are quite a number of special acts of a nonprofit nature—bridge companies, detective associations, and various special groups. We think if we can get a good nonprofit act on the books, in the end these special groups will see that this one act is sufficient for their purpose. We are not, however, proposing immediately any repeal of those special acts. We think this first act should be put on the books and its merits demonstrated to the satisfaction of the special groups.

Therefore it is our first recommendation that this nonprofit act be adopted, and I want to further supplement that by saying to the House that we would like to have you authorize the committee to review these technical and other suggestions received since this was submitted to the Bar with the idea of adopting such amendments as will make further clarification, and such changes as may be deemed meritorious by the committee.

Then the second undertaking of the committee related to the amendment of the Private Corporation Act. We were not able to do a complete job on that but we studied numerous suggestions of amendments and we came up with those amendments that are included in our report as being advisable at this time on an interim basis.

I am not going to go into those individually but I assume that those are familiar to you. We move that those amendments be approved in a legislative bill to be presented to the Legislature.

In that connection the committee has been aware that it

might be advisable in our state to give consideration on a long-term basis to the adoption of an act somewhat similar to the Model Business Corporation Act that has been developed by the American Law Institute and is now under consideration in a number of states. The suggestion has been made by many authorities that this is a definite improvement over the Delaware Act and there are some five or seven states that have either adopted the Model Act or are in the process of considering it.

We therefore in this committee recommend that consideration and study be given in the future to this Model Act, together with adaptations to Nebraska.

The committee further recommends that this special committee be continued in the future to carry on and complete the activities that I have reviewed here.

With that statement and the printed report, together with the information that has been submitted to you and to all the members of the Bar, I assume that our activities are sufficiently before you. I therefore move, Mr. Chairman, that the report and recommendations of the committee be approved, together with the supplemental report as to further amendments that may be advisable to the Nonprofit Act.

After discussion the motion to adopt the report of the committee was carried, and the report adopted.

The formal report of the committee follows:

#### **Report of the Special Committee on Revision of Corporation Laws**

During this year, this committee has inaugurated, but not completed, a comprehensive study of the corporation laws of Nebraska. The committee has been assisted by numerous suggestions of the Bar received in response to our inquiry upon this subject. Particular attention has been given to an article in the *Nebraska Law Review* of May, 1957 entitled "Nebraska Corporation Law, a Statutory Jungle," containing some 22 major recommendations in this field.

It became evident early in the studies of this committee that one of the first steps in accomplishing a program of this character would be the adoption of an independent comprehensive nonprofit corporation law by our Legislature. To that end, the committee proposed, and there has been printed and submitted to the Bar, a bill for introduction in the next session of the Legislature which contains an act upon this subject.

The pamphlet which contains the proposed nonprofit corporation act sets forth a summary of the studies of the committee in this regard. As mentioned therein, the committee suggests that, after the adoption of this act, consideration be given to eliminate many, if not all, of the special acts set forth in Chapter 21 of the Statutes dealing with a number of types of nonprofit corporations. It is the judgment of the committee that, if a satisfactory nonprofit corporation act is adopted, the various special groups will find it advantageous to come voluntarily under such act and there will remain no need or justification for continuing the many special acts in this field.

*The committee, therefore, recommends the prompt enactment of the proposed nonprofit corporation act and continued study by this committee of the related matter of simplifying our corporation law structure by eliminating the numerous special acts set forth in Chapter 21.*

Another important phase of the committee's work during this year relates to the amendment of our private corporation act, Chapter 21, Articles 1 (Organization and Powers) and 12 (Foreign Corporations). The suggestions considered in this connection covered a wide range. A number of them involved seriously controversial questions relating to group interests and legislative policy with reference to revenue and regulation. It was felt that in general proposals of this kind might properly be considered by the Legislature under separate bills introduced and supported by interested parties. The committee has concluded that it should propose and support the following specific amendments to Articles 1 and 12:

1. Amend section 21-103 by adding at the end thereof the following subsection:

(9) To indemnify any director or officer or former director or officer of the corporation, or any person who may have served at its request as a director or officer of another corporation in which it owns shares of capital stock or of which it is a creditor, against expenses actually and reasonably incurred by him in connection with the defense of any action, suit or proceeding, civil or criminal, in which he is made a party by reason of being or having been such director or officer, except in relation to matters as to which he shall be adjudged in such action, suit or proceeding to be liable for negligence or misconduct in the performance of duty; and to make any other indemnification that shall be authorized by the articles of incorporation or by any by-law or resolution adopted by the shareholders after notice.

(*Comment:* The purpose of this section is self-explanatory. It follows the language of section 4 of the Model Business Corporation Act as revised in 1957 and is substantially the same as the Delaware provision added in 1943. 8 Del. Code Ann. Sec. 122 [10].)

2. Add a new subsection to section 21-107 as follows:

The Secretary of State shall prepare and furnish upon request therefor certified composite articles of incorporation which shall contain only such provisions as are in effect at the time of certification by reason of the instruments and agreements referred to in subsection (6) of section 101 of this title. The Secretary of State shall make in each case such reasonable charge therefor as he deems proper. Any such certified copy may be recorded in the office of the county clerk of the county where the principal office of the corporation is then located in this State.

(*Comment:* The purpose of this subsection is to make it possible for a corporation to obtain if it desires a single instrument containing the original articles and amendments thereto rather than the separate instruments, as an aid to filing articles where the need for this arises. Such composite articles will only be furnished if specifically requested by the corporation which must bear the expenses incurred by the Secretary of State in preparing the same. This subsection follows the Delaware provision added in 1949. 8 Del. Code Ann. Sec. 104.)

3. Amend section 21-108 to include the underlined words:

The articles of incorporation or a copy thereof *or the composite articles of incorporation* duly certified by the Secretary of State, accompanied with the certificate of the county clerk of the county wherein the same is recorded, under his hand and the seal of his office, stating that it has been recorded, or the record of the same in the office of the county clerk aforesaid, or a copy of said record duly certified by the county clerk aforesaid, shall be evidence in all courts in this state.

(*Comment:* The purpose of this amendment is to make the composite articles of incorporation, if authorized, available as evidence. It follows the Delaware provision added in 1949. 8 Del. Code Ann. section 105.

4. Repeal section 21-174 providing as follows:

Every corporation operating or organized under this act shall have in a conspicuous place, at its principal office, place or places of business in letters sufficiently large to be

easily read, painted or printed, the corporate name of such corporation; and every such corporation which shall fail or refuse to comply with the provisions of this section shall be subject to a fine of not less than one hundred dollars and not more than five hundred dollars, to be recovered with costs by the state, before any court of competent jurisdiction, by action at law to be prosecuted by the Attorney General.

(*Comment:* The committee felt that this section was unnecessary.)

5. Amend section 21-183 by striking out the last sentence of this section and substituting the following:

Whenever all of the stockholders shall consent in writing to a dissolution, no meeting of stockholders shall be necessary. Upon the execution of such written consent, a statement of intent to dissolve shall be executed in duplicate by the corporation by its president or vice president and by its secretary or assistant secretary, and verified by one of the officers signing such statement, which statement shall set forth: (a) the name of the corporation; (b) the names and respective addresses of its officers; (c) the names and respective addresses of its directors; (d) a copy of the written consent signed by all shareholders of the corporation; and (e) a statement that such written consent has been signed by all shareholders of the corporation or signed in their names by their attorneys thereunto duly authorized. Such statement of consent shall be filed in the office of the Secretary of State, who upon being satisfied that such statement conforms to law shall issue a certificate that such statement has been filed, and when such certificate has been issued and the proof of publication of notice of dissolution has been filed in the places and manner required in section 21-1147, the corporation shall be dissolved.

(*Comment:* The purpose of this proposed amendment is to provide some assurance, upon which the Secretary of State can act, that the signatures of the stockholders consenting to the dissolution are genuine. No such assurance is contained in the present statute. The language follows that found in section 76 of the Model Business Corporation Act.)

6. Amend section 21-1208 by striking out the words "organized under the laws of this state" contained in clause (2) and substitute the words "domestic or foreign" or similar language to

permit a foreign corporation to act as a registered agent in this state.

(*Comment:* The committee felt that the present law prohibiting a foreign corporation from serving as a registered agent was unduly restrictive.)

7. Amend section 21-1209 by eliminating the requirements (a) that the statement called for by this section be executed in duplicate, (b) that the duplicate original returned by the Secretary of State shall be filed for record in the office of the register of deeds of the county in which the registered office of the corporation in this state was situated prior to the filing of such statement in the office of the Secretary of State; and (c) that, if the registered office is changed from one county to another county, the corporation shall also file for record in the office of the register of deeds of the county to which such registered office is changed, a copy of the statement of change of address of its registered office, certified by the Secretary of State.

(*Comment:* The purpose of this amendment is to eliminate the necessity for filing the certificate of good standing with the county register of deeds as well as with the Secretary of State.)

Since the adoption of our private corporation statute in 1941 the Committee on Business Corporations of the American Bar Association prepared a Model Business Corporation Act (revised 1950). This Act was designed to provide a working model for revision and modernization of state corporation laws and has been used as such by several states desiring a simple and up-to-date statute. *It is recommended that our committee explore the advisability of making a general revision of our business corporation statute patterned after the Model Act.*

The committee has not had time this year to complete studies as to the need for amending our constitutional provisions relating to corporation laws. This is an important subject and one that will deserve the careful consideration of this committee during the next year.

*It is recommended that the State Bar Association continue a special committee on revision of corporation laws until the program outlined herein can be completed.*

Bert L. Overcash, Chairman  
Edmund O. Belsheim  
George L. DeLacy  
Roland A. Luedtke  
David W. Swarr

CHAIRMAN HUNTER: The next item of business on the agenda is a report of the Special Committee on Joint Conference of Lawyers and Accountants by Harry B. Cohen.

HARRY B. COHEN: Mr. Chairman, Members of the House of Delegates: The committee's report is on page 38 of the program.

In the first instance we didn't have a lot to report except the activities of the national organizations. At the time of making the first report we did not have an opportunity to have our annual meeting.

Our annual meeting was held on September 12, 1958. It was very well attended by both the members of the Bar Association Committee and the members of the Committee of the Certified Public Accountants Society.

The meeting considered and discussed the 1957 Joint Report of the Special Committee on Professional Relations of American Bar Association and Committee on Relations with the Bar of the American Institute of Accountants.

Incidentally, the American Institute of Accountants now has been changed to the American Institute of Certified Public Accountants, and that same change was made with respect to the Nebraska State Committee, too.

Copies of the Joint Report and the suggested Code of Conduct had previously been delivered to the members of both committees. A copy of this report of the national organizations and the suggested Code of Conduct are also included in the program in toto.

In addition, at this same meeting the Accountants' Society reported on the Accountants' Licensing Act of the State of Nebraska. It was apparent that the Accountants' Licensing law was operating very successfully.

The meeting resolved to operate under and in conformity with the procedures recommended by the 1957 Joint Report.

After that, quite a discussion took place with respect to the suggested Code of Conduct. This Code of Conduct, which appears on page 45 of the program, was the Code of Conduct prepared by the Bar Association and that was submitted to the National Conference. No action was taken because it was desired by the National Conference that the suggested Code be studied, be discussed by the various state bodies; and furthermore no action could be taken because this was something that would have to be adopted by the national organizations of the respective or-



ganizations which constitute the National Conference; namely, the national organization of the Certified Public Accountants Society and the American Bar Association.

It is my understanding that the Chairman of the Committee in the American Bar Association who is a member of the National Conference discussed this matter at the national convention before the Taxation Section.

We resolved at this meeting that we felt the suggested Code of Conduct was something that was very worthwhile, and therefore we passed a resolution which requires action by this body. Our resolution is that the respective committees of the Nebraska State Bar Association and the Nebraska Society of Certified Public Accountants, constituting the Nebraska Joint Conference of Lawyers and Accountants, recommend to their respective parent associations the adoption of the following resolution:

*Resolved:* That the Nebraska State Bar Association recommends the adoption by the National Conference of Lawyers and Certified Public Accountants of the suggested Code of Conduct heretofore promulgated by and submitted to the National Conference of Lawyers and Certified Public Accountants.

*Further Resolved:* That a copy of this resolution be delivered to the National Conference of Lawyers and Certified Public Accountants.

The National Conference, by the way, seeks these recommendations.

If you will refer to page 45 you will note—I assume you have all read this—that the suggested Code of Conduct attempts to cover four situations where irritations might occur:

1. The lawyer employed by a firm of certified public accountants.
2. The certified public accountant employed by a law firm.
3. Association in the form of partnerships between lawyers and certified public accountants.
4. The individual practitioner who possesses dual qualifications.

I think a lot of thought was given to these suggestions and they are very meritorious and deserve consideration.

Mr. Chairman, I move the adoption of the report and the supplemental report which I have given.

After discussion the motion to adopt the report and supplemental report of the committee was carried and the reports adopted.

The formal report of the committee follows:

**Report of the Joint Conference of Lawyers and Accountants**

The Joint Conference of Lawyers and Accountants was initiated in 1951. The committee consists of six members of the Bar appointed by the President of the Nebraska State Bar Association, and seven members of the Nebraska Society of Certified Public Accountants appointed by the President of that organization. It has been customary for the two committees to meet annually in joint session. The annual meeting usually takes place in September of each year. We attempted to hold a meeting in August of this year, but there were too many conflicts, and accordingly the annual meeting was set for September 12, 1958. This report of necessity has to be prepared prior to the holding of the annual meeting of the conference. For that reason it is impossible to make a report of any business that may be transacted at the annual meeting.

Your committee has corresponded with the Honorable William J. Jameson who is the Chairman of the Special Committee on Professional Relations of the American Bar Association. In 1957, the American Bar Association Special Committee on Professional Relations, and the Committee on Relations with the Bar of the American Institute of Accountants issued its report. The report includes the statement of principles adopted in 1951 by the joint committees. Attached to this report is the 1957 report of the Joint Committee of the American Bar Association and the American Institute of Accountants.

The Joint Committee of the American Bar Association and the American Institute of Accountants have met frequently, and have acted jointly on matters involving the two professions. In addition, this committee has drafted a proposed Code of Conduct. Judge William J. Jameson spoke before the Section on Taxation at the recent American Bar Association annual meeting held in Los Angeles. One of the matters discussed at this meeting was the proposed Code of Conduct. As yet, the National Conference of Lawyers and Certified Public Accountants has not taken any action on the proposed Code of Conduct. The provisions of the proposed Code of Conduct will be discussed at the annual meeting of the Nebraska Joint Conference. A copy of the proposed Code of Conduct is attached to this report.

Harry B. Cohen, Chairman  
Warren K. Dalton  
Barton Kuhns  
Vance E. Leininger  
Keith Miller  
Arthur C. Sidner

THE PROFESSIONAL RELATIONS OF LAWYERS AND  
CERTIFIED PUBLIC ACCOUNTANTS

1957

Joint Report of Special Committee on Professional Relations of  
American Bar Association and Committee on Relations with  
the Bar of American Institute of Accountants

Because of the inter-relationship of financial and legal aspects of the modern economy there sometimes is a basis for dispute as to whether a particular matter properly falls within the field of law or within the field of competence of certified public accountants. The Committee on Professional Relations of the American Bar Association and the Committee on Relations with the Bar of the American Institute of Accountants believe that any such question that may arise between the two professions should be resolved by conference and cooperation. One of the principal fields in which such questions have arisen is Treasury practice.

In 1951 the American Bar Association and American Institute of Accountants adopted a Joint Statement of Principles Relating to Practice in the Field of Federal Income Taxation, for the guidance of members of each profession.

On January 30, 1956, the Secretary of the Treasury issued a statement interpreting Treasury Department Circular 230 relating to practice before the Department. In this statement the Secretary mentioned the need for uniformity in interpretation and administration of the regulations governing practice before the Department and stated that the Department has properly placed on lawyers and accountants, under the Department's ethical requirements, responsibility for determining when the assistance of a member of the other profession is required. He cited with gratification "the extent to which the two professions over the years have made progress toward mutual understanding of the proper sphere of each, as for example in the Joint Statement of Principles Relating to Practice in the Field of Federal Income Taxation."

In concluding his statement, the Secretary said that relationships of lawyers and accountants in Treasury practice would be kept under surveillance, so that, if necessary, the matter can be reviewed later to determine whether amendment of the regulations governing practice before the Department or other appropriate action is necessary.

Consideration of the public interest and the best interests of both professions seems, therefore, to require expansion of volun-

tary machinery for self-discipline by both professions and cooperation between them to enable differences between lawyers and certified public accountants as they may arise—whether in tax practice or elsewhere—to be resolved by conference and negotiations, and not by litigation.

To this end, the Special Committee on Professional Relations of the American Bar Association and the Committee on Relations with the Bar of the American Institute of Accountants have agreed that the National Conference of Lawyers and Certified Public Accountants, composed of members of the two committees, should serve as a joint committee to consider differences arising between the two professions and disputes involving questions of what constitutes the practice of law or accounting.

The Joint Committee recommends the following procedures:

1. That with respect to the field of federal income taxation, the two professions continue to adhere to the Statement of Principles approved by the governing bodies of the American Bar Association and the American Institute of Accountants in 1951. It is recognized that the statement is a guide to cooperation and does not presume to be a definition of the practice of law or the practice of accounting.
2. That state organizations of the two professions consider the establishment in each state of a joint committee similar to the National Conference for consideration of differences arising between members of the two professions.
3. That before any state organizations of either profession shall institute or participate in litigation or disputes involving differences between members of the two professions, or involving questions of what constitutes the practice of law or accounting, such differences and questions be referred to joint committees of state organizations of the two professions, where such committees exist, or to the National Conference.
4. That, in the interest of uniformity, state committees maintain close coordination with the National Conference; and if resolution of differences seems impossible at the local and state level, they be referred to the National Conference. Particularly in the early years, it would seem to be in the best interest of all concerned for the National Conference to participate actively in the consideration and settlement of disputes which might serve as guides and precedents for other cases.
5. That—again in the interest of uniformity—where joint committees at the state level are appointed to deal with any differ-

ences which may arise, they be limited, where possible, to one to a state, and their structure and procedure follow the pattern of the National Conference.

It is hoped and believed that resolution of specific cases as suggested above will in time provide a body of precedent which will come to serve as a guide to members of the two professions. Such a body of precedent will, we think, prove of more practical value than attempts to find acceptable definitions of the fields of the two professions.

The efforts of the National Conference are not, of course, intended to be punitive in nature. Their objective will be to avoid conflict and to encourage and enable continuing cooperation between lawyers and certified public accountants in accordance with the ethical standards of the two professions.

For the American Bar Association  
William J. Jameson, Chairman,  
Special Committee on Professional Relations

For the American Institute of Accountants  
John W. Queenan, Chairman,  
Committee on Relations with the Bar

#### DEPARTMENT OF THE TREASURY

Treasury Department Interpretation of Section 10.2 of Treasury  
Department Circular 230 (31 C.F.R. 10.2)

For some months the Treasury Department has had under consideration the revision of Treasury Department Circular 230 relating to practice before the Department.

Congress has given the Treasury Department the responsibility of regulating practice before the Department. It is in the exercise of this responsibility that the Department has issued the rules and regulations set forth in Circular 230, taking into consideration, among other things, the need of taxpayers for tax advice and assistance, the number of tax returns filed each year, the volume and complexity of problems relating thereto, the skills and training required for proper representation of taxpayers' interests and the availability of people who can provide such service.

The Department believes the standards prescribed in Circular 230 have generally operated in a highly satisfactory manner, have made available to taxpayers representatives to assist them in presenting their interests to the Department, and have facilitated fair and orderly administration of the tax laws.

It is the intention of the Department that all persons enrolled to practice before it be permitted to fully represent their clients before the Department, in the manner hereinafter indicated. This is apparent from section 10.2(b), which states that the scope of practice (of agents as well as attorneys) before the Department comprehends "all matters connected with the presentation of a client's interest to the Treasury Department." Enrollees, whether agents or attorneys, have been satisfactorily fully representing clients before the Department for many years. The Department believes this has been beneficial to the taxpayers and to the Government and that there presently appears no reason why the present scope and type of practice should not continue as it has in the past.

The Department's attention has been called to the decisions of certain State courts and to statements which suggest varying interpretations of section 10.2(f) of the Circular. This subsection makes it clear that an enrolled agent shall have the same rights, powers, and privileges and be subject to the same duties as an enrolled attorney, except that an enrolled agent may not prepare and interpret certain written instruments. The second proviso of the subsection states that nothing in the regulations is to be construed as authorizing persons not members of the bar to practice law. The uniform interpretation and administration of this and other sections of Circular 230 by the Department are essential to the proper discharge of the above responsibility imposed on it by the Congress.

It is not the intention of the Department that this second proviso should be interpreted as an election by the Department not to exercise fully its responsibility to determine the proper scope of practice by enrolled agents and attorneys before the Department. It should be equally clear that the Department does not have the responsibility nor the authority to regulate the professional activities of lawyers and accountants beyond the scope of their practice before the Department as defined in section 10.2(b) and nothing in Circular 230 is so intended.

The Department has properly placed on its enrolled agents and enrolled attorneys the responsibility of determining when the assistance of a member of the other profession is required. This follows from the provisions in section 10.2 (z) that enrolled attorneys must observe the canons of ethics of the American Bar Association and enrolled agents must observe the ethical standards of the accounting profession. The Department has been gratified to note the extent to which the two professions over the years have made progress toward mutual understanding of the proper sphere

of each, as for example in the Joint Statement of Principles Relating to Practice in the Field of Federal Income Taxation.

The question of Treasury practice will be kept under surveillance so that if at any time the Department finds that the professional responsibilities of its enrolled agents and enrolled attorneys are not being properly carried out or understood, or that enrolled agents and attorneys are not respecting the appropriate fields of each in accordance with that Joint Statement, it can review the matter to determine whether it is necessary to amend these provisions of the Circular or take other appropriate action.

(Signed) G. M. Humphrey

Dated: January 30, 1956

Secretary of the Treasury

#### STATEMENT OF PRINCIPLES RELATING TO PRACTICE IN THE FIELD OF FEDERAL INCOME TAXATION

Promulgated by the National Conference of  
Lawyers and Certified Public Accountants

*Preamble.* In our present complex society, the average citizen conducting a business is confronted with a myriad of governmental laws and regulations which cover every phase of human endeavor and raise intricate and perplexing problems. These are further complicated by the tax incidents attendant upon all business transactions. As a result, citizens in increasing numbers have sought the professional services of lawyers and certified public accountants. Each of these groups is well qualified to serve the public in its respective field. The primary function of the lawyer is to advise the public with respect to the legal implications involved in such problems, whereas the certified public accountant has to do with the accounting aspects thereof. Frequently the legal and accounting phases are so interrelated and interdependent and overlapping that they are difficult to distinguish. Particularly is this true in the field of income taxation where questions of law and accounting have sometimes been inextricably intermingled. As a result, there has been some doubt as to where the functions of one profession end and those of the other begin.

For the guidance of members of each profession the National Conference of Lawyers and Certified Public Accountants recommends the following statement of principles relating to practice in the field of federal income taxation:

1. *Collaboration of Lawyers and Certified Public Accountants Desirable.* It is in the best public interest that services and assistance in federal income tax matters be rendered by lawyers and

certified public accountants, who are trained in their fields by education and experience, and for whose admission to professional standing there are requirements as to education, citizenship, and high moral character. They are required to pass written examinations and are subject to rules of professional ethics, such as those of the American Bar Association and American Institute of Accountants, which set a high standard of professional practice and conduct, including prohibition of advertising and solicitation. Many problems connected with business require the skills of both lawyers and certified public accountants and there is every reason for a close and friendly cooperation between the two professions. Lawyers should encourage their clients to seek the advice of certified public accountants whenever accounting problems arise and certified public accountants should encourage clients to seek the advice of lawyers whenever legal questions are presented.

2. *Preparation of Federal Income Tax Returns.* It is a proper function of a lawyer or a certified public accountant to prepare federal income tax returns.

When a lawyer prepares a return in which questions of accounting arise, he should advise the taxpayer to enlist the assistance of a certified public accountant.

When a certified public accountant prepares a return in which questions of law arise, he should advise the taxpayer to enlist the assistance of a lawyer.

3. *Ascertainment of Probable Tax Effects of Transactions.* In the course of the practice of law and in the course of the practice of accounting, lawyers and certified public accountants are often asked about the probable tax effects of transactions.

The ascertainment of probable tax effects of transactions frequently is within the function of either a certified public accountant or a lawyer. However, in many instances, problems arise which require the attention of a member of one or the other profession, or members of both. When such ascertainment raises uncertainties as to the interpretation of law (both tax law and general law), or uncertainties as to the application of law to the transaction involved, the certified public accountant should advise the taxpayer to enlist the services of a lawyer. When such ascertainment involves difficult questions of classifying and summarizing the transaction in a significant manner and in terms of money, or interpreting the financial results thereof, the lawyer should advise the taxpayer to enlist the services of a certified public accountant.



In many cases, therefore, the public will be best served by utilizing the joint skills of both professions.

4. *Preparation of Legal and Accounting Documents.* Only a lawyer may prepare legal documents such as agreements, conveyances, trust instruments, wills, or corporate minutes, or give advice as to the legal sufficiency or effect thereof, or take the necessary steps to create, amend, or dissolve a partnership, corporation, trust, or other legal entity.

Only an accountant may properly advise as to the preparation of financial statements included in reports or submitted with tax returns, or as to accounting methods and procedures.

5. *Prohibited Self-Designations.* An accountant should not describe himself as a "tax consultant" or "tax expert" or use any similar phrase. Lawyers, similarly, are prohibited by the canons of ethics of the American Bar Association, and the opinions relating thereto, from advertising a special branch of law practice.

6. *Representation of Taxpayers before Treasury Department.* Under Treasury Department regulations lawyers and certified public accountants are authorized, upon a showing of their professional status, and subject to certain limitations as defined in the Treasury rules, to represent taxpayers in proceedings before that Department. If, in the course of such proceedings, questions arise involving the application of legal principles, a lawyer should be retained, and if in the course of such proceedings accounting questions arise, a certified public accountant should be retained.

7. *Practice before the Tax Court of the United States.* Under the Tax Court rules nonlawyers may be admitted to practice.

However, since upon issuance of a formal notice of deficiency by the Commissioner of Internal Revenue a choice of legal remedies is afforded the taxpayer under existing law (either before the Tax Court of the United States, a United States District Court, or the Court of Claims), it is in the best interests of the taxpayer that the advice of a lawyer be sought if further proceedings are contemplated. It is not intended hereby to foreclose the right of nonlawyers to practice before the Tax Court of the United States pursuant to its rules.

Here also, as in proceedings before the Treasury Department, the taxpayer, in many cases, is served best by the combined skills of both lawyers and certified public accountants, and the taxpayers, in such cases, should be advised accordingly.

8. *Claims for Refund.* Claims for refund may be prepared by lawyers or certified public accountants, provided, however, that

where a controversial legal issue is involved or where the claim is to be made the basis of litigation, the services of a lawyer should be obtained.

9. *Criminal Tax Investigations.* When a certified public accountant learns that his client is being specially investigated for possible criminal violation of the Income Tax Law, he should advise his client to seek the advice of a lawyer as to his legal and constitutional rights.

*Conclusion.* This statement of principles should be regarded as tentative and subject to revision and amplification in the light of future experience. The principal purpose is to indicate the importance of voluntary cooperation between our professions, whose members should use their knowledge and skills to the best advantage of the public. It is recommended that joint committees representing the local societies of both professions be established. Such committees might well take permanent form as local conferences of lawyers and certified public accountants patterned after this conference, or could take the form of special committees to handle a specific situation.

#### CODE OF CONDUCT FOR LAWYERS AND CERTIFIED PUBLIC ACCOUNTANTS WHO PRACTICE IN ASSOCIATION AND FOR INDIVIDUALS POSSESSING DUAL QUALIFICATIONS

Promulgated by the National Conference of Lawyers and Certified Public Accountants

NOTE: The following is the draft of a proposed Code submitted to the National Conference of Lawyers and Certified Public Accountants for consideration. No action has been taken by the Conference.

*Preamble.* In the Statement of Principles Relating to Practice in the Field of Federal Income Taxation, promulgated by the National Conference in 1951, it is stated that many problems connected with business require the skills of both lawyers and certified public accountants and that there is every reason for close and friendly cooperation between the two professions. We reaffirm that principle. While much is to be gained by such cooperation, there is danger that when lawyers and accountants associate professionally, or when a member of one profession is employed by a member of the other, the method of association or employment may raise problems of unethical conduct detrimental to the professions and to the public.

With increasing frequency, lawyers and certified public accountants find that in the conduct of normal professional activities,

it is helpful to possess knowledge and training in the other discipline. An individual who regards himself primarily as an accountant may earn his law degree and become a member of the bar, while another who regards himself primarily as a lawyer may study accounting and become a certified public accountant to aid him in his law practice. The desire of a member of either profession thus to widen the scope of his knowledge and training is laudable, as long as the individual and those with whom he may be associated clearly recognize the concomitant responsibilities of those who possess such dual qualifications to avoid misleading the public.

The scope and complexity of both professions are such that no individual simultaneously can possess, in both professions at the same time, the expertness necessary to attain and thereafter maintain the high standards of professional competence that the public is entitled to expect.

Partly to serve the mutual interests of the members of the profession concerned, but principally in the public interest, the American Bar Association has adopted Canons of Professional Ethics and the American Institute of Certified Public Accountants has adopted Rules of Professional Conduct.

It is the purpose of this statement to isolate and define the joint and overlapping problems that threaten the public interest, solutions to which are the concern of the members of both professions, and to recommend to the American Bar Association and to the American Institute of Certified Public Accountants the joint adoption of the following Code of Conduct to which members of each profession shall adhere in their relations with members of the other profession and with the public.

1. *The Lawyer Employed by a Firm of Certified Public Accountants*

Accountants are prohibited from practicing law and desire to avoid creating the impression that they are qualified to do so. The problems inherent in the employment of a lawyer by an accountant or a firm of accountants stem from the fact that public knowledge of such employment may create the erroneous impression in the public mind that the employer is qualified to practice law.

Canon 35 of the Canons of Professional Ethics of the American Bar Association provides that "The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to

his client should be personal, and the responsibility should be direct to the client." With respect to this Canon, the Committee on Professional Ethics and Grievances of the American Bar Association has ruled that "A lawyer may properly be employed by a firm of accountants on a salaried basis to advise the accounting firm, but such employment may, under no circumstances, be used to enable the accounting firm to render legal advice or legal services to its clients" (Opinion No. 272, October 26, 1946).

Canon 47 of the Canons of Professional Ethics of the American Bar Association provides that "No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate."

It is the considered judgment of the members of the National Conference that a member of the bar may not accept employment with an accountant or a firm of public accountants, except as circumscribed above, and render legal services for or continue to hold himself out to the public as a practicing lawyer, without violating the Canons of Professional Ethics of the American Bar Association; and that a member of the bar who accepts employment with an accountant or a firm of public accountants should, and must, consider his right to practice law to be restricted as long as he is so employed.

To avoid any misunderstanding on the part of the public and to avoid misleading the members of the public, neither a lawyer nor any accountant or accounting firm by which he may be employed shall make any reference, either in public or in communications with clients, to a law degree which may be held by him or to the fact that he may be a member of the bar privileged under different circumstances to practice law. Any lawyer thus employed shall not permit reference to be made to the fact that he holds a law degree or is a member of the bar in connection with the publication, distribution or advertising of any book or article written by him, or in connection with his appearance as a speaker at any time.

## *2. The Certified Public Accountant Employed by a Law Firm*

Lawyers are prohibited from practicing accountancy and desire to avoid creating the impression that they are qualified to do so. The problems inherent in the employment of an accountant by a lawyer or a law firm stem from the fact that public knowledge of such employment may create the erroneous impression in the public mind that the employer is qualified to practice accountancy.

The relationship is proper as long as the function of the accountant is to act as such on behalf of the law firm itself, and

not on behalf of any client of the law firm. If the law firm, however, holds itself out to the public as qualified to provide accounting services, or permits members of the public to secure that impression, then the law firm and its members would be, or the public might consider that they were, engaged in or qualified to engage in the practice of accounting as well as the practice of law. Such conduct on the part of a lawyer is proscribed by Canons 27 and 33 of the Canons of Professional Ethics of the American Bar Association. Canon 27 provides that it is unprofessional to solicit professional employment and that "indirect advertisements \* \* \* and all other like self-laudation offend the traditions and lower the tone of our profession and are reprehensible." The Committee on Professional Ethics and Grievances has ruled that for a law firm to state publicly that it has in its employ a certified public accountant constitutes a violation of Canon 27 (Opinion 272, October 25, 1946).

If a certified public accountant thus employed shall permit the fact of his employment to be published in such a manner as to mislead the public, then his conduct would violate Rule 4 of the Rules of Professional Conduct of the American Institute of Certified Public Accountants. This Rule provides that "A member shall not engage in any business or occupation conjointly with that of a public accountant, which is incompatible or inconsistent therewith."

To avoid any misunderstanding on the part of the public and to avoid misleading the members of the public to their detriment, neither an accountant nor any lawyer or law firm by which he may be employed shall make any reference, either in public or in communications with clients, to a degree or license signifying proficiency in accounting which may be held by him or to the fact that he may be the holder of a CPA certificate, privileged under different circumstances to act as an accountant for clients of the law firm.

### 3. *Partnerships between Lawyers and Certified Public Accountants*

Rule 3 of the Rules of Professional Conduct of the American Institute of Certified Public Accountants provides that "\* \* \* participation in the fees or profits of professional work shall not be allowed directly or indirectly to the laity by a member." The term "laity" has not been defined, and it is uncertain whether it would be held to include a lawyer (Carey, *Professional Ethics of Certified Public Accountants*, p. 200).

Canon 33 of the Canons of Professional Ethics of the American Bar Association prohibits partnerships between members of

the bar and non-members, where any part of the partnership's employment consists of the practice of law. The Committee on Professional Ethics and Grievances of the American Bar Association has ruled that a partnership between a lawyer and an accountant to specialize in income tax work and related accounting is permissible only if the lawyer "completely disassociate[s] himself from any practice or holding out that would indicate that he is a member of the bar or in any way engaged in practice as a lawyer." Canon 33 applies, in the Committee's opinion, "to one who holds himself out as a lawyer and at the same time engages in a type of activity open to laymen, which serves as a natural feeder to his law practice" (Opinion No. 269, June 21, 1945).

Conversely, when the principal business of the partnership is the practice of accountancy, the same problems arise as in the case where a lawyer is employed by an accountant or a firm of accountants. The basic problem is that public knowledge of the fact that a lawyer is a partner of an accountant or a partner in a firm of accountants may create the erroneous impression in the minds of the public that the firm is qualified to practice law. The same Canons of Ethics previously cited apply with equal force. Consequently, the lawyer must consider his right to practice law to be restricted as long as he is engaged in such a partnership. Both the lawyers and the accountants in the partnership shall observe the rules of conduct previously prescribed in the situation where a lawyer is employed by an accountant or a firm of public accountants.

It follows that neither a lawyer nor an accountant may retain membership in both a law firm and an accounting firm at the same time.

#### 4. *The Individual Practitioner Who Possesses Dual Qualifications*

The individual who is qualified to practice either as a lawyer or as a certified public accountant may not serve in both capacities at the same time. The Committee on Professional Ethics and Grievances of the American Bar Association has stated that it is deemed to be in the interest of the legal profession and its clients "that a lawyer should be precluded from holding himself out, even passively, as employable in another professional capacity." A majority of that Committee has ruled "that a lawyer, holding himself out as such, may not also hold himself out as a certified public accountant at any office without violating Canon 27, because his accounting activities will inevitably serve as a feeder of his law practice" (Opinion No. 272, October 25, 1946).

Canon 27 is designed to assure that attorneys maintain a dignity necessary to command respect for the law and the profession and that legal problems be handled by those best qualified, rather than those merely best publicized. Joint practice by a lawyer-CPA results in indirect solicitation of business to the extent that legal business is attracted by the accounting, rather than the legal, proficiencies of the individual. Conversely, legal activities, insofar as they place the individual's name before possible accounting clients, seem equally offensive to the professional ethics of the accounting profession (63 Harv. L. Rev. 1457 [1950]. Compare, however, an opinion by the Committee on Professional Ethics of the American Institute of Accounting that reached a contrary result 83 J. Accountancy 171 [1947]).

Representation to the public by a lawyer that he is a CPA also tends to imply special ability in the law and is objectionable as the representation of a specialty, which is considered another form of advertising. With limited exceptions, a statement by a lawyer of a special competence has been condemned because it is misleading to the public. Since legal specialties have not been defined with reasonable certainty, and minimum standards have not been established for specialized practice, there are no safeguards to protect the layman from the incompetent self-professed legal specialist (3 U.C.L.A. L. Rev. 360, 364 [1956]).

In addition, a lawyer-CPA engaging in the joint practice of law and accounting occupies a "schizophrenic position as a lawyer with a duty of loyalty to his client and as a CPA with a duty of impartiality. The clash in functions could appear in litigation where the attorney's privilege to refuse to reveal a client's communications might be incompatible with the need to examine him in his capacity as CPA about the facts on which he rested his purportedly impartial certification" (63 Harv. L. Rev. 1457, 1458 [1950]).

If the individual shall choose to practice law, then he may not at the same time hold himself out to his clients or to the public as qualified to serve as a certified public accountant. To avoid any misunderstanding on the part of the public, he shall make no reference, either in public or in communications with clients, to any degree signifying proficiency in accounting held by him or to the fact that he might be privileged under different circumstances to serve as a certified public accountant.

If the individual shall choose to act as a certified public accountant, then he may not at the same time hold himself out to his clients or to the public as qualified to practice law. To avoid

any misunderstanding on the part of the public, he shall make no reference, either in public or in communications with clients, to any law degree held by him or to the fact that he might be privileged under different circumstances to practice law.

The individual possessing such dual qualifications shall not permit reference to be made to his qualifications to practice the profession in which he is not then engaged in connection with the publication, distribution or advertising of any book or article written by him, or in connection with his appearance as a speaker at any time.

*Conclusion.* This Code of Conduct is designed to alleviate serious problems affecting the relations between members of the two professions and to attempt to insure that the public will not misapprehend the character of the services that they are qualified to render. Operating within the framework of this Code, the lawyer still may utilize knowledge and training in accountancy to become a better lawyer, and the certified public accountant still may utilize knowledge and training in the law to become a better accountant. It is hoped that as some of the problems plaguing the relations between the professions are laid to rest by adherence to this Code, mutual trust and confidence will improve and close and friendly cooperation between the members of the professions will flourish.

CHAIRMAN HUNTER: The next item of business is the one which appears as Item 6, the Report of the Committee on Advisory Fee Schedule, Mr. Field.

ALLEN W. FIELD: Mr. Chairman, House of Delegates: This is the report of your advisory committee and we have, as you can tell from the program, first, adopted the canons of the American Bar Association; second, we have been very careful to set out that this is merely a suggested fee schedule and also to provide in the report that the recommended fee schedule is to be a minimum for all the state, though individual bar associations may enact their own schedules with higher recommended fees.

Your committee had the very able help of George Turner, who secured for us the minimum fee schedules of every known bar association in Nebraska. In addition, we obtained and the individual members were furnished with state schedules of different states. After consideration of all of the schedules in Nebraska, this committee attempted to recommend, as we do in this report, a schedule which we think fairly represents the sentiment over the state. But please remember that this schedule does not bar any local bar association from adopting, on their own behalf, any



other or different schedule. I say that because this committee has been notified that some of the members of the Omaha Bar Association are not entirely in accord and do not wish to be bound by this recommended schedule. Be that as it may, it is clearly set out in our report that any bar association may adopt its own schedule, whether it is higher or lower.

We have gone over this thing very carefully. As I say, we have had a great deal of help from George Turner and from other members. There isn't any question but what this committee thinks that we have provided a workable fee schedule, and it has received commendation from lawyers all over the state, voluntarily. In the committee, before we finally decided on these various items, one of the members of our committee, Ray Simmons, very carefully analyzed every bar association that we have and made a report to our committee. I do not think it will be necessary to read this. It is published and you are all familiar with it. I move the adoption of the committee's report.

After discussion the report of the committee was amended to read "The recommended fee schedule is to be a minimum for all of the state, except Omaha, though individual bar associations may enact their own schedules with higher recommended fees" and as thus amended the report was adopted.

The formal report of the committee follows:

### **Report of the Special Committee on Advisory Fee Schedule**

#### **Foreword**

Canon 12 of the Canons of Professional Ethics as adopted by the American Bar Association provides:

#### **FIXING THE AMOUNT OF THE FEE:**

In fixing fees, lawyers should avoid charges which over-estimate their advice and services, as well as those which under-value them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of

employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not merely a money-getting trade.

The schedule should not be regarded as fixing the amount of the fee to be charged in any given instance, but rather as a suggestion of the consensus of this Bar as to the minimum amount to which a lawyer would be justly entitled for the proper performance of the services.

Care should be taken to avoid making the suggested MINIMUM fees herein set forth, operate as MAXIMUM fees.

#### RECOMMENDED ADVISORY FEE SCHEDULE OF NEBRASKA STATE BAR ASSOCIATION

The following recommended advisory fee schedule was prepared by the Advisory Fee Schedule Committee after study of the various schedules now in effect in Nebraska. The committee's study shows that wide areas of Nebraska are without fee schedules and in some areas where schedules are in effect, they are out of date or incomplete.

Examination of the existing Nebraska fee schedules shows that in most instances, Omaha, Lincoln, Southeast Nebraska, Central Nebraska and Western Nebraska, that is, both urban and rural areas, are fairly uniform. On some items nearly all Nebraska fee schedules are fairly uniform. In only a few types of legal services is there wide disagreement among the schedules. So, it appears to the committee that a statewide schedule is both feasible and desirable and very much in the interest of the public and the legal profession.

The following recommended schedule in most instances is a compromise between the higher and lower existing schedules. In determining the fees for each type of legal service, the committee has ordinarily borrowed from one of the existing Nebraska fee schedules as to that particular service, using whichever schedule seemed fairest and most complete.

The recommended fee schedule is to be a minimum for all of the state, though individual Bar Associations may enact their own schedules with higher recommended fees.

#### Recommended Advisory Fee Schedule of NEBRASKA STATE BAR ASSOCIATION

<i>Abstracts</i>	<i>Comments</i>
Examination of title to real estate and opinion: Where examination is for loan purposes and a different fee is not fixed by an existing contract	The provision regarding one-fourth per cent minimum is new to Nebraska, and is designed to provide a larger fee where property has a large value and risk is accordingly higher.
\$15.00	
For other purposes: 35¢ per entry	
50¢ per page of court proceedings, exhibits and certificates, but if the total so computed is less than \$20.00, the minimum shall be	
\$20.00	
In no event shall fee be less than one-fourth per cent of the purchase price. There shall be an additional fee for re-examination.	

#### *Adoption*

Minimum fee	\$100.00
Where consent must be obtained	\$150.00

*Probate, Administration and Clearing Jointly Owned Property  
of Federal and State Inheritance Taxes*

Schedule I.

Probate and administration

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

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

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

Dodge County  
schedule copied

Schedule II.

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

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

Schedule III.

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

The fee shall be 2% of the gross value.

Schedule IV.

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

The aforesaid property will be sepa-  
rated, the respective rate applied to  
each and the total thereof shall con-  
stitute the fee, Schedule I rates ap-  
plying to property which must be  
probated and Schedule II or III ap-  
plying to jointly owned property.

*Short Form Probate and Determination of Heirs*

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

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

Minimum fee

\$100.00

Dodge County  
schedule

*Construction of Wills in District Court Proceedings*

Additional fee of $\frac{1}{2}$ of 1% on gross value of estate.	Dodge County schedule
Minimum	\$100.00

*Separate Proceedings for Determination of Taxes*

State inheritance tax (to include preparation of federal estate tax return when necessary)	Central Nebraska
1% of gross value of estate, less recorded liens, with a minimum fee of	\$50.00
Estate tax where no probate is had	\$250.00

*Bankruptcy*

Services to bankrupt in voluntary case, without assets, no contest	\$150.00	Lincoln
Filing involuntary petition in bankruptcy, no contest	\$250.00	
Application for receiver in involuntary bankruptcy, preparation and presentation	\$200.00	
Preparing and filing proof of claim	\$ 10.00	
Preparation of objections to discharge	\$150.00	

*Birth Certificate*

Delayed and corrected birth certificates	\$25.00	Lincoln
Adoptive birth certificate not in connection with adoption proceedings	\$25.00	

*Collections*

On first \$300.00	33 $\frac{1}{3}$ %	Central Nebraska
On excess of \$300.00 to \$500.00	20%	
On excess over \$500.00	15%	
(Suit fee shall be in addition to the above percentage schedules)		

*Contingent Fees*

Personal injury and property damage		Southeast Nebraska
Settled before suit is filed	25%	Nebraska
Settlement after suit is filed and through District Court	33 $\frac{1}{3}$ to 40%	Except SE provides 40-50%
Settlement through Supreme Court	40 to 45%	through Supreme Court

*Condemnation Proceedings*

Preparation and processing on behalf of condemnor or condemnee through Coun- ty Court (per diem)	\$150.00	Western Nebraska Except West Ne- braska provides only fee for con- demnor
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*Corporations*

Preparation of articles, notices and minutes of organization meeting	\$200.00	Omaha
Amendments to articles	\$100.00	
Dissolution	\$200.00	
Preparing corporate minutes	\$ 25.00	
Attendance at meeting and preparation of minutes	\$ 50.00	

*Courts*

United States Courts		Central Nebraska
District Court		Except Central
Per diem preparation	\$100.00	Nebraska pro-
Per diem trial work	\$150.00	vides \$125.00 for
State Courts		District Court
Supreme Court		per diem trial
Per diem briefing and prepara-		work
tion	\$100.00	
Court appearance and argument	\$150.00	
Certiorari, mandamus, prohibi-		
tion and quo warranto, mini-		
mum	\$250.00	
District Court		
Per diem preparation	\$ 75.00	
Per diem trial work	\$150.00	
All appearances except trial (per		
diem)	\$100.00	
(minimum \$25.00)		
County Court		
Per diem preparation	\$ 50.00	
Per diem trial work	\$ 75.00	
Justice of the Peace Court Jurisdic-		
tion		
Minimum fee—defaults	\$ 10.00	
Trial additional	\$ 15.00	

## Workmen's Compensation Court

Per diem preparation	\$ 75.00
Per diem trial before one judge	\$100.00
Per diem trial before court en banc	\$125.00

## Workmen's Compensation lump sum settlement

Preparation of pleadings and processing through Workmen's Compensation Court and District Court	\$100.00
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For the purpose of determining per diem charges a six-hour day shall be adopted.

*Depositions*

Local	\$ 75.00	Lincoln
Outside county	\$100.00	

*Divorce*

Default, with property settlement	\$200.00	Lincoln
Default, without property settlement	\$175.00	Except Lincoln
Representation of defendant, with property settlement	\$150.00	provides \$50.00
Representation of defendant, uncontested, no property settlement	\$125.00	for release of child support judgment lien
(It is recommended that not less than one-half of such minimum fee be paid in advance of filing.)		
Obtaining approval and release of child support judgment lien	\$100.00	

*Foreclosure of Mortgages or Contracts and Quiet Title*

Where amount involved is \$1,000.00 to \$5,000.00	\$200.00	It was felt by the committee that the fee for each of these services should be the same
plus 2% on all value exceeding \$5,000.00		

*Guardianship and Conservatorship*

Annual report and handling of net yearly income, minimum 5%	\$ 25.00	14th Judicial District and Central Nebraska
Closing	\$ 50.00	
Opening		
Where value of estate is \$1,000.00 or less	\$ 35.00	
Where value of estate is \$1,000.00 to \$5,000.00	\$ 50.00	Except Central Nebraska does not have \$25.00 minimum on annual report and provides \$100.00 in compromise tort settlement
Where value of estate is \$5,000.00 to \$10,000.00	\$ 75.00	
Where value of estate is over \$10,000.00	\$100.00	
Services in opening and closing minor guardianship in compromise tort settlement	\$125.00	
One-half of above opening and closing fees if under \$1,000.00, Guardian ad item, recommended minimum	\$ 25.00	

*Partition*

It is recommended that fees be allowed from 7% to 10% of total sale price ⅓ to Counsel of record and ⅓ to Referee with additional allowances made for extraordinary services	Omaha
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*Partnership*

Preparation	\$ 75.00	There was a wide spread between the various fee schedules, the committee's recommended fees being a compromise.
Dissolution	\$ 75.00	

*Preparation of Legal Instruments*

Printed forms, such as deeds, mortgages, leases, options, contracts, mechanic's liens, etc.	\$ 5.00	There was a wide spread between the various fee schedules, the recommended figures being compromise.
Nonprinted forms	\$ 15.00	



*Wills*

Drafting short form \$ 15.00

For additional work, fee is to be increased commensurate with the time required, the number of provisions, time spent in estate planning, and the value of the estate.

Allen W. Field, Chairman  
Thomas M. Davies  
Lowell C. Davis  
Robert H. Downing  
Raymond Frerichs  
J. A. C. Kennedy, Jr.  
Miles N. Lee  
Charles E. McCarl  
Kenneth M. Olds  
Franklin L. Pierce  
Ray C. Simmons

CHAIRMAN HUNTER: The next item of business is the report of the Committee on American Citizenship by Mr. Otradovsky.

LUMIR F. OTRADOVSKY: Mr. Chairman and Members of the House: The report of the Committee on American Citizenship appears on page 51 of your program.

The recommendations of this committee can be stated in almost one sentence, namely, that the program be one of the preparation and presentation by members of this Association to high school students throughout the state of accurate "mock" trial procedures. As stated in our report, this is not new. It was included in the program proposed by the 1956 Committee on American Citizenship of this Association and received blanket approval with some of its other proposals.

Last year when Barton Kuhns was President of this Association and I was a member of the committee, I had occasion to discuss with him some ideas for a suitable program for this committee and at that time he mentioned that in contact with the members of the Iowa State Bar Association he found that they were doing a splendid job on the very thing that we are proposing here. I find that it has worked very successfully in Iowa and feel that it should work here.

I might comment that despite a good deal of work that has been done from time to time by various chairmen and members of this committee, we haven't been able to get a program

going that is actually operating. This is one reason why our committee has limited its recommendations to one specific field of activity, in the hope that if it is approved by this Association we can actually get going on it.

If this idea meets with the approval of the House it is our further recommendation that the committee be expanded to include at least one member from each judicial district, and we also have anticipated the suggestion made by President Martin for some continuity in carrying on the members of the committee so that we don't have an entirely new personnel on the committee each year. It should be a continuing program so that the experience of those members on the committee could be carried over to the new members coming on.

With these comments, Mr. Chairman, I move the adoption of the committee report.

The motion to adopt the report of the committee was carried and the report adopted.

The formal report of the committee follows:

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

The 1956 report of the Committee on American Citizenship contains this statement: "We submit that our Bar Association must first consider whether or not an organized program should be maintained. American Citizenship is a field in which there must be an organized and forthright program, implemented by active participation of the lawyers of Nebraska, which must go beyond mere annual written reports." By approving this portion, among others, of the report, the House of Delegates answered this question in the affirmative. Our committee has accepted this as a mandate to proceed toward this goal.

A study of the reports of the several committees on American Citizenship during the past several years reveals, despite the prodigious amount of work done by some of the committees, the extreme difficulty of formulating and putting into operation within the life of any one committee, a program which will measure up to the standard set by the 1956 committee.

We believe that such a program should have several attributes. First, it should be identified particularly with the legal profession. Second, it should be a definite, organized program which does not depend upon the efforts of individual lawyers as each may find the time or opportunity. Third, it should be a program, when

once put into operation, that can be carried on year after year along a fixed pattern. Fourth, is the obvious requirement that it must successfully build or promote American Citizenship. Moreover, the responsibility of carrying out the program should be placed in a committee of adequate size and continuity to do the job well.

After reviewing the many possible activities which could be sponsored by this committee, some having much merit, and some, such as speaking, essay and other types of contests, now being promoted to some extent by other organizations, *your committee recommends the program hereinafter set forth.* It is that of the preparation and presentation to high school students throughout the state of accurate "mock" trial procedures. This is not new. It was part of the recommendation of the 1956 committee approved by the House of Delegates. As far as we can determine, this part of that report has never been implemented. We believe that by concentrating on this one activity and by organizing the 1959 Committee on American Citizenship with this one purpose and directive in mind, all the attributes of a successful program, as mentioned above, will be realized.

The Iowa State Bar Association, through its Committee on American Citizenship, has been successfully carrying on this very program for several years. There it is called "Court Day Trial." It is presented to the graduating classes in high schools as a full court day procedure from pleadings and scripts prepared in advance by the committee.

Your committee is not unmindful of the splendid work of a similar nature now being done in Nebraska by the American Legion as part of the Cornhusker Boys' and Girls' County Government program. Your committee has investigated the possibility of conflict, and believes that a program such as this would be welcomed, if it is properly coordinated with the Legion program. This would be done on an individual county basis. In some counties the committee might assist in the program now being carried on. In other cases this program could be carried on strictly as a Bar Association activity. In all cases care must be exercised not to do anything which would take any credit away from the Legion for the work being done by it. On the other hand, it must be recognized that the lawyers and judges in the Legion who carry out that part of the County Government program are doing so principally in their capacities of lawyers and judges.

*We recommend that if this program is approved by the House of Delegates, the American Citizenship Committee be expanded to*

*include at least one member from each judicial district, in addition to a chairman and a vice-chairman. It would be desirable each year to move the vice-chairman to chairman for the following year to ensure the continuity of the program.*

*In conclusion, we recommend the adoption of the foregoing program by the House of Delegates and its immediate implementation by the 1959 Committee on American Citizenship.*

Lumir F. Otradosky, Chairman  
 Leslie H. Noble  
 George A. Farman, Jr.  
 Dewayne Wolf  
 John W. Delehant, Jr.  
 Jess C. Nielsen

CHAIRMAN HUNTER: The next item of business is the report of the Committee on Budget and Finance, Mr. Frazier.

THEODORE J. FRAIZER: Mr. Chairman and Members of the House: I almost fear to make an appearance after the report of the Committee on Cooperation of Attorneys and Accountants as to anything that I might say, being an accountant.

However, you have already heard the actual financial report of Mr. Turner under his activities as Secretary-Treasurer for the year, which is an audited, Certified Public Accountant report.

It is therefore the recommendation of the Committee on Budget and Finance, following the precedent of the last few years, that \$2,000 from the surplus funds of the Association be invested in government bonds.

There is no written report in the program nor has a report been filed.

That is the recommendation of the Committee on Budget and Finance.

CHAIRMAN HUNTER: Again, Ted, since the Executive Council is responsible solely for the expenditure of funds, may I suggest that you make your recommendation to the Executive Council that that money be invested.

MR. FRAZIER: Thank you for your suggestion.

CHAIRMAN HUNTER: Is there a second to the recommendation of the Committee on Budget and Finance?

JOSEPH VINARDI: I second the motion.

CHAIRMAN HUNTER: Any discussion? All in favor of the adoption of the report say "aye"; opposed, same sign. The motion has carried. Thank you, Ted.

The next item of business is the report of the Committee on Cooperation with the American Law Institute, Hale McCown.

SECRETARY TURNER: I believe he has asked Lyle Jackson to appear for him.

JUDGE LYLE E. JACKSON: Mr. Chairman and Gentlemen: I want to apologize for being late this morning but that 155 miles between Neligh and Omaha is quite a problem before 9:30.

I am making this report for Mr. McCown since he is unable to be here.

The report of the committee was adopted.

The formal report of the committee follows:

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

In accordance with the action of the House of Delegates, the Nebraska State Bar Association was again represented at the annual meeting of the American Law Institute held in Washington, D. C., May 21-24. Both the Chairman of the Committee and Judge Lyle E. Jackson were in attendance.

While time and space limitations do not permit a detailed analysis of the extensive work done during the year and ironed into final form at the annual meeting, it is only appropriate to state that the Institute as usual is continuing its very extensive work in connection with the restatements, model codes, and the innumerable other activities of the Institute. The majority of the members of this Association are familiar with the handbooks published by the Committee on Continuing Legal Education of the American Law Institute and the American Bar Association. Numerous additional publications have been brought out during the current year and more are on the way for fall publication. It should be of interest to the Nebraska State Bar Association that a reorganization of the Continuing Legal Education Committee of the American Law Institute and the American Bar Association is presently contemplated to strengthen the representation of the American Bar Association on the committee and to provide for continuity of service to utilize the experience of members of this committee. The contributions of the American Law Institute to the practicing attorney have been and continue to be of great service, both in the development of the law and its efficient practice. It is the belief of your committee that the work done by the American Law Institute fully justifies the continued cooperation of the Nebraska State Bar Association and each individual member of the Association.

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

Hale McCown, Chairman  
William I. Aitken  
Fred T. Hanson  
Lyle E. Jackson  
Daniel Stubbs

CHAIRMAN HUNTER: The report of the Committee on County Law Libraries.

A motion to adopt the report of the committee was made by Bernard M. Spencer, a member of the committee. The motion carried and the report adopted.

The formal report of the committee follows:

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

This committee is one that is carried on from year to year without any great show of progress in any one year but which does show some steady activity.

It appears the last general inquiry made by the committee of the several counties of the state was in the year 1953. At least we have been unable to locate any file having to do with a later survey. In 1953 there were 44 counties with established county law libraries. Since that time at least 15 counties have added county law libraries. Twenty-four now report no county law library and the remainder indicate only Nebraska Reports and Statutes.

Prior reports of this committee state that this is a matter to be considered locally and that local problems are involved. With this we agree. It is most certainly up to those who are faced with the need to put forth the effort for the accomplishment.

In answer to inquiries, two statements appear repeatedly. One is for some statement from the Association that would be helpful with local lawyers in talking to the county board for appropriation. The other is for an outline of sets of books that should go to the making up of a county law library.

*It is recommended that our successors give these points further consideration. It is our intention to pass on to our successors the files that were given to us and that we have extended. It is recommended that consideration be given to several categories based on population of the counties as follows: those under 4,000;*

4,000 to 8,000; 8,000 to 10,000; 10,000 to 14,000; 14,000 to 24,000; 24,000 to 100,000; and over 100,000.

It has been noted that in almost every county where there is a library, the county commissioners have contributed to the maintenance of the library, in many cases carrying the entire cost. This report might be used by those having difficulty with the local board as an evidence that it is a practice generally followed, calling their attention to the fact that the county attorney, county judge, and district judge need and are entitled to this service.

*We recommend continuance of the committee.*

Lynn E. Heth, Chairman  
John R. Higgins  
William H. Meier  
Daniel J. Monen, Jr.  
Robert D. Moodie  
Robert R. Moran  
John W. Newman  
Elmer M. Scheele  
Bernard M. Spencer

CHAIRMAN HUNTER: The next report is that of the Committee on Crime and Delinquency Prevention, Mr. Fahrnbruch.

DALE E. FAHRNBRUCH: Mr. Chairman and members of the House of Delegates: The report of the committee appears on pages 32 to 35 of the program. I think most of the recommendations are self-explanatory.

In regard to the first recommendation, the folder which the committee feels should be distributed throughout the schools in the state through grades 7 to 12 appears as Exhibit A on page 33. The folder has been distributed in Lancaster County. It has been put out by the Sheriff's office there.

This is an idea that came from Maryland, and it is to give the youngsters some idea of the practical effects of the commission of pranks, which may not be pranks but are actually crimes.

In many instances in the handling of juvenile court prosecution there in Lancaster County we find that these youngsters do not realize the seriousness of their acts and how it affects them. For instance, if they are taken to the adult court and they are convicted of a crime of moral turpitude such as stealing a hub cap they are denied many rights, such as becoming an officer in the services, etc.

The committee felt that if this information were given to the youngsters perhaps it would cut out some crime and possibly save a few youngsters in the State of Nebraska.

Since the report was printed the Junior Section of the Bar, some members of it, have contacted me and suggested that the Junior Bar make the distribution rather than through the county superintendents.

The second recommendation of the committee is on the county attorney's salary. I think all of us know that in some counties the county attorney's salary is below the professional legal service that is being rendered. In one particular county the county attorney was getting less money than the janitor in the courthouse. Every year as the Legislature meets, more duties are imposed on the county attorney, in the way of old age assistance claims and things of that nature. Generally speaking the county attorneys themselves are not going to make any recommendations because they feel that the public thinks that the county attorneys have an ax to grind. The committee felt that a special committee should be appointed to consider the salaries of county attorneys and make recommendations.

In regard to the third recommendation of the committee, at the present time the empaneling of a jury in a first degree murder case or any felony case is left to the discretion of the district judge. The committee felt that this statute on empaneling juries in first degree murder cases should be more specific. At the present time you put twelve jurors in the box and you begin your challenges, and it can come up to the point where the defense counsel can get three people on the jury and the state has no opportunity to weigh those three jurors against the balance of the panel to determine whether they want them on the jury and exercise the challenge.

In regard to the last paragraph of the report proper, I think it is self-explanatory. The committee took no action on it and simply included it in the report, thinking that perhaps some members of the Association might like to do some thinking on it. It is premature at this time for any action.

Mr. Chairman, I move the acceptance of the report and the adoption of it.

After discussion, the report of the committee was amended by striking therefrom in paragraph 1 the words "An effective pamphlet is attached hereto, marked 'Exhibit A,' and incorporated the same as if set forth in this report. The committee moves that the Bar Association have printed at the Association's expense



100,000 copies of 'Exhibit A' and direct that they be distributed to the youngsters in Grade 7 through 12 inclusive throughout the state" and by striking therefrom "Exhibit A."

The formal report of the committee follows:

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

The Committee on Crime and Delinquency Prevention reports to the Association that it feels that some of the juvenile delinquency in the state can be eliminated if youngsters between the grades of 7 and 12 inclusive are inculcated with an understanding of the practical effects of delinquent conduct upon their lives. The committee feels that it is a proper function of the Association to participate in educating the youth of Nebraska as to the practical results of delinquent behavior. Such participation could be in the form of distributing pamphlets to youngsters in the state through the various county superintendents of schools. An effective pamphlet is attached hereto, marked "Exhibit A," and incorporated the same as if set forth in this report. *The committee moves that the Bar Association have printed at the Association's expense 100,000 copies of "Exhibit A" and direct that they be distributed to the youngsters in Grades 7 through 12 inclusive throughout the state.*

The committee feels that lack of adequate county attorneys' salaries in many of the counties of the state has a direct relationship to the increased crime and juvenile delinquency rate. It is to be noted that in several counties there are no county attorneys, and in other counties competent attorneys have refused to run for election because of low salaries. The committee finds that some salaries of county attorneys are below professional standards. *It is, therefore, recommended that the President of the Association appoint a special committee—no member to be an incumbent county attorney—to study county attorneys' salaries throughout the state and make a recommendation relative to each county as to what a professional salary should be for the county attorney's office, and that any salary fixed at below that recommended by the special committee be considered nonprofessional, and further that the special committee's recommendation be reported to the Association at the next annual meeting.*

*The committee recommends that the Association study the statute on empaneling juries in a first degree murder case, and that consideration be given to make it mandatory that thirty-four*

*persons be empaneled before either the prosecution or the defense is permitted to make a preemptory challenge.*

It has been suggested to the committee that the Criminal Code be amended so as to provide that all defendants would not receive a sentence after pleading guilty or after being found guilty by a jury but rather that the defendant would be sentenced to the minimum and the maximum by the district judge. That thereafter, a committee of district judges would then review all cases where commitments were made to the penitentiary or reformatory and fix the actual amount of time the defendant must remain in confinement, the purpose being to establish uniformity of sentences throughout the State of Nebraska. While the committee does not recommend one way or the other on this suggestion, it does believe that the committee should be continued to study the merits of the proposal.

Dale E. Fahrnbruch, Chairman  
James F. Brogan  
William J. Hotz, Jr.  
Walter G. Huber  
John H. Keriakedes  
Greydon L. Nichols  
Betty Peterson Sharp

“EXHIBIT A”  
TO THE YOUTH OF NEBRASKA  
IT ISN'T WORTH THE CHANCE—  
HERE'S WHY—

DO YOU REALIZE THAT COMMITTING A CRIME MEANS—  
*Disgrace and Embarrassment* to you.

*Grief* to your parents and your loved ones—they also must share in your disgrace.

*Expenditure of Money* by you or your parents to employ a lawyer and engage a bondsman to furnish bail pending your trial.

*Imprisonment* in jail pending trial if you or your parents are unable to furnish bail.

*Possible Imprisonment After Trial*—and perhaps for many years.

*Your Conduct and Movements Will Be Checked* because you will be a criminal who has to be watched.

*You May Be Avoided* by many people and could become the object of contempt or pity.

*Yes—the road of crime is not only the most hazardous—but the least profitable.*

DO YOU KNOW THAT—

*By Being Arrested or Found Guilty of a Crime Your Future Is Handicapped?*

*Getting a Job Is Difficult When You Have a Criminal Record—* A criminal record will seriously affect your ability to obtain a job after leaving school. If you are convicted of a crime of moral turpitude, you will be barred from being an officer in any of the Armed Forces, from any job of trust with the government, including civil service, postal work, and you will not be able to be bonded in civil work.

*You May Lose Certain Citizenship Rights—* If convicted of certain crimes, your right to vote will be taken away.

*Your Chances of Dating and Marrying a Fine Person Will Be Lessened—* A respectable young lady or young man is reluctant to date or marry a person who has come into conflict with the law or has a criminal record.

*You Are Doing a Diservice to Your Country—* The high rate of juvenile crime is providing unfriendly governments throughout the world with effective propaganda.

*Remember—* being young or a first offender does not necessarily mean you'll get off.

DO YOU KNOW THAT—

*If you steal an automobile* you can be sentenced to the Penitentiary for 10 years AND

*If you are along when a car is stolen* you are just as guilty as the one who stole it.

*If you break into a house or building* you can be imprisoned for 10 years.

*If you rob with a weapon* you can be imprisoned for 50 years.

*If you carry a concealed weapon* you can be sent to prison for 2 years.

*If you maliciously destroy or damage personal property* in an amount up to \$100.00, you can be jailed for six months, you will be fined \$100 to \$500, or both.

*If you maliciously destroy or damage property* of a value of over \$100, you can be imprisoned for three years.

*If you have beer or liquor* in your possession, you can be fined \$25 to \$100 and be put in the County Jail for sixty days.

KEEP IN MIND THAT—

*If you steal an automobile accessory, you can be jailed for six months and fined \$500.00.*

*If you steal auto accessories a second time, you can be imprisoned two years.*

IT TAKES MORE COURAGE TO SAY "NO" THAN TO GO ALONG WITH THE CROWD AND COMMIT A CRIME WHICH COULD AFFECT YOUR WHOLE FUTURE

A WORD TO THE PARENTS—

Delinquency can be prevented. The ultimate solution of the problem is in the hands of the parents, through closer supervision of children, inquiring of their whereabouts and knowing the kind of company they keep.

Many youthful offenders come from good American homes and potentially good parents, and all are not the product of broken homes or families facing economic instability.

Statistics reveal that 80 per cent of the 16 to 18-year-old offenders turn to crime after ten o'clock at night. This is the "hour of danger."

PARENTS: ASK YOURSELVES EACH NIGHT AT 10—

Where are my children?

With whom are they associating?

What are they doing?

How much time am I giving my children?

We are sure that you will agree with us lawyers that we, as parents, are in a much better position to prevent juvenile crime than any or all of the law-enforcement agencies.

(Bar Seal)

Distributed by The Nebraska State Bar Association

Copies of this pamphlet may be obtained by writing to the office of George Turner, State House, Lincoln, Nebraska.

CHAIRMAN HUNTER: Mr. Winsor Moore, Chairman of the Committee on Legal Aid, has requested that he be allowed to give his report out of order. Unless there are any objections we will have Mr. Moore's report at this time.

WINSOR C. MOORE: Mr. Chairman, Members of the House of Delegates: This is the report of the Committee on Legal Aid.

During the past year the Committee on Legal Aid received no specific inquiries; no specific problems were received concerning

legal aid of any nature. Hence this report merely refers to a summary of the various legal aid clinics we have in Nebraska. First of all we have on page 36 of your program a report of the Omaha Legal Aid Clinic conducted at Creighton University. During the past year at Creighton University there were 272 applications received for legal aid. This was an increase of 22 cases over the prior year. Of these 272 applications received, 110 were formally accepted for process.

Also during the past year, of the 110 applications received, 42 resulted in court action. We might also note at the top of page 37 that of the 272 applications received, 141 involved domestic relations. That is approximately 50 per cent of the work at that clinic.

Coming now to the Legal Aid Bureau conducted at the University of Nebraska, we have a breakdown of figures on page 37 of your program:

Domestic relations cases there totaled 78 out of a total of 210. Outwardly that would appear that there are only 30 per cent of cases in the domestic relations field, but comparing it with the 50 per cent at Creighton, at Creighton we do not break down the figures for economic problems so some of those 48 economic problems at the University of Nebraska would undoubtedly be classified as a domestic relations problem at Creighton University. So while that 30 per cent outwardly does not compare with the 50 per cent at Creighton, I think that we have to reconcile these figures with some additional facts.

At the University of Nebraska we have an increase of 38 cases over the preceding year.

The Legal Aid Clinic at Sidney reported that they had handled only seven cases during the past year, and the Secretary-Treasurer of that Legal Aid Clinic accounts the low number of cases as due to lack of interest in that particular Clinic.

During the past year we had the inauguration of a new Legal Aid Clinic at Scottsbluff and the procedure for that Legal Aid Clinic at Scottsbluff is outline on page 37. It is rather a novel program. During the time it has been in operation since April 1, 1958, it has received and processed 13 applications until the time this report was formulated.

Your committee has seriously and diligently considered the merits of this Scotts Bluff program and it is believed that if any county in the State of Nebraska desired to adopt a Legal Aid program they might well investigate the procedure as outlined on page 37 for the Scotts Bluff Clinic.

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I call your particular attention to the top of page 38 that if any Bar Association in Nebraska is interested in formulating a legal aid program they can receive copies of the forms and applications and other matters by contacting the President of the Scotts Bluff County Bar Association at Scottsbluff.

Inasmuch as this report contains no specific recommendations, I move that the report be received and filed.

The motion that the report be received and filed was carried.

The formal report of the committee follows:

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

In addition to the Legal Aid Clinics in Omaha, Lincoln, and Sidney, which continued to function during the past year, a legal aid program was inaugurated in Scottsbluff.

The Omaha Legal Aid Clinic, conducted at Creighton University, reported that during the past year, 272 applications were received for aid as compared to approximately 250 cases for the preceding year. A substantial number of the applicants were ineligible for one reason or another. The problems of many others were handled informally or were economic rather than legal in nature. Of the total number of applications received, 110 were formally accepted. During the year 42 court actions were instituted. To supervise and handle the presentation of such court actions, 40 Omaha attorneys cooperated with the Clinic. During the year, legal aid clients deposited a total of \$1,505.50 to cover necessary court costs in such actions. Of the 272 applications received, 141 involved domestic relations, 10 clients sought a discharge in bankruptcy, and 6 cases involved adoptions. The remainder of the applications included such problems as small claims, landlord and tenant relations, paternity, child support and miscellaneous matters. From the standpoint of student training, every senior in the law school had at least one court action under the supervision of a local attorney and some had as many as five cases.

The Legal Aid Bureau, operated by the College of Law, University of Nebraska, in cooperation with the Barristers Club of Lincoln and the Lincoln Bar Association, reports that the following cases were handled from September 1, 1957, to August 12, 1958:

Domestic Relations	78
Economic Problems	48
Penitentiary Cases	20
Landlord-Tenant	14

Small Collections	12
Accident Claims	8
Criminal Matters	11
Miscellaneous	19
	<hr/>
Total	210

The total number of cases handled represents an increase of 38 cases over the preceding year.

The Legal Aid Clinic established by the Cheyenne County Bar Association in Sidney, reported that during the past year seven cases were handled. Four involved child support, one was a divorce action, one pertained to a criminal matter and there was one case concerning domestic relations. During the preceding year, eight cases were reported. The Secretary-Treasurer of the Legal Aid Clinic believes that the low number of cases handled results from lack of interest shown in the Clinic.

The Scotts Bluff County Legal Aid Society, affiliated with the Scotts Bluff County Bar Association, was inaugurated on March 13, 1958. Detailed mimeographed instructions were prepared for legal aid applicants. The application for legal aid can be filed either with the county welfare office or with the clerk of the district court. After a personal interview and the case is approved for legal aid, the applicant is given an introductory letter to a local attorney who handles the case. The county commissioners have approved \$1,000 to cover court costs for approved legal aid cases and the money is handled through the local welfare office. Since the program became operative on April 1, 1958, 13 applications have been received. Three applicants, without explanation, failed to appear for their interview. One case was denied for the reason that it concerned an action for damages for personal injury and it was believed that this was a proper contingent case. Nine applications were approved and assigned for necessary action to the various lawyers. Of the nine cases assigned, eight were divorce matters and one involved child support. Thus far, the program appears to be operating satisfactorily.

Your Committee on Legal Aid believes that local bar associations desiring to establish legal aid programs might well investigate and adopt the program now in operation in Scotts Bluff County. Copies of instructions, applications and referral letters to local attorneys can be procured by contacting Marvin L. Holscher, President of the Scotts Bluff County Bar Association, P. O. Box 217, Scottsbluff, Nebraska. It is believed that the program adopted in Scotts Bluff County has considerable merit and the

basic procedure could be adopted in any county by the local bar association desiring to establish a legal aid program.

Winsor C. Moore, Chairman  
 Joe E. Babcock  
 William D. Blue  
 Marvin L. Holscher  
 Walter R. Metz  
 Charles B. Paine

CHAIRMAN HUNTER: The next item of business is the report of the Committee on Atomic Energy Law, Dick Wilson.

RICHARD D. WILSON: Mr. Chairman, Members of the House: The report appears on page 58 of your program, and very briefly it points out, first, that there are presently in Nebraska numerous sources of radioactivity and there are going to be more in the future. The federal law with respect to those sources of radioactivity has not been found to be adequate by at least 32 of the states. Nebraska does not have any adequate legislation to cover certain of the problems that arise and can arise. There isn't even any study made, for example, that I know of whether the workmen's compensation laws of Nebraska are adequate to cover the results which sometimes come from radioactivity. There certainly hasn't been any study made by the Railway Commission of the heavy loads that will be carried on the highways and will be dangerous in case of any mishandling of those loads or accidents.

Finally, the United States government through its Atomic Energy Commission has indicated and has said that it is willing to have the states take over certain of the activities presently performed by the federal government if the states are willing to do so and are set up to do so.

The present situation in Nebraska is that there is nobody responsible for accepting that invitation of the federal government, so that there is no activity in that area of taking from the federal government whatever the federal government is willing to give in the way of local control as opposed to federal control.

To remedy the lack that is presently in Nebraska and that other states have found, the committee has recommended that the Association propose and sponsor new legislation which is printed in the recommendation section of the report. I don't want to read all of that bill that is recommended, at least recommended substantially in that form, but I will say that the first part sets out the aim which is to prepare for the utilization of atomic energy by



(a) Accepting responsibility for regulation and inspection as rapidly as it may be feasible to do so.

(b) Adapting its laws (Nebraska laws) to meet new conditions arising from such utilization.

(c) Coordination of its activities in this field.

(d) Encouragement of research in the peaceful uses of atomic energy.

In order to do that, the next section of the bill provides that the Governor will appoint some present officer of the State of Nebraska to be Coordinator of Atomic Development Activities. In other words, it does not create a new office. It does not create a new salary to be paid by the state. It provides that some present officer of the state government be designated by the Governor as Coordinator of Atomic Development Activities. This Coordinator has two principal duties. Section 3 sets out one of them. He will ask each of the state agencies, commissions and institutions to make a study of their own laws and the laws they administer to find out whether they are adequate, whether they need any changes as a result of the increasing use of radioactive material in Nebraska. Then the Coordinator will take the recommendations of each of those agencies and coordinate them into legislation that can be submitted to the Legislature.

The next duty of the Coordinator is in section 4 where he will have the affirmative duty to investigate the possibility of accepting from the federal government the duties and responsibilities which are now performed by federal employees. An example of this would be the inspection of atomic energy plants or reactors in Nebraska where the federal government has said, "We think that state inspectors could be used." It would mean that people from our own State of Nebraska would inspect our own plants rather than having the federal government inspect them.

That is the extent of the legislation which is recommended.

The second part of the recommendation is that the special committee be continued in order to be available during legislative consideration of such a bill. The wording of that was certainly not intended that the same members continue on the committee, but only that the committee continue as an entity with whatever members the President would determine were proper. Mr. Chairman, I move the adoption of the report.

The motion to adopt the committee report carried and the report was adopted.

The formal report of the committee follows:

**Report of the Special Committee on Atomic Energy Law**

The Special Committee on Atomic Energy Law submits the following report:

At the present time, radioactive materials and machines for producing radiation are being used in Nebraska. Construction work is beginning on a nuclear reactor to be constructed near Hallam, Nebraska, and to be operated by Consumers Public Power District as a part of an electric generating station. In that reactor, special nuclear materials will be combined under conditions producing large amounts of radioactivity and radioactive materials. It is hoped that much of the radioactivity will be utilized by various industries in Nebraska.

The federal Atomic Energy Act (42 USCA §§ 2011 et seq.) relates to the reactor, the nuclear materials which will be used in it and the radioactive by-products from it. It provides for regulations and for licenses and standards to be maintained by licensees. However, at least thirty-two states have determined that they should also take some action on these matters. These states are: Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

There are several reasons why the federal legislation alone is not considered enough. First of all, it is the states, not the federal government, that have general police powers, and the many sources of radiation which are not used or produced from nuclear reactors are not covered at all by federal legislation. Some states, for example, have outlawed shoe-fitting fluoroscopy. The federal government does not extend itself into such fields, and Nebraska does not have legal machinery covering the problem.

Secondly, there are many activities now carried on by state governments which must be adapted to the increased prevalence of radioactive sources and their use in business and industry. The Railway Commission and Highway Department will have to cope with transportation of extraordinarily heavy shipments which can become dangerous if not properly handled. The Health Department, the Labor Department and the Workmen's Compensation Court all have obvious interests in protecting the public generally and the employees working with or near the radioactive materials. The forms of insurance policies used in Nebraska have already been changed to deal with this new risk, and the Insurance Department

must be up-to-date on the problems involved. The Nebraska Resources Department and the Game Commission have an interest in this matter. Even the Banking Department may become interested through securities issued to finance new businesses using radiation. Up to the present time, there has been no coordinated action in Nebraska to find out what the problems will be and how to solve them.

Thirdly, the United States Atomic Energy Commission has been working toward the goal of having the states perform the necessary inspections of federally licensed facilities. In a recent address to the President's Conference on Occupational Safety, Mr. Harold L. Price, Director, Division of Licensing and Regulation of the United States Atomic Energy Commission, said:

As to the respective roles of the States and the Atomic Energy Commission in the field of radiation protection, it should be pointed out first that the Commission regulates, in only part of this field. The Commission does not have any authority for the regulation of x-rays, radium, and nonreactor produced isotopes, except as these materials might be used in conjunction with the materials regulated by the Commission.

With respect to those activities regulated by the Commission, we have taken the position that the States have an important role. In the first place, the Commission proposes to seek the assistance of the States in performing the inspection function over those activities licensed by the Commission. We have already begun discussions with several States looking towards arrangements whereby the States would conduct inspections on behalf of the Commission with respect to certain of the licensed activities.

Assuming that the best interests of Nebraska will be served by encouraging the growth of industrial radiation within the state, the people of the state should take over from the federal government the responsibility of regulating that industry as rapidly as the federal government is willing to relinquish it. Failure of the state to have the necessary machinery available will mean that controls over the industry will be operated from Washington, not from Lincoln, with the resulting increase in problems which always arise from big, central government control as opposed to local government control.

Certainly, Nebraska does not wish to proceed with any program which will place any unnecessary hurdles in the way of a healthy atomic energy industry in the state. Nevertheless, groups

such as the Joint Federal-State Action Committee, as set up by the President of the United States and the Governors of the forty-eight states, the American Bar Association and the Council of State Governments have recommended that each state study its needs for new legislation and carefully take such legislative action as may be desirable to meet the new problems of atomic energy. The conservative approach would appear to be to enact new legislation which will (1) place responsibility for the studies that are needed, (2) make certain that the studies actually will be made, (3) coordinate the state activities in this field and (4) enable the state to take advantage of opportunities in this field offered by the federal government. Other states, such as Connecticut, Massachusetts, New Hampshire and Rhode Island, have adopted statutes along this pattern which is favored by The Council of State Governments.

*This committee recommends that the Association propose new legislation substantially as follows:*

#### *A BILL*

*Be it enacted by the people of the State of Nebraska,*

*Section 1. It is the policy of this state to cooperate actively with the federal government in encouraging utilization of atomic energy for peaceful purposes and to prepare for such utilization by :*

*(a) Accepting responsibility for regulation and inspection as rapidly as it may be feasible to do so.*

*(b) Adapting its laws to meet new conditions arising from such utilization.*

*(c) Coordination of its activities in this field.*

*(d) Encouragement of research in the peaceful uses of atomic energy.*

*Section 2 Without limiting any authority the governor has under the provisions of Section 84-109 R. R. S., the governor shall designate an officer of one of the departments or agencies of the state to serve as advisor to the governor with respect to atomic energy developments, and as coordinator of the development and regulatory activities of the state relating to atomic energy and other forms of radiation, including cooperation with other states and with the government of the United States. The person so designated shall have the title of Coordinator of Atomic Development Activities, hereinafter referred to as the Coordinator.*

*Section 3. The Coordinator shall direct each department, agency, commission and institution of the state to make a study as to the need, if any, for changes in the laws and regulations administered by it that arise from the presence within the state of sources of radioactive radiation, and, on the basis of such studies, to make recommendations for the enactment of laws or amendments to law administered by it, and such proposals for amendments to the regulations issued by it, as may appear necessary and appropriate. Each such department, agency, commission and institution shall make the report and study requested, and may expend funds as needed therefor. The Coordinator shall prepare recommendations to the Legislature based on such studies.*

*Section 4. The Coordinator shall investigate the possibility of agreements with the federal government whereby this state will take over and perform inspection or regulatory activities now performed by the federal government. Any such agreement which may be developed may be signed by the Governor. If performance of the agreement requires powers in addition to those already possessed by state departments, agencies, commissions and institutions, the agreement shall be conditioned on a grant of the necessary authority by the Legislature. To the extent any such agreement requires activities by persons who are not responsible to the Governor, the Governor shall not enter into such agreements without the approval of the persons who will carry them out. In all matters relating to or affecting atomic energy developments or the control of radiation sources, the Coordinator shall be authorized to consult with the head of the department, agency, commission or institution of the state which may be involved and to participate in all hearings for the purpose of aiding in the development of uniform and consistent rules, regulations and practices which will encourage the development of industry within this state using radiation.*

*It is further recommended that this special committee be continued in order to be available during legislative consideration of such a bill.*

Richard D. Wilson, Chairman  
Leslie Boslaugh  
David Dow  
Leo Eisenstatt  
John E. North

CHAIRMAN HUNTER: The next item of business is the report of the Committee on Bar Examination Standards, Mr. Bongardt.

SECRETARY TURNER: Mr. Chairman, that report contains no recommendations and therefore only needs to be received. However, the members of the House may be interested to know why that committee was constituted. A section in the Legal Education and Admissions to the Bar of the American Bar Association is in the process of promulgating standards for bar examiners and bar examination procedures. Whether they are needed in Nebraska or whether they are applicable to our problems here has not been determined, but this committee was created to consider the matter.

HARRY A. SPENCER: Mr. Chairman, I move that the report of the committee be accepted and placed on file.

The motion that the report of the committee be accepted and placed on file was carried. A motion was made that the special committee be continued. That motion also carried.

The formal report of the committee follows:

#### **Report of the Special Committee on Bar Examination Standards**

In creating the Special Committee on Bar Examination Standards in the Nebraska State Bar Association, President Paul L. Martin advised that it was being constituted at the request of the American Bar Association to serve as a liaison committee.

Since our committee was created we have not been contacted by the American Bar Association or by any committee or representative thereof. We, accordingly, have nothing to report.

Charles F. Bongardt, Chairman  
 Wilber S. Aten  
 George A. Healey

CHAIRMAN HUNTER: That completes all of the items that we have for the morning session. We will start promptly at 1:30 o'clock.

FRED H. RICHARDS: We did not approve the 1957 Title Standards which were adopted by the Real Estate Section at the Section held last year, and I move that you place on the agenda for this meeting the approval of the Title Standards that were approved and adopted by the Real Estate Section for 1957.

CHAIRMAN HUNTER: Is there a second?

PHIL B. CAMPBELL: I second the motion.

CHAIRMAN HUNTER: It has been moved and seconded that we change the order of business to include the Title Standards report. Any discussion? All in favor say "aye"; opposed, same sign. The motion carried.

Who is to make that report, Mr. Richards? Will you make that the first order of business after we return?

I will appoint as members of the Committee on the Revision of the Bylaws: Ralph Svoboda, Dean Sackett, and Paul Martin as Chairman. I realize that you have a few other things to do, Paul, during the next two days. If you have no objection I would like to have you serve as Chairman of that Bylaws Committee.

PAUL MARTIN: O. K.

CHAIRMAN HUNTER: You may set your own time because I know you have several other things to do. Will that committee meet immediately following this meeting.

The Executive Council will meet in Room 614 immediately. The Committee on Resolutions, Mr. Kuhns as Chairman, Flavel Wright, L. R. Stiner, and W. E. Mumby, will meet in Room 714 at 1:00 o'clock.

If there is nothing further we will recess until 1:30 o'clock.

The Wednesday morning session of the House of Delegates recessed at 11:50 o'clock.

HOUSE OF DELEGATES  
WEDNESDAY AFTERNOON SESSION

October 1, 1958

The Wednesday afternoon session of the House of Delegates was called to order at 1:45 by Chairman Hunter.

CHAIRMAN HUNTER: The House of Delegates will please come to order.

At this time I would like to call on Mr. Fred Richards.

1957 STANDARDS

Fred H. Richards

Mr. Chairman, Members of the House of Delegates: We have quality here if we don't have quantity.

I want to give at this time the 1957 Standards which are in written form. This is the Title Standards, the supporting citations and the index that accompanies these standards which were promulgated by the Executive Committee of the Real Estate Section and which were approved and adopted by the 1957 session of the Real Estate Tax Section.

I will read the standards. I will not read the supporting citations nor the accompanying index unless I am requested so to do. After I have read the standard I will move its adoption, first asking for discussion or questions.

*Standard 56* reads: "Matters 'purporting to divest' within the meaning of the Marketable Title Act are those matters appearing of record which, if taken at face value, warrant the inference that the interest has, in truth, been divested."

Are there any questions or discussion? If not, Mr. Chairman, I move the adoption of Standard 56.

CHAIRMAN HUNTER: Is there a second?

C. M. PIERSON: I second the motion.

CHAIRMAN HUNTER: Motion has been made to approve Standard No. 56. Is there any discussion? If not, all those in favor of the adoption of Title Standard No. 56 say "aye"; opposed, same sign. The motion carried.

MR. RICHARDS: *Standard No. 57*: "The omission of the date of execution or the date of acknowledgment, or both, in and of itself does not invalidate a conveyance."

Any questions? I move the adoption of Standard No. 57.



HARRY A. SPENCER: I second the motion.

CHAIRMAN HUNTER: It has been moved and seconded that Title Standard No. 57 be approved. All in favor signify by saying "aye"; opposed, same sign. The Standard is approved.

MR. RICHARDS: That the following sentence be added at the end of the first paragraph of the *Comment to Standard No. 42*: "The Iowa Supreme Court has recently upheld the constitutionality of the Iowa Marketable Title Act in the case of *Tesdell v. Hanes*, 82 N.W. 2d 119."

I move the addition of that recital to Standard No. 42.

CHAIRMAN HUNTER: Mr. Richards, would you inform us regarding the contents of Title Standard 42?

MR. RICHARDS: It is my recollection, Mr. Chairman, that that particular Standard in effect gives efficacy to the Marketable Record Title Act. It is one that we can rely upon and gives the interpretation of that Act. Is Herman Ginsburg here?

My best recollection is that that is giving legal efficacy to our Marketable Title Act prior to having this adjudication.

CHAIRMAN HUNTER: Thank you.

Have you moved its adoption?

MR. RICHARDS: I have moved the adoption of that addition to Title Standard No. 42.

MILTON ABRAHAMS: I second the motion.

CHAIRMAN HUNTER: All in favor signify by saying "aye"; opposed, the same sign. The motion is approved.

MR. RICHARDS: *Standard No. 58*: "A title examiner should assume the constitutionality of Nebraska procedures relating to service of process and publication of notices."

Any questions? I move the adoption of Standard No. 58.

CHAIRMAN HUNTER: Is there a second?

MR. ABRAHAMS: I second the motion.

CHAIRMAN HUNTER: It has been moved and seconded that Title Standard No. 58 be approved. All in favor signify by saying "aye"; opposed, the same sign. Title Standard No. 58 has been approved.

MR. RICHARDS: That *Standard 38* be amended to read as follows: "Where an individual has acquired title to real property by initial and surname, and in a subsequent title transaction (including estate proceedings) the first name is used, the initial letter of which is the same as the initial in the name of the individual in the prior title transaction, and the same surname

appears as in the prior title transaction, identity of such individuals should be presumed where there is nothing of record to the contrary. The same presumption exists where the individual in the first title transaction acquired title by initials, and the individual in the subsequent title transaction conveys by first name, as above, and same middle initial and surname."

Any questions? I move the adoption of Title Standard No. 38.

EDSON SMITH: I second the motion.

CHAIRMAN HUNTER: It has been moved and seconded that Title Standard No. 38 be amended as read. All in favor signify by saying "aye"; opposed, same sign. It has been adopted.

MR. RICHARDS: *Title Standard No. 59*: "Designation of a grantor or a mortgagor as 'widower' or 'widow' is equivalent to describing him or her as 'single' or as 'unmarried.'"

I move the adoption of No. 59.

R. B. HAMER: I'll second the motion.

CHAIRMAN HUNTER: It has been moved and seconded that Title Standard No. 59 as read be approved. All in favor say "aye"; opposed, same sign. The motion carried.

MR. RICHARDS: *Standard No. 60*: "A conservator has the same power of sale and mortgaging of real estate as a guardian."

Any questions? I move adoption of No. 60.

ROBERT K. ADAMS: I second the motion.

CHAIRMAN HUNTER: It has been moved and seconded that Title Standard No. 60 be approved as read. All in favor signify by saying "aye"; opposed, same sign. The motion carried.

MR. RICHARDS: *Standard No. 61*: "A judgment or transcript of judgment in the District Court is not a lien upon an equitable interest in real estate of a debtor."

Any questions? I move the adoption of No. 61.

MR. ADAMS: I second the motion.

CHAIRMAN HUNTER: Title Standard No. 61 has been moved and seconded for approval. As many as favor the motion signify by saying "aye"; opposed, same sign. The motion carried.

MR. RICHARDS: Mr. Chairman, for the purpose of saving time and to complete the report and the record, I move that the citations which accompany these Standards and the index which also accompanies these Standards as contained in the report entitled "1957 Title Standards" also be approved and adopted.

CHAIRMAN HUNTER: Is there a second to the motion?

MR. ADAMS: I second the motion.

CHAIRMAN HUNTER: As many as favor the motion signify by saying "aye"; opposed, same sign. The motion carried.

MR. RICHARDS: Thank you, Mr. Chairman.

EDWIN CASSEM: Mr. Chairman, may I be permitted the liberty of suggesting at this time that I think the time has come when we should consider whatever measures are necessary to change the size of the customary abstract page from legal to letter size.

MR. RICHARDS: Mr. Chairman, in answer thereto I would say that we have that under consideration. We are in the process of changing the format and the mechanical setup of the abstract.

CHAIRMAN HUNTER: The next item of business is the report of the Bylaws Revision Committee of last year, which was appointed by the Chairman of the House of Delegates last year to consider the revision of the Bylaws to include the office of President-Elect. Barton Kuhns was in charge of that committee. Will you come forward please, Mr. Kuhns, and make your report of the action of the Executive Council.

#### **Report of Committee on Rules Revision**

BARTON H. KUHNS. Mr. Chairman, this is a committee on recommendations for changes in the Rules, not in the Bylaws.

At the conclusion of reading the proposed revised rules I am going to make a motion that the President of the Association be requested to recommend to the Supreme Court these changes in the rules as I will read them.

Also by way of preliminary remarks I might say the other members of the committee were Tom Quinlan of Omaha and Charles Yost of Fremont. Last year we felt there wasn't sufficient time at the meeting to work up these changes but this year these changes are not whipped together at the last minute, so to speak, but have been circulated and studied. I think this is the third revision of them to try, not to change the thought, but to get acceptable language. I say that not because we think they are perfect but so that you will know they have been carefully considered.

The changes go to Article V of the existing Rules, which is the Article of the Rules which pertains to the organization of the Nebraska State Bar Association. The only change that has been effected is to provide for the office of President-Elect and to describe what happens in the event of a vacancy in the office of

President before the expiration of the term of the President, and to make the President-Elect a member of the Executive Council.

I think the best way to present it, and I discussed this with Paul Martin, rather than try to read you what has been stricken and what has been inserted in the form of a legislative bill, although that is the form in which I have it here, is to read you the paragraphs of Article V as they will read when they have been changed. Anything you may note in here pertaining to anything other than what I have said about the office of President-Elect is unchanged and just the way it is in the present Rules.

## ARTICLE V ORGANIZATION

1. *Officers.* The officers of this Association shall be a President, President-Elect, Chairman of the House of Delegates, and Secretary-Treasurer. The officers except the Secretary-Treasurer shall be elected at the time and in the manner provided by the Bylaws of the Association. In the year 1959, there shall be elected a President and President-Elect to serve concurrent terms of one (1) year with the right of automatic succession by the President-Elect to the office of President for the following year. In the year 1960 and annually thereafter, the President-Elect shall be elected for a term of one (1) year with the right of automatic succession to the office of President the following year. The Chairman of the House of Delegates shall be elected for a term of two (2) years.

a. The President shall preside at all meetings of the Association and of the Council, and shall perform the duties usually belonging to such office. He shall also deliver an address at the regular meeting of the Association next succeeding his election.

The President-Elect shall perform such duties as are assigned to him by the President.

b. The Chairman of the House of Delegates shall preside at all meetings of the House of Delegates. In the event of the death, disqualification, resignation or removal from the state of the President, President-Elect of the Association, or of the Chairman of the House of Delegates, the Executive Council shall declare such office vacant. In the event of the vacancy in the office of President, the President-Elect shall assume the office of President for the unexpired term. If

the vacancy in the office of President occurs less than six months after the annual meeting the President-Elect who assumes the office of President will serve only for the unexpired term, with the President-Elect who is appointed automatically succeeding to the office of President at the end of said term. In the event of the vacancy in the office of President-Elect or Chairman of the House of Delegates, the Executive Council shall designate a successor who shall serve for the balance of the term. If the vacancy is in the office of the Chairman of the House of Delegates, the successor shall be chosen from the membership of the House of Delegates.

c. No change.

d. No member shall be eligible for election as President, President-Elect of the Association, or Chairman of the House of Delegates unless he shall have served previously as a member of the House of Delegates or of the Executive Council.

2. No change.

3. *Executive Council.* The Executive Council of the Association shall consist of the President and the President-Elect of the Association, the Chairman of the House of Delegates, and nine (9) other members, three (3) of whom shall be known as "Members at Large," and six (6) of whom shall be known as "District Members." The immediate past President of the Association shall be a member of the Council for the year following his term as President. As the terms of office of the Members at Large of the present Executive Council shall expire, their successors shall be elected by the Association at the time and in the manner provided by the Bylaws of the Association, for a term of three (3) years.

That is the way the Rules would read if changed in accordance with our recommendations. There is no need for any change in the bylaws because the bylaws refer to the manner of the election of officers and these Rules make the President-Elect an officer, so that situation is covered.

Mr. Chairman, I move that the President of the Association be requested to recommend to the Supreme Court the change in the Rules of the Association in accordance with the paragraphs which I have just read. I might say they have been unanimously approved by the Executive Council.

CHAIRMAN HUNTER: Is there a second to the motion?

HARRY A. SPENCER: I second the motion.

CHAIRMAN HUNTER: If there any discussion?

EDSON SMITH: Is the President of the Association under the revised Rule there to make his presidential address at the meeting after he serves his term as President or does it mean after he serves his term as President-Elect?

MR. KUHNS: After he serves his term as President.

MR. SMITH: I think the way you read it it remains the same as it is at the present "at the next regular meeting of the Association next succeeding his election."

MR. KUHNS: As President.

MR. SMITH: Does it say "as President"? Somewhere else it says that he automatically succeeds to the office.

MR. KUHNS: That is the President-Elect. I think that is all right. We tried to watch it.

"The President shall preside at all meetings of the Association and of the Council, and shall perform the duties usually belonging to such office. He shall also deliver an address at the regular meeting of the Association next succeeding his election."

Now that means that if Joe Tye had been President-Elect during the past year, this would be the meeting at which he would become President, and next year would be the meeting at which he would deliver his address.

MR. SMITH: That would be the *second* annual meeting after his election.

ROBERT K. ADAMS: Edson's point is that he isn't *elected* President. He automatically succeeds to the office of President. The only *election* is that of President-Elect.

MR. KUHNS: You would suggest changing "next succeeding his election" to "at which he becomes President."

MR. SMITH: That would make it clearer to me.

MR. KUHNS: We have all repeatedly said in correspondence with each other that we have no pride of authorship. We were just trying to get a job done. It seems to me that if there is any doubt about that it should read: "He shall also deliver an address at the regular meeting of the Association next succeeding the meeting at which he becomes President."

MILTON ABRAHAM: That would clarify it.

MR. KUHNS: Mr. Chairman, if I may adopt that change in the Rules as read as a part of my motion, I am quite sure it would be acceptable to Mr. Quinlan and Mr. Yost, neither of whom is here.

CHAIRMAN HUNTER: Is that change acceptable to the second?

JUDGE SPENCER: That is acceptable.

CHAIRMAN HUNTER: Is there any further discussion? If not, all those in favor of the motion as amended say "aye"; opposed, same sign. The motion is carried.

I would like to have it made a matter of record that this House is laboring today under a very severe handicap, being the first day of the World Series. In order to alleviate a little bit of the pain I have arranged for a runner to come in any time the score changes. However, any member of this House will be in order this afternoon if he has any detailed information to give it on the Series at any time. So if you will make yourself known you will be recognized.

I will recognize Mr. Berkshire.

ROBERT BERKSHIRE: I am Chairman of the Junior Bar Section of the Nebraska Bar Association. I have a resolution to present recommending adoption of amendments to Article IV of the Bylaws of the Nebraska State Bar Association. A little bit of the background of the purpose of the amendments is this:

For several years the Junior Bar Section has been scheduling its annual Section meeting at the annual meeting of the Nebraska Bar Association and through the years we have scheduled the Section meeting on Friday afternoon opposite either the Tax Section or some other Section which is generally of vital interest from an educational standpoint to members of the Bar, and consequently we haven't had too great an attendance at the Section meeting. Therefore this year, after giving the matter some thought, we determined that we would attempt to have a Section meeting in conjunction with a seminar in continuing legal education at some time apart from the meeting of the annual Bar Association. We did this because there was no time when we could have a meeting of the Section when it wouldn't conflict with some other meeting, because through the years and by experience it was determined that Thursday and Friday should be the two days reserved for Section meetings and Wednesday was the annual business meeting of the House of Delegates and that any other Section meeting would just lengthen out the program unduly and cause a great deal of hardship in that way.

Therefore this fall we had a seminar in conjunction with the University of Nebraska Law School on the question of damages and we worked with the Law School and helped set it up and attempted to publicize it through cooperation with George Turner and with the University. I know many of you people in the audience were at the seminar meeting. It was generally very

well attended. The registration was in excess of 240 members of the Bar.

So what we determined to do was to amend the Bylaws so that we could hold our annual Section meeting and the election of our members of the Executive Committee of the Junior Bar Section at some time other than at the annual meeting of the Bar Association. To do that it would be necessary to amend four sections, Sections 4, 5, 6 and 7 of Article IV of the Bylaws, which provide that the Section members must be elected at the annual meeting of the Bar Association. What we propose to do is have our Section meeting either at the annual meeting of the Bar Association or at some other time that the Section might have a meeting; for instance, if we were able to do it this year we would have had the Section meeting of the Junior Bar Section at the seminar which we held two weeks ago in Lincoln, Nebraska.

As Mr. Kuhns did when he read the amendments that he proposed previously, I will read the amendment to the Bylaws that we propose to adopt. We haven't done anything with the wording of the particular Bylaws as they pertain to the other Sections of the Bar Association. We have just attempted to amend them so that they pertain to the Junior Bar Section. Before I start doing that, are there any questions concerning what we propose to do?

Well, we propose that Section 4 be amended to read as follows:

"Section 4. Each section, *except the Junior Bar Section*, shall meet during the period of the annual meeting at such time as the Executive Council may direct. *The Junior Bar Section shall meet at such time during the period of the annual meeting or on such date and at such time prior to the annual meeting as the Executive Council may direct.* Upon request made by a majority of the Executive Committee of a section not less than six months before an annual meeting, the Executive Council may excuse any section from meeting at not more than one consecutive annual meeting."

Second, the last two sentences of Section 5 be amended to read:

"Section 5. \* \* \* Thereafter at each annual meeting of *each section*, two members of the Executive Committee who shall serve for a term of three years shall be elected in the manner hereinafter provided. Members of the Executive Committee shall serve as such *from adjournment of the annual meeting of the Association in the year in which elected* until the adjournment of the annual meeting of *the Association* in the year in which their



terms expire, and no member of the Executive Committee shall be elected for more than one successive term."

Third, that the first and third sentences of Section 6 be amended to read:

"Section 6. 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 of the section. \* \* \* 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. \* \* \*"

And, finally, that Section 7 be amended to read:

"Section 7. If any section fails to conduct an annual meeting of the section, 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."

Those are the proposed amendments to the Bylaws. Mr. Chairman, at this time I move that those amendments to the Bylaws be approved by the House of Delegates.

CHAIRMAN HUNTER: Is there a second to the motion?

HENRY M. GRETHUR: I second the motion.

CHAIRMAN HUNTER: All those in favor of the motion signify by saying "aye"; opposed, same sign. The motion is carried.

CHAIRMAN HUNTER: Now we will get back to the regular list of business before the House as it is printed in the program, and I make my apologies to those committee chairmen who were supposed to come up at 1:30, but there were several of these more or less formal matters that we wanted to get out of the way as soon as possible.

Next is the report of the Committee on Unauthorized Practice, Al Reddish.

ALBERT T. REDDISH: Thank you, Mr. Chairman.

The Committee on Unauthorized Practice is deeply disturbed by the continued encroachment on the practice of law by so-called "lay experts." Jeopardy to the professional status of the lawyer is of incidental concern in this area. Each instance of encroachment endangers the welfare of some misguided individual and of the public generally, and threatens the protection to the public intended through statutes governing the practice of law.

Equally disturbing is the apparent complacency among a large segment of the Bar as to the activities of these so-called "lay experts."

In addition to this problem, the committee the past year has directed its activities to two fundamental problems. First, the scope of authority of realtors in preparing real estate contracts; and, second, the increasing use of simulated process, mostly by collection agencies.

Realtors commonly use a form designated "uniform purchase agreement" and containing a notation "approved by the Nebraska Real Estate Association, 10-3-48."

The committee believes these quoted statements lend undue dignity to the form, and may misguide the unsuspecting purchaser or seller. In addition, the committee believes the caption and the contents of the form exceed the scope intended in the Statement of Principles between realtors and lawyers authorizing a realtor to "use an earnest money contract form" and other documents approved by agreement of the local bar associations and associations of realtors.

The second problem, the simulated process, we note that the County Attorney of Dodge County in 1957 on his own initiative filed complaint upon use of simulated process. After a hearing and submission of briefs the defendant was found guilty and there was no appeal. Despite such action, simulated process in its various forms appears in more frequent use daily. Use of simulated process has been bitterly criticized by the Supreme Courts of Iowa, Oklahoma and Montana. In addition, Illinois since 1919 has had a statute expressly providing circulating papers simulating court process to be a misdemeanor.

On these respective points your committee, first, urges a re-education of lawyers in the general field of what constitutes practice of law, and education of the public generally on the services of and the need for a lawyer.

Parenthetically I might note that some of the public service pamphlets by our Public Service Committee are helpful in that and I believe there are various pamphlets on the practice of law which have been primarily submitted to lawyers for their own use which might be designed for use and distribution among the public generally.

Second, the committee recommends establishment of a joint commission of realtors and lawyers within the State of Nebraska to work in cooperation with the Nebraska Real Estate Commission to prepare an earnest money contract form within the scope

of the Statement of Principles adopted by the National Conference of Realtors and Lawyers, together with such other standard legal forms as the joint committee may deem proper, and a defining of the principles of lawyers and realtors within the scope of the National Conference Statement.

I might comment parenthetically here that we don't want to get into the position that the Colorado Bar found itself in two cases where the Supreme Court of Colorado found in favor of the real estate brokers on preparation of forms and the use of forms.

Third, the committee recommends referral to the Legislation Committee of the Association consideration of legislation providing circulating of papers simulating court process to be a misdemeanor, with addition of a civil penalty providing that if simulated process is used in any case and the trial court so finds in any later action to collect the obligation set forth in the simulated process, the creditor shall collect no interest on the obligation, shall be required to pay all court costs and shall not be entitled to resort to garnishment proceedings in aid of execution.

Fourth, the committee recommends, after thorough investigation by properly constituted authorities, citation for contempt of the Supreme Court be sought against one or more of the firms most frequently using a form of simulated process.

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

After discussion the motion to adopt the report of the committee was carried and the report adopted.

The formal report of the committee follows:

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

Your Committee on the Unauthorized Practice of Law reports:

The committee is deeply disturbed by the continued encroachment upon the practice of law by so-called "lay experts." Jeopardy to the professional status of the lawyer is of incidental concern in this area. Each instance of encroachment endangers the welfare of some misguided individual and of the public generally, and threatens the protection to the public intended through statutes governing the practice of law.

Even more disturbing to the committee is the apparent complacency among members of the Bar to increasing activity of these "lay experts" which may lead to abdication of areas of proper law practice by lawyers.

The committee has directed its activities the past year to two fundamental problems:

- (1) Scope of authority of realtors in preparing real estate contracts.
- (2) Increasing use of simulated process.

(1) *Real Estate Agreements.* Realtors commonly use a form designated "uniform purchase agreement" and containing a notation "approved by the Nebraska Real Estate Association, 10-3-48."

The committee believes these quoted statements lend undue dignity to the form, and may misguide the unsuspecting purchaser or seller. In addition, the committee believes the caption and the contents of the form exceed the scope intended in the Statement of Principles between realtors and lawyers authorizing a realtor to "use an earnest money contract form for the protection for either party against unreasonable withdrawal from the transaction, provided that such earnest money contract form, as well as any other standard legal form used by the broker in transacting such business, shall first have been approved and promulgated for such use by the Bar Association and the Real Estate Board in the locality where the forms are to be used."

(2) *Simulated Process.* The County Attorney of Dodge County, Nebraska, in 1957, on his own initiative, filed complaint upon use of simulated process as constituting unauthorized practice of the law pursuant to Section 7-101, procured conviction and fine, from which there was no appeal.

Despite such action, simulated process in its various forms appears in more frequent use daily. Aggravated instances of use of forms which have been bitterly criticized by Supreme Courts of Iowa, Oklahoma and Montana have been brought to the attention of the committee. Illinois since 1919 has had a statute expressly providing circulating papers simulating court process to be a misdemeanor. Your committee believes civil sanctions also should be enacted as more readily enforceable and as a deterrent to nonresidents using such devices against Nebraskans.

*Your Committee therefore:*

1. *Urges a re-education of lawyers in the general field of what constitutes practice of law, and education of the public generally on the services of and the need for a lawyer.*
2. *Recommends establishment of a joint commission of realtors and lawyers within the State of Nebraska, to work in cooperation with the Nebraska Real Estate Commission to prepare an earnest money contract form within the scope of the Statement of*

*Principles adopted by the National Conference of Realtors and Lawyers, together with such other standard legal forms as the joint committee may deem proper, and a defining of the principles of lawyers and realtors within the scope of the National Conference statement.*

3. *Recommends referral to the Legislation Committee of the Association consideration of legislation providing circulating of papers simulating court process to be a misdemeanor, with addition of a civil penalty providing that if simulated process is used in any case and the trial court so finds in any later action to collect the obligation set forth in the simulated process, the creditor shall collect no interest on the obligation, shall be required to pay all court costs, and shall not be entitled to resort to garnishment proceedings in aid of execution.*
4. *Recommends, after thorough investigation by properly constituted authorities, citation for contempt of the Supreme Court be sought against one or more of firms most frequently using a form of simulated process.*

Albert T. Reddish, Chairman

Raymond M. Crossman, Jr.

A. J. Luebs

Clarence A. H. Meyer

Philip H. Robinson

Richard W. Satterfield

CHAIRMAN HUNTER: The next item of business is the report of the Committee on the Judiciary, Joe Tye.

EDWIN CASSEM: Mr. Chairman, I am Edwin Cassem of Omaha of the committee, and at Mr. Tye's request I have agreed to present this report. I would like to do so in inverse order.

The first recommendation is that a special committee be appointed to endeavor to improve the dignity and prestige of the county judge's office. This recommendation is on page 58 of the program.

Another recommendation of the committee is that representations be made to the District Judges Association and the County Judges Association that they appoint appropriate committees as liaison between their Associations and this committee so that their problems and suggestions can be adequately presented to this Association.

Another suggestion is that this committee function on a year-round basis and encourage the appointment of local committees throughout the state with the same object to report to this com-

mittee and that their reports be included in the next annual report of this committee.

The pre-eminent function of bar associations and the function that overshadows all others of course is the improvement of the conditions of the practice of law, and therefore this committee's chief project in my judgment is far and away the most important proposal that is now before this Association, or has been for several years, and that is the merit plan. You will note from the report that it has been drafted and prepared and turned over to the Legislative Committee. The report says, "We have every confidence that the Committee on Legislation will agree to submit the Bill to the next Legislature." I regard that as perhaps the understatement of the year. I am sure they will — they had better. Anyhow, it is a great project and we urge that everybody in this Association wake up to the tremendous importance of this measure and the importance of propagandizing the public.

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

The motion to adopt the report of the committee was carried and the report adopted.

The formal report of the committee follows:

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

Your Committee on Judiciary undertook to give consideration to all of the recommendations made by last year's committee. It appeared that the most important recommendation was Number 5, "to get the American Bar Plan for the selection of Judges adopted."

After full consideration by the committee it was the consensus of opinion that an attempt should be made to get the next Legislature to pass the necessary Bill to submit the American Bar Plan for Selection of Judiciary to the voters of Nebraska. It was the consensus of the committee that the plan be submitted on a State-wide basis.

Your committee gave a great deal of time to this subject and, therefore, was unable to develop the other recommendations of last year's committee. The members of this year's committee divided the Legislative Districts of the State among them and proceeded to contact the nominees for the next Legislature, explaining the American Bar Plan for Selection of Judiciary and soliciting their support of the proposed Bill. With only two exceptions it would appear that the next Legislature will be most receptive. These exceptions were not positive opposition to the plan but were reservations of opinion.

The Bill to submit the American Bar Plan to the electors of Nebraska, which requires a Constitutional Amendment, has been prepared and submitted to the Committee on Legislation in compliance with the action of the House of Delegates. We have every confidence that the Committee on Legislation will agree to submit the Bill to the next Legislature and to use their best efforts in obtaining passage of the Bill.

The members of this committee have unanimously agreed to continue contacting the members of the next Legislature following the fall election and to give all cooperation requested by the Committee on Legislation to the end that the necessary Bill be passed by the 1959 Legislature.

Your committee sincerely believes that with a proper program of education State-wide, a favorable vote can be obtained upon the American Bar Plan for Selection of Judges if and when submitted to the voters. This will be a real job for the committee two years hence and should be participated in by the Committee on Public Service.

Because of the time devoted to the American Bar Plan by this committee this year, we recommend the recommendations of last year, except for Number 5, "the American Bar Plan," which we believe we have taken care of for the next year.

The committee, therefore, recommends:

1. *That the Judiciary Committee of this Association pursue its objects on a year-round basis and encourage the appointment of local committees throughout the State with the same object.*

2. *That such local committees be asked to report their progress and suggestions to the committee of this Association; and the results be included in the next annual report of this committee so that like committees throughout the State may benefit from the same.*

3. *That suggested legislation on procedure be solicited from such local bar committees, be given careful study and recommendations made.*

4. *That the District Judges Association and the County Judges Association be requested to appoint committees as a liaison between their associations and this committee so that their suggestions and problems might be more adequately presented to this Association.*

5. *That continued effort be made by the Association to improve the dignity and prestige of the county judge's office by appointing a special committee to study this problem and submit its recommendations to the Association at its next annual meeting.*

6. *That full cooperation be given the Committee on Legislation in support of the Bill to submit the American Bar Plan to the electorate of the State.*

J. C. Tye, Chairman  
 Wilber S. Aten  
 Edwin Cassem  
 Paul P. Chaney  
 Julius D. Cronin  
 Robert B. Crosby  
 Robert V. Denney  
 Donald F. McGinley  
 Alexander McKie, Jr.  
 Thomas C. Quinlan  
 Donald R. Ross  
 Ralph E. Svoboda  
 John J. Wilson  
 Floyd E. Wright

CHAIRMAN HUNTER: The next item of business is the report of the Committee on Legislation, Mr. Ginsburg.

HERMAN GINSBURG: Mr. Chairman and Members of the House of Delegates: The report of the Committee on Legislation will be found on page 54 of the program, and I do not intend to discuss that report because I assume that everyone is familiar with it.

I have some matters however that I want to bring up that I think are of vital importance so far as the work of the Committee on Legislation is concerned and so far as the legislative activities of this Bar Association are concerned.

The committee has been feeling its way this year. We have had a very difficult year. We have had nothing in the past to guide us. I might say that one of the things that has developed is that I found out that the committee still isn't sure just what its jurisdiction is, and I will go into that in a moment.

First, since the report of the committee was printed there have been referred to the committee a number of bills which we have been asked to sponsor, quite a number relating to workmen's compensation. I won't mention them all because it would take almost all afternoon, but there is one in particular that the House of Delegates might be interested in, and that is a bill with reference to procedure on subrogation rights where there is a suit filed by the injured employee against a third party. We are all familiar with the fact that the employer's insurance company has to be repaid, and as the statute now reads it doesn't have to stand



any of the attorneys' fees, and there is a proposal that there be a provision made for the attorneys' fees. Then there are a good many other things having to do with the workmen's compensation law as a whole that I will be glad to refer to anyone who is interested in reading them. I don't know myself exactly what to do with them. I think there are about a dozen bills here, including one which is an increase in the salary of the workmen's compensation court judges.

Also I have received from the Nebraska District Court Judges Association a very important communication which was received subsequent to the preparation of our report, and I think I will read it in detail.

A proposal that the following amendment to Section 10 of Article V of the Nebraska Constitution be made as follows:

"Provided, however, that the retired district judges may, when needed and on a call by the Chief Justice of the Supreme Court, serve temporarily as active judges of the district court anywhere in the state. Such judges need not be elected.

"The President pro tem of the Association called for discussion and after some discussion it was moved and seconded that the proposed amendment of Section 10 of Article V be approved by the District Judges Association and steps be taken by the Secretary to see to it that it was properly submitted to the House of Delegates of the State Bar Association with recommendation that it be submitted to the Legislature for final submission to the people as an amendment to the Constitution as soon as possible, and this was passed immediately."

I received communications, therefore, from the Secretary of the Nebraska District Judges Association requesting that I present that proposed legislation to this House for approval and that it be made a subject to be sponsored by our Committee on Legislation.

Then finally I received just recently from one of the members of the Association some proposed amendments to the adoptive birth certificate statute. It is quite technical. They say there are some defects in connection with some of the questions that should be asked and filled in, and that there has been some trouble with the military and naval authorities with reference to those. It is a noncontroversial amendment. From reading it it seems to me that it is quite sound.

Here is the situation, and I can make my point no better than by referring back to the report of the Committee on Unauthorized Practice.

If No. 3 of the recommendations of that committee is the policy of the House, then the Committee on Legislation becomes the supreme body of this Association, as far as I can understand, because we, and when I say "we" I mean the Committee on Legislation, then decide what legislation should be sponsored. For example, No. 3 says that we refer to the Legislation Committee consideration of legislation to provide certain things. Now, does that mean that if we decide that that is the way the bill is to be presented, or that a bill of that kind should be presented, that is the voice of the Association?

As a matter of fact may I tell you what has happened during this past year. We have received a number of proposals from lawyers involving suggested defects and recommendations as to what should be done, and in many, many instances when the members of the Legislation Committee were polled there was vast dispute among the members of the committee as to whether anything should be done. For example, one of the things that impressed itself on me so much because I was so vitally interested was an act setting a period of dormancy for an alimony or child support judgment. I thought everybody would be for that, but when I polled my Committee on Legislation at least half of the committee were opposed. They didn't want any change in the law.

Now, is the Committee on Legislation to decide whether, as a matter of policy, such a law should be adopted or not? May I say further that the position which we took with this was that it was not the function of our committee to determine any policy questions, that we could simply point out to the House of Delegates and to the Association as a whole matters which we thought required looking into, but that the minute we ran into anything that was controversial, such for example as this very report of the Committee on Unauthorized Practice, whether that should be a criminal statutory statute preventing their collection of their claims, etc., that that was a matter for the Association and for the proper committee and Sections of the Association.

I hope I may be forgiven for saying this because I don't want to step on anyone's toes. There was one Section of the Association which operated the way I thought we *should* operate. The members of the Committee on Legislation were invited to sit in with that Section, and I am referring to the Section on Real Estate, Trust and Probate Law. They told us what problems they thought they had and what problems they decided should be taken care of. For instance, on this very subject of a dormancy

bill as far as alimony judgment is concerned. They want one and they decided what the period of time should be, etc. As I understand it, they will present their recommendations to this House, and then if the House approves it, then our committee will go ahead and work on such a bill. But so far as our committee itself deciding whether or not such a bill should be adopted, I can see right now it will never work because you can't get the committee, any more than you can get any group of lawyers, to agree on anything.

We can recommend subjects, and that is what we have done in our report, subjects which we think merit attention. The thing that I am vehement about here is that I haven't had any word from any other Sections of the Association or any other committees except those that I have referred to in our report even telling us at all about what they have in mind or what they would like to do. Of course this is the first year of this new procedure and I think everybody is to be forgiven if there has been any misunderstanding, but the Committee on Legislation is not a superbody, we are not the ones to decide what legislation should be passed, and particularly we are not the ones to decide what the policy of the law should be. Therefore that is going to have to be left to the proper institutions of this Association to decide and, in turn, advise the Committee on Legislation.

When the report of the Real Estate Committee comes in there will be I think a half-dozen bills proposed that they have discussed, that they have decided on matters of policy, etc., and if this House approves that report, then the Committee on Legislation will act. Outside of that the committee cannot function.

Then the final thing that I want to say to you before I leave the rostrum is that we will undoubtedly have presented to the Legislature this year, at least that has been the circumstance in previous sessions, bills which we as lawyers think improper for adoption. We have no method set up at the present time for anyone to speak on behalf of the Association *against* anything at all. We will have by the time this meeting closes an agenda of legislation that the committee will be expected to work on, and we will do the best we can. We have no procedure, so far as I know, set up for anyone if some bill is introduced that we lawyers know and feel is improper so far as the practice of law is concerned, or so far as the public itself is concerned; we have no procedure set up for our voice to be heard in opposition. I commend to your thinking and your decision some determination as to procedure in that regard. With these remarks I move the adoption of the report of the Committee on Legislation.

After discussion the motion to adopt the report of the committee was carried and the report adopted.

The formal report of the committee follows:

### **Report of the Committee on Legislation**

The Committee on Legislation has endeavored to function during this past year in accordance with the new procedure promulgated by the House of Delegates. In accordance therewith the committee has been in contact with the various committees of the Association as well as with some of the sections. Various proposals as to legislation which will be offered to the Association for approval by the various committees have been referred to the Committee on Legislation; and the Committee on Legislation can report that no problems on correlation as between the acts of the various committees and sections have arisen. If the reports of the various committees and sections are approved by the Association, the Committee on Legislation stands ready to furnish its services in the sponsoring of such legislation on behalf of the Association.

Up to the present date the Committee on Legislation has received reports from the following committees indicating legislative action proposed to the Association for approval:

- Special Committee on Administrative Agencies
- Special Committee on Revision of Corporation Laws
- Special Committee on Atomic Energy Law
- Committee on Judiciary
- Special Committee on Oil and Gas Law

In addition to the reports and recommendations of these committees, the Committee on Legislation has received word from the Legislative Committee of the Section of Real Property Trust and Probate Law that it will sponsor a number of acts in the particular field of that section. As previously mentioned, none of such proposed legislation created any problem so far as correlation was concerned. If the reports of the several committees and sections are approved and accepted by the Association, the Committee on Legislation will assist in the drafting of bills where necessary, and in the sponsorship of such proposed legislation.

In addition to the work of the committees and sections aforesaid, the Committee on Legislation has also received information from the Judicial Council concerning proposals relating to measures to be sponsored by the Judicial Council. The Committee on Legislation has endeavored to be helpful in furnishing its views with

regard to such measures and believes that any measures so sponsored by the Judicial Council should receive the support of this Association through the Committee on Legislation.

In addition thereto, the Bar generally was circularized and advised of the work of the Committee on Legislation, with a request that the Bar indicate to the Committee on Legislation defects in the existing statutes which ought to be remedied. Twenty proposals as to legislation were thus received. With reference to two of these proposals it was ascertained that the Judicial Council was working thereon, and therefore it was not felt that any further action by this committee was necessary. Several of the proposals were disposed of by reason of the subject matter being included within proposed acts sponsored by various sections and committees of the Association. Of the remaining items, seven were judged by the committee to be unsuitable for proposal at this coming session of the Legislature for one reason or another. The following recommendations and proposals of members of the Association remain for disposition and have been recommended for sponsorship by a majority of the Committee on Legislation in each instance, namely:

1. A proposal for an amendment to Section 36-303 dealing with chattel mortgages, to provide for the filing of a renewal affidavit, or for an extension of the original filing.

2. Clarification of ambiguities in the present garnishment statutes relating to the date to be used by the garnishee in answering interrogatories, and the date of determination of liability of the garnishee, as provided by Section 25-1030.02.

3. An amendment of L. B. 445 of the 1957 session of the Legislature so as to eliminate the provision that the sale of property by the county shall be in the manner provided for in Section 77-1936, which procedure is cumbersome and uncertain.

4. Amendment to Section 25-215 relating to the bar of the statute of limitations as to causes of action arising in foreign states.

5. Clarification of the time within which a declination of nomination for a municipal office may be filed so as to clear up an ambiguity in Section 32-519.

It is not to be presumed that the other items proposed by the Bar were found to be entirely unworthy, but only that it was felt that more study was required than was presently available, or that questions of policy were involved as to which this committee should not take a stand or attempt to commit the Asso-

ciation. It will be noticed, however, that the proposals received from the membership of the Association were comparatively negligible. It is hoped that in years to come the Bar will acquire greater knowledge of the work of this Association in the field of legislation, and that accordingly this committee will be able to be of much greater service.

*It is the recommendation of this committee that this Association approve the sponsorship by this committee of the proposed legislation recommended by this committee as hereinbefore set forth.*

*It is further recommended that when any report of any section or committee of the Association which recommends legislation is approved by this Association, that the chairman of such committee be instructed to communicate with the Committee on Legislation and to cooperate in the drafting and sponsorship of any bill to be presented to the legislative session beginning this coming January; and that the sponsoring committee cooperate with the Committee on Legislation in endeavoring to procure the enactment of such legislation.*

*It is further recommended that the committee be continued as a permanent committee of the Association; and that the members of the Association generally be invited to participate in the work of the committee.*

Herman Ginsburg, Chairman  
James N. Ackerman  
Otto Kotouc, Jr.  
Bert L. Overcash.  
Clement B. Pedersen  
R. Robert Perry  
Tracy J. Peycke  
Joseph C. Tye  
Ivan Van Steenberg

CHAIRMAN HUNTER: The next item of business is the report of the Advisory Committee, Raymond Young.

RAYMOND G. YOUNG: Mr. Chairman and Gentlemen: It is deemed desirable that the report of the Advisory Committee be made as nearly complete as possible as of the date of the annual meeting. Because of the continuing activity of so many committees on inquiry whose reports must be received and assembled, it is not feasible to submit our report in time for its publication in the program. The report is very brief and I would like to read it.

The Advisory Committee held one meeting on May 23 and 24, 1958, conducted one rehearing and reviewed five records.

No matters are pending before the Advisory Committee except three requests received within the last few days for advisory opinions. The opinions are in process of preparation.

During the year the Supreme Court rendered a judgment of disbarment in one case (166 Neb. 132, N. W. 2d 135). In 166 Neb. 94, 87 N.W. 2d 394, it held one guilty of contempt of Court who assumed to practice law in violation of an order of disbarment.

Pending in the Supreme Court are complaints in three cases which were investigated and heard by the District Committees on Inquiry in District No. 1 (acting in the place of the Committee in District No. 18 whose members were disqualified) and in Districts Nos. 12 and 17, respectively, and were reviewed by the Advisory Committee. One of them required a two-day hearing before the Advisory Committee.

In addition to the usual correspondence and exchange of views between the Advisory Committee and members of the Association in relation to points of practice and procedure under the Rules, the committee prepared four advisory opinions. In substance the matters considered by the committee in its advisory opinions were these:

1. Canon 9 on communications or negotiations with opposite party who is represented by counsel is to have strict application. It is generally held to mean just what it says, that "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel \* \* \*." The only permissible exceptions are those which have been noted by the American Bar Association Committee on Professional Ethics and Grievances (Example: Opinion No. 66).
2. A county attorney who is named as executor of the will or administrator of the estate of a recipient of old age assistance cannot lawfully accept statutory fee for such service where the estate amounts to less than the full amount of the old age assistance lien, nor should he, by accepting such appointment, place himself in a position where his duties as executor or administrator may conflict with his duties as county attorney.
3. Even though parties to a contract have consulted with the attorney who drew it, the latter should not accept employment from one party to enforce the contract against

the other party who employed the lawyer and paid him for his services. It is believed that accepting such employment would violate the spirit of Canon 6 which forbids the "subsequent acceptance of \* \* \* employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

4. Prior to the 1937 amendments to Canons 27 and 43, the publication of simple professional cards in local newspapers was not prohibited where permitted by local custom. Since the amendments, the publication of such cards is prohibited.

The District Committees on Inquiry have performed their duties effectively and in general with as much promptness as is consistent with thorough investigation and consideration. The actions of the District Committees may be summarized as follows:

In Districts Nos. 1, 2, 7, 8, 10, 12, 13 and 15 no matters have arisen requiring attention, and no charges are pending. The committee in District No. 1 investigated and heard one case referred to it from District No. 18.

In District No. 3 (Lincoln) charges were received in seven matters. Three of them were determined to be without merit. Two, which appeared to be without merit, were withdrawn by complainants upon request for specific information. One is held in abeyance awaiting information. Hearing will be had upon a complaint seeking to disbar, in Nebraska, a lawyer who formerly practiced in this State and who was recently disbarred in Oregon.

In District No. 4 (Omaha) investigations are under way in three pending matters.

In District No. 5, one investigation is under way.

In District No. 6, one investigation is pending.

In District No. 9, one hearing was had and determination was against the respondent.

In District No. 11 informal investigations resulted in dismissals for lack of merit in two cases.

In District No. 14 action is being withheld in one matter until determination of related litigation now in the Supreme Court. Charges in one matter were found to be without merit. Mr. Clark, the chairman of the committee, participated in the Association's radio program on professional ethics.

In District No. 16 charges were filed against one lawyer in two cases and against another lawyer in one of them. Partial



hearings have been had but no determination has been made. Charges are pending in one other case.

In District No. 17, one matter which was heard and decided is now pending in the Supreme Court.

In District No. 18, one matter in which the committee was disqualified was referred to and disposed of by the committee in District No. 1.

The Advisory Committee would direct the attention of the members of the Committees on Inquiry to the digest of "Decisions by the Ethics Committee, from its minutes, not embodied in formal opinions," which appears at pages 627 through 648 of the 1957 edition of the volume containing the Opinions of the American Bar Association Committee on Professional Ethics and Grievances. These informal decisions should be of great assistance in considering the problems that are submitted to the committees.

Mr. Chairman, I move that the report be received and filed.

JOSEPH VINARDI: I second the motion.

CHAIRMAN HUNTER: Is there any discussion? The motion is to accept and place on file the report of the Advisory Committee. All in favor signify by saying "aye"; opposed, same sign. The motion is carried.

CHAIRMAN HUNTER: The next item is the report of the Committee on Legal Education and Continuing Legal Education, Mr. Grether.

HENRY M. GREETHER, JR.: Mr Chairman and Members of the House of Delegates: The report of the Committee on Legal Education and Continuing Legal Education is printed on page 50 of the program.

When this committee was appointed our President, Paul Martin, suggested that the greatest benefit which we might have to the Bar of the State would be to sponsor legal institutes, so our work for the year has been concentrated in this area. As Bob Berkshire has mentioned, two weeks ago an institute on damages was held at the University of Nebraska College of Law in cooperation with the Junior Bar Section, and the Creighton Law School now has planned for early next year an institute at that college.

I might say that not only have we felt that from an educational standpoint of the law have these institutes been beneficial, but from the standpoint of closer cooperation between the law schools and the Bar, and a free interchange of ideas that come about in an informal fashion at meetings like this has proved to

be quite beneficial. We had lawyers from more than fifty different Nebraska communities at our last institute.

In keeping with these ideas, our committee has made two recommendations:

1. The Nebraska State Bar Association should continue to encourage co-sponsorship of clinics by the Association and the law schools.

2. The Association should encourage increased participation by faculty members of both our law colleges in Nebraska at the various clinics sponsored by the Association throughout the year.

Mr. Chairman, I move that the recommendations of the committee be adopted.

RALPH E. SVOBODA: I second the motion.

CHAIRMAN HUNTER: Is there any discussion? As many as favor the adoption of the report signify by saying "aye"; opposed, same sign. The report is approved.

KEITH MILLER: Mr. Chairman, I am a member of the Committee on Continuing Legal Education but right now I am speaking as Chairman of the Section on Taxation. The Executive Committee of the Section on Taxation for the past several years, actually, and more specifically during this past year have had several discussions with regard to our whole program of continuing legal education in the Bar Association.

I think the Section on Taxation maybe has been more consistent in presenting institutes every year, in that they have conducted that annual December institute. The other Sections have had institutes spasmodically at various times of the year and with no apparent coordination. This is the thing that concerns us most, and with that in mind we have, as a result of our discussions, come up with certain propositions.

Generally speaking we of the Executive Committee of the Tax Section feel perhaps that all of our legal institutes and clinics conducted by all Sections and all bodies of the Bar Association should be better coordinated.

For example, this year in the past few weeks we have had a couple of institutes. Last year we had our November annual meeting at which various programs of continuing legal education were presented. Here at this meeting we are going to have programs of continuing legal education. We have two very fine programs to be presented tomorrow which will conflict with each

other. Thus over the year, even though the Bar Association as a whole is doing a pretty good job of presenting various programs for continuing legal education, because of (1) the time and (2) the distance involved and conflicting dates, not all lawyers of the Association are yet getting full benefit from this program.

Therefore, we are suggesting that the Committee on Continuing Legal Education for the coming year consider whether or not this whole program could be better administered and coordinated if all institutes and clinics were planned as a result of a central planning committee, probably that committee itself.

In order to get this under way, as Chairman of the Section on Taxation I move that the following propositions be referred to the Committee on Legal Education and Continuing Legal Education for consideration during the coming year, with directions that said committee make its recommendations at the 1959 annual meeting. The propositions are:

1. That the program of continuing legal education would be enhanced should all institutes and clinics for continuing legal education be scheduled and conducted at times and places first approved, planned and authorized by a central planning body or committee.

2. That it might be advisable to discontinue the present system of Section meetings at the annual meeting of the Association whereunder two Sections often conduct interesting and enlightening programs of continuing legal education simultaneously.

3. That it might be advisable should the Association commence and schedule regularly a two- or three-day institute for continuing legal education in all fields of the law, much in the same manner as the institute of the Section on Taxation has been scheduled and conducted in the past, such clinic possibly to be held either immediately prior to the annual meeting of the Association or, in the alternative, at a time several months away from the time of the annual meeting.

4. That as a general proposition it is probably more convenient for members of the Association to attend one-, two- or three-day sessions during the year at which a full program on continuing legal education is presented than to attend several different shorter programs scheduled at such times as each separate Section may choose.

5. That better and more attractive programs of continuing legal education might be presented, that members of the Association attending might be more attentive, and that it generally might

be more meritorious should an admission or enrollment fee be charged for programs of continuing legal education presented by the Bar Association.

That is the end of my motion. All I am asking is that this House today pass this motion which will refer these propositions to the Committee on Continuing Legal Education for study and recommendation during the coming year.

FLAVEL A. WRIGHT: I will second the motion.

CHAIRMAN HUNTER: Is there any discussion? As I understand the motion it is that the Committee on Continuing Legal Education be handed these suggestions which you have made for purposes of study to determine an over-all program of continuing legal education.

MR. MILLER: That's right. And I want it understood that these are not necessarily recommendations, but we feel that there certainly is room for improvement in our present program and we are suggesting that these various propositions should be taken into consideration by the committee.

CHAIRMAN HUNTER: Is there any discussion on this?

PAUL H. BEK: Would you be kind enough to read the second recommendation again, please?

MR. MILLER: Please, Mr. Bek, understand that these are not recommendations but propositions for consideration.

"2. That it might be advisable to discontinue the present system of Section meetings at the annual meeting of the Association whereunder two Sections often conduct interesting and enlightening programs of continuing legal education simultaneously."

That doesn't mean that we would necessarily discontinue them entirely. It might mean that we would have fuller — well, for example, there are various state bar associations which use different programs. It might be that we would have a three-day meeting of nothing but clinics and seminars. Each Section meeting would not necessarily be two hours long. We might one year have two days of trial clinics and the next year we might have some other field of law covered more thoroughly, and then cover our business part of the annual meeting in a shorter time. That is just a proposition that we feel should be considered.

CHAIRMAN HUNTER: Is there any further discussion of the motion? As many as favor the adoption of the motion signify by saying "aye"; opposed, same sign. The motion carried.

The formal report of the committee follows:

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

The committee has recognized that there are many important questions which are relevant to the responsibility of a Committee for Legal Education and Continuing Legal Education. Some of these questions are perennials and many of them are questions upon which a diversity of view prevails. No complaints regarding the training in the law colleges of our state have been presented to this committee.

The committee has felt it could do the most good for the Bar Association and the law schools by encouraging legal clinics for lawyers and law students under the joint sponsorship of the Nebraska State Bar Association and the law schools. The committee feels that such legal clinics improve the program of continuing legal education, contribute to a better understanding of the resources and needs of the law schools and furnish an opportunity for law students to meet the lawyers.

In furtherance of these principles the committee actively assisted in the planning and preparation of the Clinic on Damages held so successfully September 19 and 20 at the University of Nebraska College of Law under the joint sponsorship of the law college and the Junior Bar Section of the Nebraska State Bar Association. The committee also is pleased to report that a law clinic is planned and expected to be announced soon for a date after the first of the year in Omaha under the joint sponsorship of the Creighton University law school and the Nebraska State Bar Association.

The committee believes the cultivation of these kinds of relationships between the law colleges and the Bar Association are highly desirable and should be encouraged.

*In furtherance of these views the committee makes two recommendations to the Association as follows:*

1. *The Nebraska State Bar Association should continue to encourage co-sponsorship of clinics by the Association and the law schools.*

2. *The Association should encourage increased participation by faculty members of both law colleges in Nebraska at the various clinics sponsored throughout the year by the Association.*

Henry M. Grether, Jr., Chairman  
Roger V. Dickeson  
A. Lee Bloomingdale, Jr.  
Keith Miller

CHAIRMAN HUNTER: The next item of business is the report of the Committee on Public Service, Mr. McGrath.

RAYMOND E. McGRATH: Mr. Chairman, Members of the House of Delegates: The other members of the Committee on Public Service who served with me are: Auburn Atkins, Jean B. Cain, Edward F. Carter, Jr., Tyler Gaines, John Mason, P. M. Moodie, Don Sampson, W. A. Stewart and myself as Chairman. I want to thank these fellow members of the committee for their splendid cooperation during the year in connection with the various projects of the committee.

I do not intend to read the entire report. However I would like to discuss a few of the things that were done by the committee. Some of you may be familiar with the newly established Law Day, U.S.A. It has been proclaimed by the President of the United States for May 1. If you will notice, that it is the identical day, May Day, in the Communist world and it is particularly appropriate that Law Day, U.S.A., be designated as May 1.

The first annual Law Day was held in the United States this year. Proclamations were made by the President of the United States and by the governors of many of the states, as well as the Governor of the State of Nebraska. The idea is to emphasize the importance of law under our democratic form of government.

The whole idea is developed in my report and I would just like to say this, that it is the feeling of the committee that as a public relations measure, this Law Day, U.S.A., should be developed by the local bar associations to the end that programs be held locally not only in the Bar Association itself but in PTA meetings in the schools and in the churches so that the proper emphasis on the subject of the day could be made.

The next subject is our new brothers in the profession. It was felt by the members of the committee that more should be done by the Nebraska State Bar Association to help and assist the young men coming out of our law schools in the state. It is a nebulous subject that is hard to take hold of. The best thing we could do, of course, is to help them get a foothold in the profession, but as you know that depends on individual circumstances and it is pretty hard to generalize. As a starter we wrote to Dean Belsheim of the Nebraska Law School and Dean Doyle of the Creighton Law School and we received excellent suggestions and excellent ideas. Specifically as to what we did, Jack Wilson appeared before the senior class of the University of Nebraska and I appeared before the Creighton senior class, and we gave them a talk on practical phases of public relations for the lawyer.

We followed pretty closely the ideas and suggestions that were contained in the pamphlet that had been published previously by the Committee on Public Service called "Look in the Looking Glass" or something along that line. The idea is that the lawyer should take a look at himself and how he handles himself in this field of public relations.

In addition to that, on behalf of the State Bar Association and with the compliments and best wishes of the State Bar Association, every senior graduating from Creighton and from Nebraska received a complimentary copy of the plaque, "A Lawyer's Obligations," and that was presented at the time of the talk.

In the field of pamphlets, we did not attempt to publish any new pamphlets; however John Mason rewrote and added to the public relations pamphlet already published called "Confidentially, Mr. Attorney," and he added this, which I think would be worthy of note at this time. The reports says: "Mr. Mason has suggested the following addition which we think is extremely worthwhile and should be quoted:

Don't underestimate the influence you have on your clients and friends in forming their opinions about the Courts and the Bar generally. In your business and social contacts you should express your respect for your fellow lawyers and the Courts. In doing so you will be contributing far more to the public relations of the Bar and to your own good reputation as a member of the Bar than can possibly result from criticism and disrespectful comment. If you find fault in another lawyer, direct your criticism to the Grievance Committee rather than to the general public.

What has happened with reference to this pamphlet "Confidentially, Mr. Attorney," it was the concensus of opinion that the pamphlet is excellent. I think it was written principally by my good friend and former chairman of this committee, Jack Wilson, who has done yeoman service in this field of public relations for the lawyers. So what we have at the printer's now is a rewrite of that particular pamphlet except that we are having it prepared on forms that can be inserted into your "Lawyer's Desk Book," so it will be something that will be immediately at hand and easily accessible to a lawyer whenever he wants to kind of look in the looking glass as to this field of public relations.

Many of you are familiar with the parchment, "A Lawyer's Obligations." As you know, there were seven different canons of judicial ethics with reference to the obligations that a lawyer has that were printed up by the Florida State Bar Association,

and when we came upon them we thought that would be a very fine activity for the committee in the State of Nebraska. So we obtained reprints of this parchment that contains these canons of "A Lawyer's Obligations" and we ordered enough so that we could furnish every lawyer in the State of Nebraska who wanted one, a free copy. If he wanted it framed he could have a walnut frame and glass and the whole thing mailed out to him for \$1.50; if he just wanted a black frame he could get it for \$1.35. Here is the interesting thing: The response of the lawyers to this idea was extremely satisfactory; 196 requests were received for framed copies and 234 for unframed copies, so therefore there are 430 lawyers participating in this part of the public service program. We are very happy with that result.

Another thing that we tried to do is this: we feel that many of the various committees of the Bar Association are engaged in worthwhile activities that never reach the light of day as far as the public is concerned. So the chairman of this committee has written to the chairmen of all of the other committees and advised these other chairmen that if there is any particular activity that should receive publicity in the newspapers, the radio or TV, if they will advise the Chairman of the Public Service Committee, we will be set up in our relationships and our contacts with the press and the radio and TV to see to it that proper publicity to the activities of these committees can be had.

In the field of newspapers we have the series of "You and the Law" and we have 408 insertions. Most of you are familiar with these dealing with legal subjects so I won't spend any time on that.

The radio and television programs we didn't emphasize too much. We had a bi-monthly program over KMTV, which is an interview with Marianne Peters and some lawyer on legal subjects; and we had on KRNY radio programs at Kearney, but this question on radio programs and TV programs is a tough one, and unless it is done right it is better not to do it at all. Bill Stewart is working on some ideas on that. He is the chairman of the subcommittee, and if we have an idea that we can recommend that we think will be a first-class type of a program we will do so; otherwise we are going to leave it alone.

Then we passed out the usual number of Jurors Manuals. I think now in all more than 12,000 Jurors Manuals have been distributed by the committee.

Last, and this is our strong recommendation, it is presented in a little unusual style but it still is something that I think the House of Delegates should consider.



I was listening to a radio program at 7:30 o'clock on the morning of August 29 — that was right during the meeting of the American Bar Association, if you recall — and I heard this announcement:

Just as you go to your doctor for a regular physical checkup once a year, so \* \* \* you should see your lawyer once a year to make sure of your legal well-being. This "legal stethoscope" on your personal affairs is the theme of the annual convention of the American Bar Association this week in Los Angeles.

Many people have a lawyer draw their will, and then forget all about it. But in the course of every year new laws are passed by state and local governments which may affect your legal problems. Only your lawyer can advise you in such matters, and it is a wise procedure to review your will, as well as your status in business contracts, real estate titles and other legal matters, every year.

This message is brought to you as a public service by The Omaha National Bank \* \* \*.

We feel that this suggestion of the American Bar Association perhaps contains the germ of one of the most worthwhile public relations ideas that has been presented to the lawyers and we strongly recommend that the above idea, given to us by the Bar Association, be implemented in the future activities of the Committee on Public Service.

I respectfully present this report and ask that it be accepted and placed on file.

The motion that the report of the committee be received and filed was carried.

The formal report of the committee follows:

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

The Committee on Public Service makes the following report. The principal activities of the committee during 1957-1958 have been:

#### **LAW DAY, U.S.A.**

By proclamation of President Eisenhower, the first of what is expected to be an annual "Law Day, U.S.A." was celebrated throughout the country on May 1, 1958, to focus the attention of the nation and the world on the role of law in American life.

President Eisenhower called it a day of "national dedication to the principles of government under laws," and expressed the hope that the observance would demonstrate to the world that the rule of law is "the heart and sinew of our nation" and "the beacon light for oppressed people seeking freedom, justice and equality for the individual."

The American Bar Association and 1400 bar associations throughout the country joined in observance of "Law Day, U.S.A." with special programs in cooperation with laymen's organizations and in schools and colleges. Support was pledged and given by the National Conference of Parents and Teachers, the Association of American Colleges, the National Conference of Bar Presidents, the Association of American Law Schools and the International Association of Chiefs of Police.

In Nebraska the Nebraska State Bar Association and local bar associations all over the state participated in the Law Day program. Governor Victor E. Anderson signed a Governor's proclamation in connection with the Law Day program and, through the cooperation of television and radio technicians from the University of Nebraska, films of the signing of the Governor's proclamation were made and distributed to six television stations in the state, and sound strips were distributed to all of the larger radio stations. The splendid cooperation of the radio and television stations of the state is very much appreciated by this committee. Newspaper advertisements in connection with the occasion were bought and paid for by some of the banks in the larger cities. The idea was new this year but your committee feels that it is excellent and that next year plans should be made by all of the local bar associations for the development of "Law Day, U.S.A." programs not only in the associations themselves but in other groups in communities throughout the state. Mr. Edward F. Carter, Jr., of Lincoln, Nebraska, was chairman of the subcommittee on Law Day, U.S.A., and he did yeoman service in setting up the first program in the State

### OUR NEW BROTHERS IN THE PROFESSION

The members of the Public Service Committee have tried to develop some kind of a constructive program for the Bar Association with reference to the relationship of the Association with the law schools and law students of the state. We have conferred with and received excellent cooperation from Mr. Edmund O. Belshem, Dean of the Law School of the University of Nebraska, and Mr. James A. Doyle, Dean of the Creighton University School of

Law. Much good can be done in this field, and your committee feels that a constructive program along these lines should be developed.

Mr. John J. Wilson of Lincoln appeared before the senior class of the University of Nebraska Law School, and the chairman of this committee appeared before the senior class of the Creighton University Law School to give talks in May, 1958, on the subject of "The Lawyer and Public Relations." The thoughts were stressed that a great deal of the responsibility in the field of public relations rests with the lawyers themselves; that every day thousands of contacts are made by lawyers with their clients, with the courts and with the public generally, and it is through ideas, thoughts and impressions arising from these contacts that much good in the field of public relations can be done. At the same time copies of "A Lawyer's Obligations" were presented to all members of the senior class of each law school, as an expression of good wishes and welcome to the profession from all of the members of the Nebraska State Bar Association.

#### PAMPHLETS

Mr. John C. Mason of Lincoln, Nebraska, has prepared some additional paragraphs, and has rewritten a pamphlet previously distributed by the Committee on Public Service of the Nebraska State Bar Association entitled "Confidentially, Mr. Attorney." Among the paragraphs added in the revision is a paragraph on "telephone manners" and a paragraph to be added at the end of the material on "Canons of Ethics." Mr. Mason has suggested the following addition which we think is extremely worthwhile and should be quoted in this report:

Don't underestimate the influence you have on your clients and friends in forming their opinions about the Courts and the Bar generally. In your business and social contacts you should express your respect for your fellow lawyers and the Courts. In doing so you will be contributing far more to the public relations of the Bar and to your own good reputation as a member of the Bar than can possibly result from criticism and disrespectful comment. If you find fault in another lawyer direct your criticism to the Grievance Committee rather than to the general public.

The above amended pamphlet is at the printers now and will be printed on paper which can be inserted in your "Lawyer's Desk Book." It contains suggestions which your committee believes every lawyer should have at hand to refer to from time to time

because it is important to our public relations program, and it is particularly important to you in your attorney-client relationships.

### "A LAWYER'S OBLIGATIONS"

Mr. Donald F. Sampson of Central City, Nebraska, was the chairman of the subcommittee on "A Lawyer's Obligations." The committee obtained some parchments entitled "A Lawyer's Obligations." These parchments read as follows:

#### A Lawyer's Obligations

To aid in and improve the administration of justice, civil and criminal, as an Officer of the Court and a Minister of the Law.

Preamble to Canons of Professional Ethics; Canons 4, 5, 9, 12, 15, 20, 22, 29, 30, and 32

To conduct his practice in the spirit of public service, with personal earnings incidental to his primary purpose of serving the public.

Definition of Profession; Preamble to Canons; Canons 12 and 33

To be candid, fair, courteous, and respectful to the Courts at all times; to support them against unjust criticism and clamor; and to see that only judicially-fit persons are selected or continued as Judges.

Canons 1, 2, 22, 32, and 41

To give candid counsel to his Clients; to respect their confidences and avoid conflicting interests; to be responsible for litigation, controlling the incidents of trial; and to give undivided fidelity to his Clients but to obey his own conscience rather than theirs, recognizing that his great trust as a lawyer is to be performed within the bounds of the law.

Canons 6-8, 11, 15, 16, 18, 24, 30-32, 35, 37, 38, 41, and 44

To be candid and fair to his Fellow-Lawyers, avoiding ill-will and personalities; and to expose without fear before the proper tribunals corruption and dishonest or unethical conduct in the profession.

Canons 7, 9, 17, 22, 24, 25, 28 and 29

To refrain from soliciting professional employment through any agent or advertising, or in any other way forbidden by the letter or spirit of the Canons of Professional Ethics; and to refrain from encroaching upon the professional employment of other lawyers, from stirring up strife and litigation, and from acquiring an interest in the litigation he is conducting.

Canons 7, 10, 27, 28, 42, 43 and 46

To strive at all times to uphold the honor and maintain the dignity of the legal profession; find his highest honor in a deserved reputation for fidelity to private trust and to public duty as an honest man and as a patriotic and loyal citizen; and attain, as the highest reward that can come to a lawyer, the esteem of his professional brethren.

Canons 11, 29 and 32

It was thought by the committee that the plaque would be most effective if displayed in the lawyer's office in a position where it can easily be read, and the committee feels that the reading of "A Lawyer's Obligations" by the clients should help the clients to more readily understand the nature of our profession. The response of the lawyers to this idea was extremely satisfactory—196 requests were received for the framed copies and 234 requests for the unframed copies—so therefore 430 lawyers in the state are participating in this part of the program of the committee.

#### CHAIRMEN OF ALL OTHER ASSOCIATION COMMITTEES

This committee discussed the fact that much very fine, constructive and worthwhile work is done by the various committees of the Nebraska State Bar Association, but to date there is no plan by virtue of which public credit and publicity are obtained in connection with much of the work.

In order to try to remedy this situation, the chairman of the committee requested all of the chairmen of all of the other committees of the Nebraska State Bar Association to advise the Public Service Committee of any special activities which the chairmen of the respective committees deemed newsworthy. It then is the function of this committee to contact the press, the radio, the television stations and the news media to try to obtain newscasts and news stories. *We respectfully recommend that the chairmen of the various committees follow this part of the public service program of the Association.*

#### NEWSPAPERS

The series "You and the Law" is being continued, and during the past year our columns have appeared in 60 newspapers for a total of 408 insertions. Since the inception of the service in 1955 these columns have appeared in 93 newspapers for a total of 1024 insertions.

These articles deal with legal subjects and are designed to make the readers aware of the fact that there are legal aspects to nearly every phase of every day life. Individual lawyers and

local bar associations are urged to make a better effort to see that these articles are carried in their local newspapers.

### TELEVISION AND RADIO PROGRAMS

A bi-monthly program over KMTV in Omaha is being continued. These television programs consist of brief interviews with lawyers on various legal subjects by station personnel. Mrs. Marianne Peters is in charge of the KMTV program, and scripts are prepared in advance by Mr. George Turner, Secretary of the Association, under the direction of the committee, and lawyers not only from Omaha but also from other parts of the State are invited to participate.

The committee would welcome suggestions from members as to subjects to be included in these programs.

Until June 1, 1958, there was also a radio program once a week over KRNY at Kearney, Nebraska.

### JURORS MANUALS

During the year the committee continued the distribution of Jurors Manuals with the cooperation of the clerks of the district court throughout the state. In all, more than 12,000 such manuals were placed in the hands of Nebraskans called to serve upon juries.

### OUR STRONG RECOMMENDATION

The chairman of this committee was listening to a news broadcast from radio station WOW at 7:00 A. M. on Friday, August 29, and was pleased and startled to hear the following announcement:

Just as you go to your doctor for a regular physical checkup once a year, so \* \* \* you should see your lawyer once a year to make sure of your legal well-being. This "legal stethoscope" on your personal affairs is the theme of the annual convention of the American Bar Association this week in Los Angeles.

Many people have a lawyer draw their will, and then forget all about it. But in the course of every year new laws are passed by state and local governments which may affect your legal problems. Only your lawyer can advise you in such matters, and it is a wise procedure to review your will, as well as your status in business contracts, real estate titles, and other legal matters, every year.

This message is brought to you as a public service by The Omaha National Bank \* \* \* the bank that has been helping Omaha grow since 1866.

We think the above is an excellent public relations idea and we commend the American Bar Association for what we consider one of the most worthwhile suggestions in the field of lawyers' public relations that we have heard of to date. *We recommend that the above idea which has been given to us by the American Bar Association be implemented in the future activities of the Committee on Public Service of the Nebraska State Bar Association.*

Raymond E. McGrath, Chairman

Auburn H. Atkins

Jean B. Cain

Edward F. Carter, Jr.

Tyler B. Gaines

John C. Mason

P. M. Moodie

Donald F. Sampson

W. A. Stewart

CHAIRMAN HUNTER: The next report is the report of the Committee on Oil and Gas Law, Mr. Van Steenberg is chairman.

ROBERT G. SIMMONS, JR.: Mr. Chairman, Mr. Van Steenberg was unable to be present and asked me to make the report. I might say that Mr. Van Steenberg is having problems none of us face very often; besides the ordinary problems of business, his wife is now going blind, so I think the time he has devoted to Bar Association activities in view of this situation is very commendable.

The report of the committee appears on pages 22, 23, 24 and 25 of the program. The committee met in North Platte and first had a short talk from Mr. E. C. Reed, State Geologist. Mr. Reed claims that he is now the sole authority in the state of oil and gas so far as conservation or anything else is concerned. In addition, some regulations which do not have the effect of law he would like to have have the effect of law, and he submitted to the committee some recommendations on the passage of a conservation law. The committee did not make any recommendations concerning the conservation law although it does feel that a conservation law of some type should be enacted by the Legislature. Mr. Reed made the suggestion in the event that the conservation act is not passed that he as State Geologist be given some authority concerning the plugging of wells, etc., as set forth in the report and he would like to have these regulations given the au-

thority of law. The committee does not make any particular recommendations but merely passes it on to you.

The committee did propose a bill which is set forth on pages 24 and 25 to take care of a situation which in some instances has been very aggravating. As you may or may not know, the oil industry attracts people of the highest character and also people of the lowest, and there have been many instances in which people in the latter category have left the state with numerous and sundry bills of various kinds, and there has been no way to reach them because they have no assets left in the state and no service or summons can be had upon them. It is a very difficult situation for the lawyers practicing in the area. Consequently, the committee suggested the bill which is quite similar to the one for the appointment of the Secretary of State for purposes of service on nonresident automotive vehicles. In other words, in this bill it is suggested that when someone comes in and acquires interests in minerals that are different from his interest in the surface of the land, he automatically appoints the Secretary of the State as his agent for the purpose of service of summons on any matter arising out of his interest in that tract.

I think you will find that the provisions thereof are quite similar to the nonresident motor vehicle statute and are probably inoffensive, with one exception which has come to our attention since the committee met and since this report was filed, and that has been called to our attention by the members of the oil industry who are not in the latter category; that is, are substantial and honorable businesses and have already complied with the statute by appointing an agent for the purpose of service in the counties in which they are doing business. These are very reliable concerns and have no objections to this bill except that they would like to have them eliminated so that when they have appointed someone for the purpose of service in the counties in which they are doing business, that that person be the authorized agent. In other words, they don't like to be sued without knowing that they are being sued. That is a matter which probably should be considered by the committee at the time it is submitted to the Legislature.

The committee also recommends amendment of four sections of the statutes under the mineral titles. The first one is an amendment to 57-210. That is the statute that gives authority to executors, guardians, administrators, trustees, etc., to execute an oil and gas lease by procedure in district court. The first thing that the committee recommends is that the procedure be broadened. It is set forth on page 23, but the effect is that it will give the court



authority to ratify a lease which is already improperly entered into. I think that probably is desirable.

The second one, 57-223, is concerning pooling agreements. Those of you who are not interested in the oil industry may not know that on occasion, especially as the field grows older, it is desirable and to everybody's advantage that the field itself be pooled; that is, be operated as one unit. Perhaps one well will be used as a water flood; they will put in water or some other agent in the ground to cause pressure to bring the oil out of another well. In order to do that the whole field has to be pooled and everyone shares equally in the proceeds. At the present time it is not clear that the executor, trustee, etc., has authority to enter into a pooling agreement, and it isn't clear how he does it. This statute would merely provide that when he wishes authority to enter into a pooling agreement it is done by the same procedure as to obtain authority to enter into an oil and gas lease in the first instance.

The third suggestion refers to the law which gives a lien to oil field truckers, a lien for moving oil field equipment. At the present time it is slightly ambiguous and indefinite. The committee recommends only that it be amended to mean that the lien must be filed within four months, just as a mechanic's lien law is. The second suggestion is that it shall be foreclosed within two years, just as the present mechanic's lien law is also.

The committee also concerned itself with the possibility of passage by the Legislature of a bill creating an Oil and Gas Commission in the state. On page 23 you will note the comment concerning that. The committee felt there is a probability or a possibility of such a bill being submitted to the Legislature and a possibility of its being passed, and it has concerned itself only with the procedural aspects. The committee has felt that whatever kind of a bill is presented, there should be two things of importance that lawyers should try to insist upon. The first is that there be an appeal direct from the Oil and Gas Commission to the district court of the county in which the land is located, rather than the procedure which is suggested in the sample bill presented by the Interstate Oil Compact Commission, which would be somewhat as our procedure is in appeals from the Railway Commission direct to the Supreme Court.

The committee did not come to any conclusion as to whether or not the hearing in the district court should be de novo or upon the record before the Oil and Gas Commission but suggests that that matter should receive further thought by a continuing committee.

There are some other things that the committee definitely thought, and that is that the law ought to provide that the hearing before the Oil and Gas Commission should be in the county in which the land is located. The sole purpose of that is to keep the Commission from having all its meetings in Lincoln. Right now a substantial portion of the oil business is in western Nebraska. The burden of transporting witnesses, etc., is hard.

I might say that since this report has been published we have heard from the representatives of the oil industry who don't like that provision. They agree that something should be put in to keep the hearings from being in Lincoln but they think that hearings, say, in Scottsbluff or Kimball or Sidney might be appropriate to take care of all the counties in the neighborhood, their principal thought being that if you have to go to every county to have the hearing, the Oil and Gas Commission, instead of meeting one day a month and taking care of all its business at one place, would have to hold four or five or more meetings a month in different places, and that that puts a burden on its commissioners. The thing that they are particularly interested in is getting men on the Oil and Gas Commission of high character and ability, and if they make it onerous for them to act in that capacity it would be harder to get that type of man. Consequently the men in the industry don't like that particular recommendation, but that is the recommendation of the committee. I think there isn't any particular way of getting around the problem of bringing witnesses to Lincoln except to have the hearing in the county in which the land is located.

The committee also recommended that the statute set forth the qualification that at least one member of the Oil and Gas Commission, if it is adopted, be a member of the Bar. Since this has been reported, the industry representatives have also contacted us and they don't like that provision for this reason: They say that they prefer to have every one of them members of the Bar but they are afraid when it is submitted to the Legislature with such a recommendation that the Legislature will shy away from it, and that it would be easier to get the bill passed if nothing is said about it. As long as it is an appointive commission a lawyer can sidle up to the Governor and point out the necessity and desirability of more than one being a member of the Bar. Nevertheless the recommendation of the committee is as is set forth.

The committee also recommends that there be continued a Special Committee on Oil and Gas Law and that the committee be appointed by the new officers as soon as possible to help with

any proposed conservation legislation or oil and gas commission legislation which may be proposed and to work with the Legislative Committee in connection with that, and also to watch closely and work with closely the Nebraska Oil and Gas Association, which is the association formed by substantial representatives of the oil and gas industry, as they will probably be proposing bills along the conservation line and also along the Oil and Gas Commission line, and we should work with that organization as a Bar Association.

The committee also felt that the Bar Association should authorize some committee to represent the Bar Association concerning matters of this kind in hearings before committees of the state legislature.

Mr. Chairman, I move adoption of the report of the Special Committee on Oil and Gas Law.

After discussion, the motion to adopt the report of the committee was carried and the report adopted.

The formal report of the committee follows:

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

Your Special Oil and Gas Committee submits the following report:

Your committee conferred with E. C. Reed, State Geologist, who generally outlined some of the problems faced by him and his staff specifically relating to the oil industry. Mr. Reed is in favor of an oil and gas conservation statute, but stated that if one failed to pass at the next Legislature he would like to have the following two sections changed:

- (a) Amend 57-215 to broaden the authority of the State Geologist to adopt rules and regulations pertaining to the exploration, development and production, and abandonment of such wells, and delegate such authority to him so that these rules and regulations would have the force of law, and
- (b) Amend 57-217 to provide penalties for violation of his regulations, as well as the sections of the statutes.

A proposed bill was also drafted, designed to have nonresident persons appoint the Secretary of State as their agent for service when they come into Nebraska and acquire any interest in minerals or in oil and gas rights, or in any way engage in the performance of any service in connection with exploring for oil and gas, development of oil and gas interests, and operating and servicing oil and

gas properties. This draft was submitted to the Legislative Committee for their study and redrafting the proposed legislation if they thought they could do a better job. Copy is enclosed.

Your committee also recommended to the Committee on Legislation that the following legislative changes be made:

1. Amend 57-210 as follows: Add at end of first sentence—"or ratify any prior unauthorized or defective lease executed by any executor, administrator, guardian or trustee." Add after word "lease" in fourth line of second sentence—"ratification agreement."
2. Amend 57-223 as follows: The second sentence to read as follows: "The procedure to obtain such authority shall be substantially the same as the procedure provided under Sections 57-211 and 57-212."
3. Amend 57-303 as follows: The first sentence to read: "Any person entitled to file a lien shall, within *four months* \* \* \*."
4. Amend 57-304 as follows: "The holder of such lien shall, within *two years after the filing of such lien* institute an action to foreclose and enforce the lien in the manner now provided by law for the foreclosure of a mechanic's lien or institute an action in attachment or replevin [rest of section same as now]."

The committee has also concerned itself about the procedures for hearings before, and appeal from, an Oil and Gas Commission that may be created in an oil and gas conservation statute that might be introduced and passed at the next legislative session. L. B. 300 introduced at the 1957 session provided for no appeal from the orders of the Commission, but set up some requirements in the event that temporary restraining orders or injunctions of any kind against the Commission were brought. The interstate Oil Compact Commission, in their suggested form for an oil and gas conservation statute, provides for an appeal direct to the Supreme Court by any person adversely affected by an order of the Commission, or, as an alternative, said statute provides that relief may be had by suit for an injunction against the Commission as defendant. The injunction procedure seems to be one that is in use in many of the other states having oil and gas conservation statutes. It was the expressed opinion of several members of the committee that a better provision would be for an appeal direct to the district court, and have the matter tried de novo, something similar to our present workman's compensation procedures. The committee makes no recommendation on this point at this time, since they feel it deserves further study. The committee

does feel, however, that this is a point that the Bar Association should concern itself with since the lawyers are the ones that will be guiding their clients on the procedural road. Should a conservation bill be introduced in the next Legislature creating an Oil and Gas Commission, *the committee does recommend that the bill require that hearings by the Commission must be conducted in the county in which the real estate or some part of it is located, and any appeals to the district court, or, if the injunction road is followed, that such relief be sought in the district court only in the county in which the real estate or some part of it is located.*

*The committee also recommends that the personnel of the Oil and Gas Commission include at least one lawyer familiar with the procedure and taking of evidence.*

*This committee recommends that the Special Committee on Oil and Gas Law be continued in the future, and that such committee be appointed and organized in time to consider such a bill the minute a proposed draft can be obtained. It is quite likely that the Nebraska Oil and Gas Association will sponsor such a bill, and by keeping in touch with this Association, a copy of a proposed bill can be obtained before it is introduced in the Legislature. It is recommended further that such committee should work jointly with the Legislative Committee, make a proper study of the bill, and specifically the procedural aspects of such bill.*

We also feel that some committee should be authorized by the Nebraska Bar Association to represent the Bar Association in the formation of the procedural aspects of the bill and, if necessary, appear at the legislative hearings on the bill and plug for that portion of said bill, and in general keep track of the bill until it is passed or defeated. While the Oil and Gas Committee does not want to dodge any of its obligations, perhaps this is within the province of the Legislative Committee.

Ivan Van Steenberg, Chairman  
Robert J. Bulger  
Robert G. Simmons, Jr.  
John W. Stewart  
J. H. McNish  
R. L. Smith  
Archibald J. Weaver

#### PRELIMINARY DRAFT OF A BILL FOR SERVICE UPON NON-RESIDENTS CONNECTED WITH THE OIL INDUSTRY

Summons: Personal Service upon Secretary of State as  
Agent of Non-Resident Persons acquiring ownership of any in-

terest in mineral acres or trafficking therein or performing any service or work for exploration or development purposes of oil wells on land in Nebraska; not revokable by death; manner of service; fees; record.

(1) The acquisition of any interest in minerals or in oil and gas rights in different proportions than acquisition by the same entity of the rights in the surface, whether by deed of conveyance or by leasehold, and whether the interest be entire or an undivided fraction of the whole, or the engaging in the purchase and sale of such interests as a broker or dealer, or the performance of any service in connection with exploring for oil and gas, drilling wells therefor (regardless of whether such wells be "dry"), development of oil and gas interests, and operating and servicing oil and gas properties by (a) a non-resident of the State of Nebraska, or by (b) by a Nebraska resident who has become a non-resident of the State of Nebraska, or by an agent or employer of any such persons, shall be deemed an appointment of the Secretary of State of the State of Nebraska as his true and lawful attorney upon whom may be served all legal process in any action or proceeding filed against him in the State of Nebraska growing out of or resulting from his activities within the State of Nebraska.

(2) The acquisition of any such interests or the engagement in the business of buying or selling such interests, or in furnishing services pertaining to in any way the oil industry, shall be a signification of his agreement that any such process which is so served in the action against him shall be of the same legal force and effect as if served upon him personally within this State.

(3) The appointment of agent in accordance with sub-sections (1) or (2) of this section shall not be revokable by death, but shall continue and be binding upon the executor or administrator of such non-resident.

(4) Service of such process shall be made by serving a copy thereof upon the Secretary of State personally, in his office in the State Capitol or elsewhere, or, if the Secretary is absent from or is not found in his office in the State Capitol at the time of the attempted service, by leaving a copy of all legal processes served in the office of the Secretary of State with any person employed in the office of the Secretary of State who, previously to such service, has been designated in writing by the Secretary of State as a person or one of the persons with whom such copies may be left for such service upon the Secretary of State, together with a fee of \$2.00, and such service shall

be sufficient service upon the said non-resident; provided that notices of such service and a copy of the process shall within ten days after the date of such service be sent by the plaintiff to the defendant either by registered or certified mail, addressed to the defendant's last known address, and it shall be the duty of the plaintiff to file with the Clerk of the Court in which the action is brought an affidavit that he has complied with such requirement.

(5) The court in which the action is pending shall order such continuance as may be necessary to afford the defendant a reasonable opportunity to defend any such action. The fee of two dollars paid by the plaintiff to the Secretary of State at the time of service of such process shall be taxed as part of his costs if he prevails in the suit.

(6) It shall be the duty of the Secretary of State to keep a record of all processes so served, as permitted by sub-section (4) of this section, which shall show the date and hour of such service, and to so arrange and index said records as to make the same readily accessible and convenient for inspection.

CHAIRMAN HUNTER: The last item on the agenda is the report of the Resolutions Committee, Barton Kuhns.

## REPORT OF RESOLUTIONS COMMITTEE

Barton H. Kuhns

Mr. Chairman, the Committee on Resolutions met at 1:00 o'clock today at the designated room and remained there for thirty minutes. No one appeared to present any resolutions. I understand that Judge Spencer has one resolution that he wishes to present to the committee and we will arrange to meet between now and the next meeting of the House of Delegates. I hope in that time to have an opportunity to consider that resolution.

JUDGE SPENCER: It will be a resolution from the Executive Session.

MR. KUHNS: I didn't understand that.

CHAIRMAN HUNTER: This brings up the announcement of the next session of this House which is on Friday afternoon immediately following the Taxation Section which will be held in this ballroom. It is listed in the program as being at 4:00 o'clock. However, it will be no later than 4:00 o'clock, assuming that the committee is out. We are going to try to start this session, because we do have some very important Section reports to be made, with interesting topics in them, at that time. So if you

will be here at the close of that Section we will get started within a matter of five or ten minutes.

I think that the fact we have gotten all of our business today out of the way in the manner in which we have is a very fine tribute to these committees, the committee chairmen and the people on them. I think you are all aware after reading the program and listening to these reports that there has been a great deal of work done by the committees this year and I think they are all to be complimented.

Do you have any announcements?

SECRETARY TURNER: To any of the Section chairmen who are in the room, I think you know that the Section on Real Estate, Probate and Trust Law is the only one submitting nominees for their respective Executive Committees. The Bylaws then require the Executive Council to make such nominations, which they did at a meeting this noon. I am having ballots mimeographed with the names of the nominees for all the Sections. The ballots will be in the hands of the Section chairmen prior to their meetings tomorrow and Friday.

A number of the Section chairmen in the past have been in doubt as to how they should report to the House of Delegates. That report should be made at the place indicated on the calendar at the close of the Section meeting, or after all the Section meetings have been held, and at the next meeting of the House of Delegates. Please see to it that your Section Executive Committees when elected hold a meeting and select and announce to the House of Delegates the Section officers. That is very important for our records.

CHAIRMAN HUNTER: There is a place on the program for Friday afternoon for other matters to be brought up by any member of the House, but are there any other matters that should come up at this time? Hearing none, I will entertain a motion to adjourn until Friday, no later than 4:00 o'clock.

HAROLD W. KAUFFMAN: I so move.

ROBERT K. ADAMS: I second the motion.

CHAIRMAN HUNTER: All in favor of adjournment signify by saying "aye." It has carried.

The Wednesday afternoon meeting adjourned at 3:40 o'clock.



## NEBRASKA STATE BAR ASSOCIATION

## THURSDAY MORNING SESSION

October 2, 1958

The fifty-ninth annual meeting of the Nebraska Bar Association, convening in Hotel Paxton, Omaha, Nebraska, was called to order at 10:20 o'clock by President Paul L. Martin of Sidney.

PRESIDENT MARTIN: Gentlemen of the Nebraska State Bar Association, the fifty-ninth annual meeting of the Association is now in order.

Will you all stand while the Reverend Father Henry W. Linn gives the invocation.

REVEREND HENRY W. LINN: Almighty God, look down with kindness upon this assembly of the Nebraska Bar Association and give to our thoughts and actions the favor of Thy blessing.

Incomprehensible Creator, true fountain of life and source of all knowledge, who makest eloquent the tongues of those that want utterance, vouchsafe, we beseech Thee, to enlighten our understanding, direct our tongues and pour on our lips the grace of Thy blessing. Grant that what we endeavor and accomplish we may apply to Thy honor and glory. Amen

PRESIDENT MARTIN: Year after year we come to Omaha hoping that we are welcome and that you don't desire us to move on to some other place, but we do like to be reassured. For that purpose I am going to call on the President of the Omaha Bar Association, Edwin Cassem.

## ADDRESS OF WELCOME

Edwin Cassem

Thank you, Mr. Martin. On behalf of the host Association, it is indeed a great pleasure to see you here again. This is a familiar occasion to me. I was here last year on this same occasion substituting for Mr. Ed Garvey who was the President of the Omaha Bar Association then. He then happened to be in the hospital. I thought he was in California, and said so. That was probably not the only piece of misinformation that was contained in my remarks.

It is doubly easy to be here again this year. I am using the same speech I did last year. There were so few people here that I figured it wouldn't do any harm; I wouldn't have to prepare a new speech.

The vast throng that attends this opening session and the tremendous enthusiasm and receptiveness that attend the cold gray dawn of the opening hours of this convention are, of course, a great temptation to a speaker to prepare a long address. I have prepared it. I have concluded that I shall hand it to the reporter with the admonition that it be reported verbatim and in extenso in the proceedings, but I shall not burden you with it here. I am following the practice that prevails in the Congress of the United States in that respect.

Let me say on behalf of the Omaha Bar Association what I said last year—we appreciate the business you sent us during the past year; we apologize that we have not been able to send you more ourselves; we hope that situation will improve in the coming year. In the meantime we hope you will have a good time in Omaha. It is always very nice to have you here and we regard it as a great privilege to be the host of the Nebraska Bar Association.

We are having a cocktail party at which the Omaha Bar Association is the host tonight in this hotel, and we hope that you will join us there and even have a drink or two.

Welcome to Omaha! As a one-time occupant of the White House would have said, "We hope to have you here 'a-gain and a-gain and a-gain.'"

PRESIDENT MARTIN: Thank you, Squire! If there are no objections, you will be allowed to extend your remarks in the record.

For the response to the Squire I am going to call on a member of the Lincoln Bar, Roger V. Dickeson.

## RESPONSE

Roger V. Dickeson

Mr. President, President Cassem, and all the Members of the Nebraska Bar Association: It is indeed a pleasure and privilege to be here and to be guests of the Omaha Bar Association, and I am sure many of us are looking forward to that cocktail party which is to be given this evening. I particularly am looking forward to it. I am sure we will gain many valuable citations of authority and much learning there that we can carry back to the wilds of the rest of the state.

It is always an enjoyable occasion to look forward to this meeting each year and to be hosted by the fellows of the Omaha Bar. And I know our wives look forward to it also. They look forward to renewing their social acquaintances and to the shopping that

goes on. I know that many of us from out-state will certainly leave here richer in learning but maybe a little poorer in purse.

I want to carry a message to you here today. I want to tell you particularly why we gentlemen of the Lincoln Bar, President Cassem, are especially glad to be here this year. It is for this reason: It gives us a peculiar and particular opportunity to renew our status as professional men.

Many of you may have learned from reading your newspapers recently that for the past two weeks in Lincoln we have rather abandoned our jealous mistress, our noble profession, and we have turned to the trades, particularly the trade of carpentry. We have been receiving instruction in that trade from one of our able state Senators, who shall be nameless for the moment but whom many of you know as the campaign manager of that mythical vice-presidential nominee of the Republican Party. Yes, indeed, President Cassem, we have learned much of carpentry in Lincoln. You gentlemen of the Omaha Bar I understand have your apprenticeship ahead of you yet.

Now if we of the Lincoln Bar and the out-state Bars that have had their apprenticeship have any teaching that we can share with the Omaha Bar, we are certainly glad to do it. But I want to give you a caveat, since that is a good professional word, that we haven't learned too much about some of the tools of this trade of carpentry as yet. We know, in fact, relatively little of the use of the square, the level, the plane, but we do have considerable skill in drilling holes, both large and small, and in the use of the screwdriver and chisel and also in the use of the vise, which as I understand it is a very skilled manipulation of the press.

Ah, indeed it is most enlightening, President Cassem—but we are glad to leave it. We are glad that you have that opportunity ahead of you.

Whatever may be our motives in leaving the tents in the hills, and our flocks there, to journey down here to the river plain to come to your exotic city, we are glad to be here.

On behalf of the entire Bar Association of the State of Nebraska I want to thank you gentlemen of the Omaha Bar, and thank you again for your hospitality.

PRESIDENT MARTIN: Thank you, Roger.

This is the fifty-ninth annual meeting of the Nebraska State Bar Association. The Bylaws of the Association leave none of the procedure to chance. Article I, Section 3 of its Bylaws provides that at the regular meeting after the appropriate opening thereof,

the order of business shall be (1) "Annual Address of the President." That pins me down to protocol whether I have a message worthwhile or not.

## ADDRESS OF THE PRESIDENT

Paul L. Martin

In an interview with a newspaper reporter recently, Herbert Hoover was quoted as saying that he tried to limit his speeches to fifteen minutes and talked from a script for a double reason: first, everything he had to say could be said in fifteen minutes; and when he attempted to talk without a script he lost his terminal facilities.

While I disclaim any parallel between a speech of Herbert Hoover and my appearance here, I am nevertheless going to follow his advice.

Eleven months have gone by since I assumed the office of President of this Association—months filled with interesting and enjoyable experiences. I am not going to regale you with the intimate details of the banquet circuit, of the mountains of mashed potatoes, cold roast beef, baked ham covered with some sort of sticky, sweet sauce, and the endless dishes of peas and carrots! These are no different from the years gone by.

But I do want to comment on the wonderful hospitality extended to us at the Association meetings we attended in our adjoining states. I think this exchange of visits with the accompanying exchange of ideas for the betterment of our Association is really worthwhile. I want to take this opportunity to welcome the officers of the Association of Missouri and am sorry that the others are unable to be with us.

I was particularly struck with the activities of the Iowa State Bar Association and with the seriousness of their annual meeting, although their entertainment was extremely pleasant and they proved to be wonderful hosts. Iowa does not have an integrated Bar, but while it is a voluntary Bar, only a few more than six per cent of the practicing lawyers in the state are not members of the Bar Association.

All committees are appointed by the incoming President before the annual meeting, and the members of the committees are called in on the day prior to the annual meeting for a full day of conferences. In that manner the new President starts the year with all programs set up and started. There is no lost time making plans for a new year.

Most of their meetings were devoted to the workshop, and I have never seen any more worthwhile work crowded into such a short time. They are very successful in the use of the faculty members of Drake University and the University of Iowa. I think that I counted at least seven faculty members conducting parts of their institutes.

In each state we visited, the Association had a president-elect or vice-president who succeeds to the office of president, and I couldn't help but feel that this method of choosing their presidents coordinates from year to year the activities of the Association and that we have taken a definite step forward in starting action to reverse our Rules to provide for the election of a President-Elect.

I also want to convey to you the best wishes of our President of the American Bar Association, Ross Malone, who is compelled to attend an American Bar Association regional meeting at Portland, Maine. He expressed his regrets at not being able to be with us and sent his greetings.

In February I attended the National Conference of Bar Presidents held in Atlanta, Georgia, in conjunction with the midyear meeting of the House of Delegates and Board of Governors of the American Bar Association. A regional meeting of the A.B.A. was held in Atlanta at the same time. It is extremely interesting to discuss with the officers of the other states their plans, experiences and programs. I know we received a lot of good from these contacts. But I do know that Nebraska does not have to take a back seat for any of the other Associations, and our Nebraska activities compare very favorably with states with far larger budgets for Association expenses.

The regional meeting of the American Bar Association at St. Louis was a very successful undertaking. Your Secretary and I tried to add our little bit to the plans for the meeting. It was well attended and there were quite a few Nebraskans there in spite of the distance. It is very gratifying to watch the increase of interest in the activities of the American Bar Association, and this can't help but improve our State Association.

The Rocky Mountain Mineral Law Institute was held in Boulder, Colorado, the last of July. As you know, the University of Nebraska and the Nebraska State Bar Association are members of the organization and have representatives on the Board of Trustees, together with the Bar Associations and law schools of South Dakota, North Dakota, Wyoming, Montana, Utah, Colorado and New Mexico. Western Nebraska was well represented in attendance, and we were pleased to have many more from eastern Nebraska than attended the previous institute. The program was

well worthwhile and I was very glad to have a small part in carrying on an institution which I think is beginning to approach the standing of the Southwestern Legal Foundation at Dallas. The meeting next year is to be held in Salt Lake City, Utah, and promises to be an excellent combination of a short vacation with continuing legal education.

Prior to the meeting of the American Bar Association in August the National Conference of Bar Presidents held a two-day session. This is a workshop for the exchange of ideas and plans for coordination of the activities of the state associations with the American Bar Association. The National Conference of Bar Secretaries is held at the same time and many worthwhile plans come out of these well-attended sessions.

I have always felt that the state associations were an integral part of the American Bar Association, although entirely different organizations, and I was very pleased at the increasing attendance of Nebraskans at the Los Angeles meeting of the American Bar Association. There are so many different sections and affiliated organizations that one first attending feels lost, but there is something for everyone no matter how varied their interests.

Nebraskans this year, as usual, played an important part in the proceedings, among them being Fred T. Hanson, Barton H. Kuhns and Edmund D. McEachen. Hale McCown was Chairman of the Resolutions Committee; Laurens Williams gave a speech before the Section on Corporation Banking and Business Law; Clarence A. Davis spoke to the Section on Mineral and Natural Resources Law; and Chief Justice Robert G. Simmons appeared on a panel of the Section of Judicial Administration.

The highlight of the Association was the annual banquet held at the Beverly Hilton Hotel where we were amused by the wisecracking Bob Hope, and inspired by the beauty and eloquence of Madame Chaing Kai-shek.

Those of us who have been in the practice of law in Nebraska for a number of years have seen the Nebraska State Bar Association grow from a purely social organization with an annual play day, interspersed with political bickering and bitterness, into a well-rounded organization, still interested in the pleasant things in life but more interested in the welfare of the members of the Bar and in increasing the stature and economic condition of the individual. There is a lot of unselfish voluntary contribution of service to the Association, and this particularly is shown in the activities of the Sections of the Association.

The annual institutes of the Section on Taxation were held at Scottsbluff, Grand Island and Omaha in December last year with a two-day session in each city. The program was excellent and the members of the panel deserve the thanks of the Association for the careful preparation of their respective papers. The lawyer in Nebraska who failed to take advantage of the opportunity to attend this institute suffered a distinct loss.

The College of Law and the Junior Bar Section of the Nebraska State Bar Association presented an Institute on Damages for Personal Injuries at the College of Law building on September 19 and 20. It was educational, practical and interesting, and I am sure that everyone in attendance found it well worthwhile. I know how much good this sort of an institute does for the practicing lawyer, but I feel that it is invaluable to the student who is still in law college. Anything we can do to bridge the gap and bring the law schools and the Bar Association closer together is of enormous benefit to the members of the Association.

Your program for the next two days will forcibly call to your attention the work of other Sections. These programs do not just happen. They represent many days of hard work on the part of the officers of the Sections and the talent appearing on the panels of each Section. It is this work on the part of the Section and the programs which they provide that make these annual meetings really worthwhile.

I don't want to leave this problem of Sections of the Association without mentioning especially the Real Estate Section under the leadership of Fred H. Richards. This committee has done a magnificent job and has enlisted the help of every lawyer in the state who really wanted to work in the Association. The work on title standards, conveyancing, probate procedure and on the program for the meeting really deserves the commendation of the members of the Association.

The various committees have also done a real worthwhile work. The reports which appear in the printed program of the Association meeting set forth their activities and their recommendations for the coming year. Let me say that I didn't call on a single member of the Association for help without his giving the Association his wholehearted assistance.

But without detracting in any manner from the activities of the other committees I do want to mention the work of certain committees.

You have each received a copy of the proposed legislative act concerning nonprofit corporations, prepared by the Special Com-

mittee on Revision of Corporation Laws. I hope you took the time to study this act and realize what an improvement it would be over our present hodgepodge of laws on the subject.

The committee now has under study the Model Business Corporation Act prepared by the National Conference of Commissioners on Uniform State Laws, which would require some constitutional changes in our present corporation law. This is a matter that takes time and cannot be completed in one year. In the meantime the committee proposes several amendments to our present laws which would not make any basic changes but would simplify corporate procedure.

I do not think that as an Association we have taken as active a part in legislation as we should, and without in any way interfering with the work of the Legislative Council and the Judicial Council, and without being activated by any selfish interest, we can be an aid to the Legislature of the state and of great benefit to the legal profession. I am sure that the Legislature will encourage these activities on our part.

The major task of the Committee on Judiciary was to further the mandate of the House of Delegates to get the American Bar Plan for the selection of judges adopted by the State of Nebraska. This is an enormous task, but who can be more interested in the selection of our judiciary than the members of the Bar? The committee decided that the proper way of promoting the passage of the necessary constitutional amendment was to have the Legislature pass the necessary bill to submit the American Bar Plan for selection of judiciary to the voters of Nebraska.

The bill has been prepared and submitted to the Committee on Legislation. Our first task is to convince the Legislature of the necessity of this procedure, and every member of the Association has a vital interest at stake. Even after being passed by the Legislature there is an enormous task ahead to educate the voters of the State of Nebraska. I think this should be one of the major projects of this Association.

Let me explain in a few words the method in which the voice of the Nebraska State Bar Association is heard in the Legislature. The Committee on Legislation is in charge of the legislative program of the Association. All committees and Sections of the Association are required to clear all legislation to be proposed, and all legislation to be opposed, to this committee for review. The Legislative Committee submits to any Section or committee any subject matter for study requiring a report thereon, together with a draft of any suggested legislation.



Before the convening of the Legislature the Legislative Committee submits to the Executive Council of this Association its proposed legislative program to obtain approval thereof. Only after obtaining the necessary approval by the Executive Council of the Association is the Legislative Committee authorized to appear before the Legislature and to sponsor the legislative program of the Association. The Legislative Committee has authority to call on any committee or Section of the Association to appear in behalf of such program. With these safeguards you may be sure that no matter will be presented to the Legislature unless it is representative of the thinking of the great majority of the members of the Association.

This year for the first time an attempt has been made to prepare an advisory fee schedule for the entire State of Nebraska. Nearly every part of the state has had some sort of a schedule but many were out of date or incomplete and there was a wide variation in different parts of the state. The Special Committee on Advisory Fee Schedule labored diligently in arriving at a common ground for what they considered to be fair charges over the entire state. All sections of the state were represented on the committee. Where there appeared a variance in different parts of the state there was generally a compromise between the higher and lower existing schedules. In their determination of fees the committee arrived at the schedule they considered fair to the members of the Bar and to the public. I think the proposal of this fee schedule is a forward movement for the benefit of the Association and the public at large.

The work of the Committee on Public Service has also been outstanding. The Law Day, U.S.A. celebration was particularly noteworthy. The Nebraska State Bar Association and local bar associations all over the state participated in the program. Governor Victor E. Anderson signed a Governor's proclamation in connection with the program, and films were distributed to six television stations, and sound strips were distributed to all the larger radio stations. Newspaper advertisements in connection with the occasion were bought and paid for by some of the banks in the larger cities. I hope that next year all of the local bar associations will carry on this program to even greater heights.

Members of the committee have appeared before the senior classes of the law schools of the University of Nebraska and Creighton University, giving talks on the subject of "The Lawyer and Public Relations." We have continued with the distribution of pamphlets, and one has been rewritten and will be ready for dis-

tribution soon. Others are in contemplation by the committee. The response to these pamphlets has been excellent.

During the past year the series "You and the Law" has appeared in the columns of sixty newspapers in the state. These actually deal with legal subjects tending to make the readers aware of the fact that nearly every phase of everyday life involves some legal aspect. The committee is doing its share in carrying our story to the public in newspapers, over the radio and television, and by public programs. This is sure to bring good results. The committee needs the help of every member of the Association.

In passing I want to mention just a few more matters. Last year the Executive Council completed arrangements with the John Hancock Insurance Company for a plan of group life insurance. I am informed that we now have over 900 policies in force. This spring the Council approved a proposition for an extended and enlarged health and hospital plan referred to as major medical expense insurance. The response of the members has been excellent and we feel that we have rendered the membership a distinct service.

This year for the first time the Secretary arranged headquarters at Los Angeles for the Nebraska members attending the American Bar Association meeting. This plan has been followed by many other states for some time. This made a meeting place for Nebraskans, where they could find their friends. Former Nebraskans in Southern California were able to contact Nebraskans attending the Association meeting. It was well received and I think distinctly worthwhile.

We have continued the past year with the *Bar Journal*. It is just an informal news media, but fills a place in the activities of the Association. There have been some very interesting articles published. The expense is not great and the project fills a need in the Association activities.

This has been a somewhat garbled report of what has happened in Nebraska during the past year. Maybe too much hasn't been accomplished. One thing certain, the progress and success of our organization will be in direct proportion to the increased stature of the members themselves.

What is the future of the legal profession? Lawyers and their bar associations enjoy good public relations. With our system of self-discipline we have convinced the public that our ideals are high and we will not countenance the unscrupulous or unethical in our midst. The integrity and competency of lawyers, individually and collectively, is better appreciated today than ever before.

This attitude towards our profession is felt in many directions. The public more and more relies on the lawyers for assistance in all matters touching any phase of the law. There is a recognition of lawyers as leaders in every field of community and public life, and, what is more important, there is a public respect for courts of law and the judicial system.

The public reaction to the celebration of Law Day, U.S.A. on May 1 of this year is a vivid example of the position of law and lawyers in the life of these United States. It is estimated that there were over 30,000 local programs held in connection with that celebration, and plans for a second Law Day will make the 1959 observance the biggest joint participation effort in the history of the Bar in the United States.

But none of us is so naive as to suppose that our present state of good public relations just happens, or that it cannot be further improved, or that we can just sit back and receive praise for the efforts of our members in the past. The fact is that the increased acceptance of our profession in the eyes of the public is the direct result of long years of struggle and effort by many individuals and their bar associations. We must realize that there is still a strong undercurrent of resentment and dissatisfaction with us, and that what we have achieved in the eyes of the public can be quickly dissipated.

When our country was first formed, in colonial times, there was a definite attempt to get along without lawyers at all. In the effort to do this, laws were enacted forbidding the charging of legal fees or fixing very low fees. We still see evidence of such an attitude on the part of some elements of our citizenry today. Other laws strictly limited the number who could engage in the practice of law, or specified conditions of admission to the Bar which necessarily produced that result. Still others established other methods of obtaining justice wholly by passing up judicial process, such as the Pennsylvania system of conciliation by "common peacemakers." Many of these laws contained most uncomplimentary passages concerning lawyers and the profession.

These early attempts to stifle the American legal profession were unsuccessful. In its place we went to the other extreme. The legal practice was opened up to untrained and irresponsible pettifoggers. The history of the Bar in western Nebraska would astound the younger members of the profession. Of course, some of the stories are pure legend, but nevertheless there is enough of the truth to make one realize to what depths the legal profession could descend.

Gradually, however, there came an era in which the profession was represented by men admitted to the Bar on a basis of competitive and good character.

By the time of the Revolution the members of the legal profession in most of the colonies were well educated, well qualified by study of law, and were high in the public esteem. As a matter of fact, effective bar associations were in existence at that early date. Twenty-five of the fifty-six signers of the Declaration of Independence and thirty-one of the fifty-five members of the Constitutional Convention were lawyers.

From the time of the American Revolution to the mid-1830's the stature and fortune of the legal profession in America were constantly ascending. It was the time of great judges—John Marshall, Joseph Story—and great lawyers—William Pinckney, William Wirt, Jeremiah Mason, Daniel Webster, and many others. Then the pendulum began to swing the other way. Between 1836 and 1870 there was a near breakdown of education and professional training for the members of the Bar. The terrible days of the Reconstruction following the War between the States directly added to the breakdown of law and the legal profession. But with the gradual development of bar associations in the 1870's the legal profession took a different trend which has continued upward to this day.

The American Bar Association was organized in 1878 and has always been a moving factor in this upward trend. The development of integrated state bar associations has given stability to the states where formed, making all members of the Bar a definite part of the profession as a whole. The reorganization of the American Bar Association in 1936 added new force and vigor. The membership is now approximately 100,000, all interested in bringing up the status of the profession. The tremendous increase in local bar associations and their expanded activities brought new support.

It is no coincidence that our profession has grown in stature with effective bar associations. Led by men of vision who were willing to devote their untiring efforts to the upbuilding of their profession, these organizations have been working to correct the major causes of dissatisfaction on the part of the public with our profession. This dissatisfaction, insofar as it has merit and can be corrected, stems from the dishonesty and incompetence of some who have been admitted to the Bar, and the inadequacies and delays in the judicial system itself.

The responsibility of each one of us is a heavy one. We have within our power the ability to add or detract from not only our

personal standing as a member of the Bar, but the standing of the legal profession as a whole.

In the long run the most effective way for the profession of law to improve its relations with the public is to deserve a high opinion based on conduct and performance, not only in its public activities but in its private lives.

There is nothing mysterious or extraordinary as to our conduct as individuals which will maintain and increase our public relations.

First, there must be a constant and exacting adherence to the high ethical standards of our profession. The conscience and sense of decency with which every man is equipped ordinarily provides all that is needed in the way of standards of professional conduct. High ethical standards, however, require more than individual adherence to the accepted code. It requires the willing cooperation and assistance of all lawyers in carrying out the disciplinary procedures of the Bar and the Court. The attitude of every lawyer must be to raise the moral standards of every member of the bar to a point above the criticism of the public.

Second, it is the responsibility of each lawyer to attain and maintain the highest degree of legal knowledge, competence and efficiency so that we can properly represent our clients in any matter that may be presented to us. This calls for a constant effort by every lawyer to keep abreast of current legal changes and developments of both legislative and court-made laws.

Some of the most effective of the modern facilities for carrying on with this continuing education are the legal institutes sponsored by the various bar associations and law schools. We are doing a good job in Nebraska, but our program can very well be extended.

A third responsibility which the individual lawyer must accept is to render legal service without expectation of compensation in those instances where justice would not otherwise prevail. Maybe we should periodically take stock and see what we as individuals are doing to promote the furtherance of justice to the underprivileged and unfortunate who come to us for help.

And not the least responsibility of the lawyer in upholding the dignity and prestige of the profession is to seek and accept the position of leadership in the educational, cultural, patriotic, charitable and political life of the community. The lawyer should be the directing force in most of the worthy group activities of our people. The opportunity is his because he is the technician of

democracy. To the extent the lawyer accepts the responsibility, the stature of the legal profession is increased.

The law is a noble profession and lawyers should be proud of it. When I decided that I wanted to practice law I knew that from a monetary standpoint there were much more favored occupations but felt that the life of a lawyer held all of the thrills, satisfactions and honors that anyone could wish for in his lifetime. And I have never been sorry for my decision!

I realize that the lawyer is often subject to miserable libels against a profession which is not the least deserving of praise for unselfish service to his fellow man, against a legal system which, in spite of the size of our country, and its necessary complexities, assures for the average citizen more effective protection for individual rights, more evenly distributed economic opportunity, more security in person and property and greater personal freedom than could be found under any other system.

We cannot close our eyes to our frailties nor to the necessity of improving both our profession and the administration of justice, but our objective cannot be reached in the absence of public acceptance and professional self-respect.

We ourselves must recognize our position in our own calling. We have become almost apologetic of our profession. Doctors, dentists and even veterinarians proudly add the prefix "Doctor" to their names and are addressed the same with due respect. Lawyers must not sell their profession short!

The Nebraska State Bar Association cannot be any stronger than its Secretary, and I want to take this opportunity of thanking George H. Turner for the excellent service that he has given the Association during the past year. His contacts over many years with the activities of the American Bar Association have brought to us the benefits to be derived from the experiences nationwide of the various state associations. We were very sorry to have had him out of circulation for a short time last spring, but we all rejoice in his recovery. I would be the first to admit that what good has been accomplished during the past year is due to the untiring efforts of our Secretary.

Before I close I want to urge you to attend the luncheon this noon, where Sylvester C. Smith, Chairman of the House of Delegates of the American Bar Association, will be the luncheon speaker. We are very fortunate to have him with us. His message will be worthwhile.

I do want to express my sincere appreciation for the honor of serving you as President of the Nebraska State Bar Association.

It has been a rewarding experience. The cooperation of the members of the Bar has been marvelous.

**PRESIDENT MARTIN:** We will now hear the report of the Secretary-Treasurer, George H. Turner.

**SECRETARY TURNER:** I first have some announcements. The Junior Bar Section is not holding a formal meeting in connection with the annual meeting of this Association because of the fact that they cooperated a week or two ago with the University of Nebraska College of Law in presenting a very fine institute which they felt was a sufficient activity for the Section for the year. But it is necessary that they hold a short business meeting for the election of new members of their Executive Committee and officers of the Section.

They will hold that meeting in this room at 4:30 this afternoon immediately following the program of the Section on Real Estate, Probate and Trust Law.

### **REPORT OF SECRETARY-TREASURER**

**George H. Turner**

The books of the Association were audited under date of September 15 by Peat, Marwick, Mitchell and Company of Lincoln. Due to the fact that our convention this year is held approximately two weeks earlier than usual, we had to close the books as of September 15, so this audit does not cover a full year. It covers the period from October 1, 1957, the date of our last audit, to September 15, 1958.

The accountants report that they have examined the statement of cash receipts and disbursements of the Nebraska State Bar Association for the period beginning October 1, 1957, and ended September 15, 1958.

"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 a cash receipts and disbursements basis of accounting; that is, 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 reported cash transactions for the period beginning October 1, 1957, and ended September 15, 1958; and the cash balance at September 15, 1958, applied on a cash basis consistent with that of the preceding period."

Then they proceed with a statement of the cash receipts and disbursements of the Association. These were reported in some detail yesterday at the meeting of the Executive Council and it has been approved. The full statement will, of course, be printed in the proceedings issue of the *Nebraska Law Review*. But for the information of the members, the total receipts during the year were \$46,806.59. The principal items of expenditure were: salaries and payroll tax, \$6,219; printing and stationery, \$1,202; telephone and telegraph, \$277.15; postage and express, \$981.92; publication of our directory, \$1,106.68; the expense of officers, \$1,833.46; the publication of the *Nebraska Law Review*, \$7,430.37.

I think many of you may not know the method by which that is financed. The Association pays the entire cost of the January issue which contains the proceedings of each annual meeting, and one-half of the cost of the other three issues during the year.

The net cost of publishing our *Nebraska State Bar Association Journal* to which the President referred was \$910.23. That is for four issues.

The Committee on Public Service: the net cost of that activity was \$3,882.88. The expense of attending the sessions of the American Bar Association by the delegates and the members of important committees whose expenses are defrayed was \$4,348.93. The net cost of the 1957 annual meeting was \$3,939.67. The various committee expenditures were very modest.

The group life insurance program was put into force, and to facilitate that the company asked the Association to advance the sum of \$1,000.00 to cover their postage, their advertising, etc., which is to be reimbursed to us at the end of this first policy year, which will be December 1.

Acting under the direction of the House of Delegates of a year ago, we purchased additional savings bonds in the amount of \$2,000.00.

The cash balance at the beginning of this audit period was \$3,293.52; the cash balance at the end of the audit period was \$5,937.47, leaving an excess of receipts over disbursements of \$2,643.95. So I am very pleased to tell you that our Association is in a very favorable financial condition.



PRESIDENT MARTIN: We will now have the report of the American Bar Association delegate, John J. Wilson.

## REPORT OF AMERICAN BAR ASSOCIATION DELEGATE

John J. Wilson

President Martin, Members of the Nebraska State Bar Association: It was a pleasure to represent this Association at the mid-winter meeting of the American Bar Association, as well as the annual meeting held in Los Angeles in August.

The American Bar Association includes so many activities that it is impossible for one person to tell exactly what goes on. The report to you can only describe some of the items that I think are more important to the local members.

The meetings were held in various places in Los Angeles. Each of the hotels was crowded. Section meetings were held in four of the large hotels and there was some distance between them so it was difficult to go from Section to Section or from meeting to meeting.

The House of Delegates met at the Statler Hotel. It was in the center of the hotel area but it was some distance to travel from there to other hotels, and with the House of Delegates having so many sessions I attended only one Section meeting.

It was interesting to see how important the lawyers think the American Bar Association is, as there were about 800 more who attended this year than have attended any previous year. There were some 5,700 lawyers there, and with their families it was estimated there were possibly 11,000 people in Los Angeles the last week in August to attend the sessions and the activities of the American Bar Association.

At the sessions of the House of Delegates, all phases of law were covered. I will report to you on some that I think were most important to our local associations.

Canon 35, as you will remember, has been discussed in the press and it was before the House of Delegates of the American Bar at the mid-winter meeting in Atlanta last February and it was scheduled to be discussed at the Los Angeles meeting but we acted on the advice and recommendation of the Board of Governors and it was postponed again. It probably will come up at the February meeting.

One of the interesting things on this Canon 35 is that we had been told by the media that they could take pictures without the use of flashbulbs and they could sit in the courtroom and take

pictures and nobody would know they were being taken. There would be no disturbance. We found that when Thomas E. Dewey was making his report on International Law Planning, for about five minutes you couldn't see him because of the camera and flash equipment. If that is what they are going to do when they take pictures of witnesses and judges and other participants in court, I am sure it will be a disturbance.

George Turner went over to one of the men of the press and said, "I understood you could take these pictures without flash-bulbs, but I notice that you are using them here. What about it?"

The fellow said, "Well, that must be members of the House of Delegates taking pictures. The press wouldn't do anything like that."

He came back in about fifteen minutes and said, "Well, I am embarrassed. That was the press taking those pictures."

Two or three other speakers who made reports were hidden from view by the flash cameras and their attachments. It would have been wise for the photographers to have demonstrated there the equipment they propose to use because that is the body which will make any recommendation for amending Canon 35 if it is to be amended. Nebraska has Canon 35 by rule of court. The House of Delegates can change Canon 35 as much as it may want to but until our court sees fit to change it we have, not Canon 35, but a rule of court on the taking of pictures and reporting by the media.

The house adopted a National Inter-Professional Code for physicians and attorneys. The theory of it is to condemn the intemperate and abusive criticism by members of either profession. In other words, it is good public relations to get along with your other professional men. This was a joint report which has also been adopted by the American Medical Association. It may lead to better relations in the future.

As President Martin has told you, Law Day, U.S.A. was such a success this year that May 1, 1959, has been set again for another Law Day, U.S.A. with the idea that with the experiences of this year and the new ideas for next year it should be even better and carry to the public the work of the lawyers and further the interest in what Law Day, U.S.A. means.

One of the big debates was on the committee that was appointed to consider appointees to federal judgeships. As you know, during one era we had one party practically dominating the appointments that were made to the federal judiciary. Now there is proposed an independent committee to make recommendations,

in the hope that judges of the federal courts will be appointed on a nonpolitical basis. How far that will get I do not know, but there is to be a special committee appointed to work with the President of the United States in the selection of a committee that can make nominations and approve nominees for the federal judiciary.

The American Bar approved the idea that we would again go to Congress to obtain enactment of the incentive pay plan to encourage lawyers to remain in the armed services. It is felt that the compensation of career lawyers in the armed forces should be comparable to the income of lawyers of equal ability who are engaged in the private practice of their profession.

It is also proposed that the rules of evidence previously drafted by the Conference of Commissioners on Uniform Laws be adopted as the rules of evidence for the federal courts. I think that would be very worthwhile, for the reason that we would have uniform rules of evidence in all of the courts.

Another problem that was brought to our attention dealt with disciplinary action for improper practice. New York State now has adopted a statute that puts the investigation and disciplinary work and the prosecution of cases under the attorney general's office. I think we have a very satisfactory arrangement in this state and that is not necessary, but it does bring to our attention how disciplinary work is being carried on in other states.

The Section on Judicial Administration has drafted and has proposed a model judicial article to also help improve the judiciary of the states and help modernize some of the structures.

Also there were some amendments to the Constitution of the Association offered for our consideration. The two principal amendments were: one similar to the action of the House of Delegates here yesterday, in that they have created the office of President-Elect. Starting in 1959 at the mid-winter meeting there will be nominated both a President and a President-Elect, and the President-Elect will succeed to the office of President.

Also they realigned the manner of having delegates selected for the House of Delegates, and by that action Nebraska loses one Association member in the House of Delegates. The number of Association delegates is determined by the size of the state association. Heretofore we have had a state delegate, which is George Turner, and the last several years there have been two members of the House of Delegates representing the Bar Association. From now on, starting with the adjournment of the meeting in Los Angeles, Nebraska has only one. They felt that the House

was getting unwieldy, there were too many members, and so that representation has been cut down, and we suffer in that regard since now you will have only a state delegate and one Association delegate.

The House went on record as favoring legislation that would prevent the handling of personal injury claims arising out of automobile accidents by an administrative commission. There has been some proposal over the country that a commission be set up similar to our industrial commission or workmen's compensation courts, but the House definitely turned that down.

The Committee on Taxation has done a great job of trying to stop the loopholes in our federal tax structure. All of their recommendations were approved except one, and that was the matter of taxing cooperatives. The vote on that in the Section was so close that it was turned down, and rightfully so, because Congress wants to know what percentage of the members voted whenever you recommend legislation. It will have to come up again because I think there were only about five votes between the "fors" and the "against."

Laurens Williams, as head of the committee, has done a great job on federal tax liens. There is a printed report out that you can get by writing to the Chicago office. After you get it and if you have any suggestions or ideas, Laurens says their committee would welcome any help.

There were many other problems that came up before the House, some that we as Nebraska lawyers are vitally interested in, some that we are not, but all in all it was a great convention. It was a lawyers' meeting for lawyers, and that is what the American Bar Association really is, and it is worthwhile for anybody to belong and take a part in it. The ones who take part and belong to Sections I am sure are improving their legal education as well as helping themselves in their practice.

PRESIDENT MARTIN: Thank you, Jack, for a very comprehensive report.

According to the Rules the next order of business on the program is a report of the Executive Council. After my long report I do not see any real reason for this but here it comes.

## REPORT OF THE EXECUTIVE COUNCIL

Paul L. Martin

Prior to the establishment of the House of Delegates, the Council was compelled to take a much larger part in the program of the Association, being the executive branch of the organization,

and also had what was equal to legislative power between the annual meetings.

The House of Delegates has taken over a great many of the previous activities of the Council and the organization has become far more democratic, with the membership as a whole taking a much more active part in the conduct of the Association.

The Sections are really associations in themselves, and their program and institutes have become an integral part of the Association activities.

The Council reported quite fully to the House of Delegates yesterday, and the House has generally followed the recommendations of the Council.

Briefly I might tell you some of the activities of the Council. All items of income, receipts, and expenditures by the Treasurer are carefully checked by the Council, and in addition to the report to the Council the Treasurer makes a monthly report to the President of the Association.

The Council authorizes and directs the institutes which are held by the various Sections and plans the details for the annual meeting.

The Council nominates candidates for the offices of the Association, and where the Sections fail to make their own nominations the Council fills the vacancies. It also fills the vacancies in the ballot for election of the House of Delegates in any district where there are no nominating petitions filed by the lawyers in that District.

This has not been a legislative year so the Council has not been called upon to present the position of the Association in any matters pending before the legislature, but this coming year promises to be one in which the Bar Association has an important program, and the voice of the Association should be heard in the deliberation of the legislature.

This, in a few words, is a resumé of the activities of the Executive Council.

Richard E. Hunter is the Chairman of the House of Delegates and will now submit to you a report of the deliberations of the House and its meetings yesterday.

## REPORT OF THE HOUSE OF DELEGATES

Richard E. Hunter

President Martin, Members of the Association: I am not going to give you any detailed report about the deliberations of the

House of Delegates yesterday. As you know from the program the House has an additional session Friday afternoon at which they will receive the reports of the various Sections of the Association.

The reports of the committees are found in your program and all of these committee reports were given to the House of Delegates, and after due deliberation and consideration they were approved, or approved as amended, or rejected. It is my purpose today to very briefly list those, not give you a summary of the committee reports because you can find them in your own program.

The report of the Committee on Administrative Agencies was approved.

The report of the Committee on Revision of Corporation Law was approved with the additional approval of the committee recommendation that it be authorized to make additional changes in the Nonprofit Corporation Act as mailed to the members of the Association.

The report of the Special Committee on Joint Conference of Lawyers and Accountants was approved, together with a supplemental report, which does not appear in the program, which adopted the Code of Conduct which is printed on page 45 of the program with a recommendation to the National Conference of Lawyers and Accountants that it be adopted by that organization.

The report of the Committee on Advisory Fee Schedule was approved as amended to exclude the Omaha Bar Association from the provisions of the minimum fee schedule.

The report of the Committee on American Citizenship was approved.

The report of the Committee on Budget and Finance was approved, and the recommendation was adopted that the Executive Council invest an additional \$2,000 of the Association funds in government bonds.

The report of the Committee on Cooperation with the American Law Institute was approved, as was the report of the Committee on County Law Libraries.

The report of the Committee on Crime and Delinquency Prevention was approved except for the recommendation that the Bar Association print and circulate copies of the pamphlet which appears on page 33 of the program. This provision was deleted by amendment of the House.

The report of the Committee on Legal Aid was placed on file.

The report of the Special Committee on Atomic Energy Law was approved.

The report of the Special Committee on Bar Examination Standards was placed on file and a motion to continue the committee next year was approved.

The report of the Committee on Unauthorized Practice was approved, as were the reports of the Committees on Judiciary and Legislation.

The report of the Advisory Committee was received and placed on file.

The report of the Committee on Legal Education and Continuing Legal Education was approved, as were the reports of the Committee on Public Service and the Special Committee on Oil and Gas Law.

In addition, at the suggestion of President Martin, a special committee to consider a revision of the Bylaws to provide for the appointment of members of the various standing committees of this Association for a period of three years with staggered terms was approved, and the chairman appointed a committee of Ralph Svoboda, Dean Sackett and Paul Martin, with the latter as chairman, to consider such a revision and report to the House at its session on Friday.

The following Title Standards which were adopted by the Section on Real Estate, Probate and Trust Law in 1957 were approved: Standards 56 through 61 inclusive. In addition, the House approved the Section's amendment to Title Standard No. 38 and an addition to the Comment which is a part of Standard No. 42.

Following the approval of the Executive Council of a change in the Rules of the Association, the House recommended to the Supreme Court the creation of the office of President-Elect of the Association, together with a provision for succession to the offices of President, President-Elect and Chairman of the House of Delegates in case of a vacancy in those offices.

The House also approved a change in the Bylaws of the Association which will permit the Junior Bar Section to hold its regular annual meeting at a time other than the annual meeting of the Association because of various conflicts which have arisen in the past.

The House also approved a motion that the Committee on Legal Education and Continuing Legal Education undertake a study to consider the propriety of having a central committee or organization plan all future clinics and institutes sponsored by the Bar

Association and other suggestions regarding the improvement of the continuing legal education of the Bar.

There were no resolutions presented at the first session of the House of Delegates, although it is anticipated that there will be resolutions that will be considered by the House at its final session on Friday.

I think any of you who have considered the program and gone over the reports of the various committees will agree that these committees which have reported to the House of Delegates have done a tremendous amount of valuable work and service as far as the Bar Association is concerned this year. The House of Delegates, I am happy to report, certainly is not a rubber stamp organization. It has given due consideration to each one of these reports and I think everyone who is familiar with the House of Delegates will agree that it has had a very valuable place in this organization so far as taking this much of the problem of the organization of the Association off the rest of the schedule.

I move that the report of the Chairman of the House of Delegates be accepted and placed on file.

PHIL B. CAMPBELL: I second the motion.

PRESIDENT MARTIN: Are there any remarks? If not, all those in favor signify by saying "aye"; contrary, same sign. Carried.

Dick, I want to thank you personally for the administration of the meeting yesterday. I thought it was an excellent job and anybody who attended couldn't help but feel that we were getting a lot of good out of the House of Delegates.

Now we will have a report from one of the most important committees with which we have anything to do. We will have the report of the Judicial Council by the Honorable Edward F. Carter.

## REPORT OF THE JUDICIAL COUNCIL

Edward F. Carter

Mr. President, Members of the Bar: The Judicial Council has had several meetings during the past year, and two or three more are anticipated before the first of the coming year. Since we have had no legislative session since the last meeting of the Association, we have no report upon important procedural matters which have been enacted into law during the current year.

The Council has before it several matters of importance which it hopes to submit to the Legislature in January, 1959. Some of



these matters were reported last year and are still awaiting the next legislative session. I shall briefly review the more important matters pending before the Council.

1. A proposal for a new bill of exceptions statute is still pending. While the Council has arrived at no final conclusions, it appears that the purposes in mind are to simplify the procedure for procuring a bill of exceptions, to make the preparation and filing of the bill the duty of the court reporter as a public officer and not a duty of a litigant, and to eliminate the multitude of deadlines necessary to be met in the present statute. It is the feeling of the Council that the obtaining of a bill of exceptions should be on approximately the same basis as the procuring of a transcript with the consequent elimination of time limits for serving the bill as contained in the present statute. The proposal for a new bill of exceptions statute will be discussed by the Section on Practice and Procedure on Friday morning at 9:30. I would suggest that those interested in the proposal for a new bill of exceptions statute make it a point to attend that meeting.

2. A proposal for statutory amendments preparatory to the adoption of uniform orders and notices of publication in the district court by Supreme Court rule.

3. A proposal to amend the sections of the statutes dealing with grand juries, particularly with reference to the number of petitioners required to compel the calling of a grand jury.

4. A proposed statute to provide for the trial of suits against nonresidents having automobile accidents in Nebraska, in the county where the accident occurred when service on the nonresident was obtained by serving the Secretary of State. The proposed statute is for the purpose of clarifying existing statutes by removing any uncertainty as to where such cases are to be tried.

Many important proposals are before the Council which I shall not attempt to detail here.

The work of the Council is becoming more laborious each year. More and more time has been required of its members. By necessity we have referred important matters to subcommittees composed largely of lawyers not members of the Council to do the preliminary research and to make a report thereon. We have received excellent assistance from these groups and we desire to commend the lawyers of this Association for their willingness to help us on these important projects. I might add that we have never had a lawyer who refused to serve on any one of these subcommittees. We presently have four subcommittees working

on Judicial Council projects. They are making substantial contributions to the improvement of court procedure in this state.

I again call your attention to the fact that the Judicial Council is set up for the purpose of improving court procedures. We urge members of the Bar to call our attention to apparent errors or needed changes in matters of procedure. It would be a service to the Bar for you to do so.

I might add in addition to that, in view of the remarks made by President Martin about various groups making proposals to the Legislature, that I agree with what he says about that.

The Judicial Council considers nothing except procedural matters. We take no action or give no consideration to substantive law on the Judicial Council. Consequently all matters of that character have to come from some other source. We have made it a point, and we try to stick to that religiously, that procedure is the only matter with which we concern ourselves.

PRESIDENT MARTIN: The Secretary has an announcement to make as to the election of officers.

SECRETARY TURNER: Under the Constitution of this Association the Executive Council is required to nominate candidates for the offices to be filled at the annual meeting and three months in advance of the annual meeting to send a notice of such nominations to each active member of the Bar. That was done on June 29. There is also a provision, as you know, for the nomination of opposing candidates by petition. This has not been done this year. So the candidates nominated by the Executive Council will become your officers for the ensuing year. They are:

For President: Joseph C. Tye of Kearney.

For member at large of the Executive Council: Clarence E. Haley of Hartington.

For Association representative or member of the House of Delegates of the American Bar Association: John J. Wilson of Lincoln.

PRESIDENT MARTIN: We have on the program a short statement as to the group life insurance program. If Walter Black is here I would like to hear from him.

WALTER BLACK: Mr. President, Members of the Nebraska State Bar Association: A year ago you adopted and put into effect in thirty days' time the group life insurance plan. I am very pleased to give you a few facts, namely: (1) That there is now in force on the lives of members of the Bar Association of this state some \$8,000,000 of insurance. That means that the group

case has well qualified over the minimum requirement of twenty-five per cent enrollees. The paid premium last year was \$90,284, or that is this year. The death claims were five in number, which means a payment of \$50,000 was had last year.

The premium paid for that \$50,000, which will be of interest to you likewise, was \$427.90.

Many of you received this letter. It might be that some of you coming from the far ends of the state did not receive it; it will be there when you return. It points out that we have secured the cooperation and consent of the Home Office to open up the enrollment for those of you who did not come in last year on a non-medical basis, open up the enrollment during the convention dates. That was yesterday, today, and tomorrow, the first, second and third of October.

I think I can best point this out by reading a short letter. Then there will be an ample number of representatives to answer your individual questions out in the booth adjacent to the immediate floor. This was sent forward from your office at Lincoln a few days ago:

To All Members:

If you have already enrolled in the Association's group life insurance program, read no further. If you have not enrolled in the Association's group life insurance program, please read this letter completely because it is important to you.

We are pleased to announce arrangements have been made with the John Hancock Mutual Life Insurance Company to make available our fine group life insurance program on a non-medical basis up to and including age 60, or, if you have previously been turned down for medical reasons then of course it is not open.

You may sign up with the group program at the John Hancock booth at our convention October 1, 2, and 3. We know that many of you failed to take advantage of the program a year ago. In order to take advantage of the non-medical open dates during our convention we must have a goodly number sign up for the program. As some of you know, once a non-medical period has passed you must submit evidence of insurability to be considered for the group life insurance.

Gentlemen, it is up to us to take advantage of this opportunity. For those of you who are not enrolled, please come prepared to do so.

Sincerely,  
George A. Turner

Those of you who will not be able to attend the convention may enroll by mail until October 15.

For questions, I have just mentioned that representatives, including myself, will be available on this floor today and tomorrow immediately adjacent to the booth.

I am pleased at this time to introduce to you "Larry" Hennings who is manager of our group department in this entire area. "Larry," will you please stand? By chance, but with probably some motive in the back of his mind, we have "Ren" Alderman from Kansas City who is our group area annuity specialist. "Ren," will you please stand? This afternoon and tomorrow George Bodemiller, whom many of you have met in previous contacts, general agent for this area, headquarters in Omaha, will be here with us also.

The John Hancock Company has an office in Lincoln for your service.

Now it is always customary to give away something free. We have something for you if you have registered. Don't forget to pick up a Declaration of Independence reproduction at the booth. It will be handed to you by one or two very pretty and smiling young ladies. There are several other very interesting pamphlets on Presidents, etc. Please make these pamphlets available to yourselves. Thank you very kindly, Mr. President.

PRESIDENT MARTIN: Frank D. Williams will make the report of the Committee on Memorials.

## REPORT OF COMMITTEE ON MEMORIALS

Frank D. Williams

Mr. President and Members of the Nebraska State Bar Association: Your committee reports the names of those of our membership who have departed this life since our last meeting. They are:

Julian A. Abbott, McAllen, Texas  
C. J. Aldrich, Omaha  
Ross Amspoker, Springview  
Clyde Anderson, Pacomia, California  
Herbert W. Baird, Lincoln  
John L. Barton, Omaha  
Charles L. Brewster, Beatrice  
Leo Bump, Chadron  
O. B. Clark, Lincoln  
Norris P. Crafts, Omaha

Clarence M. Davis, Ord  
Robert W. Devoe, Lincoln  
William J. Donahue, Albion  
I. J. Dunn, Omaha  
George A. Eberly, Lincoln  
Cloyde B. Ellis, Beatrice  
Sylvester L. Gaves, Indianapolis, Indiana  
Charles E. Glade, Lincoln  
Alexander Humble, Auburn  
Loyal G. Kaplan, Omaha  
Guy Laverty, Burwell  
Hymen Levin, Los Angeles, California  
Stanley F. Levin, San Francisco, California  
A. Marvin Lungren, Denver, Colo.  
George J. Marshall, Riverton  
Charles Mousel, Hastings  
Milo E. Moyer, Omaha  
Rowland F. Nelson, Lincoln  
Harold J. Reed, Omaha  
Ernest L. Reeker, Norfolk  
Dan J. Riley, Dawson  
C. C. Shoemaker, Wilber  
David S. Simms, Hebron  
John F. Smith, Omaha  
T. B. Strain, Lincoln  
Arthur H. Sturges, Omaha  
Lewis M. Troup, Lincoln  
Lauer Ward, Lincoln  
John E. Willits, Hastings  
Thomas C. Woods, Lincoln  
Otto H. Zacek, West Point

As lawyers, they believed in the dignity of man. Justice was an inspirational part of their pattern of life. As they have inspired us to carry out the best traditions of the law, so must we inspire others.

To their memory we dedicate the profound respect, the deep appreciation, and the sincere commendations of the lawyers of Nebraska.

May we please stand as a final tribute to their memory.

... Moment of silence ...

PRESIDENT MARTIN: Gentlemen, this concludes the morning program.

The Thursday morning session adjourned at 11:50 o'clock.

# THURSDAY LUNCHEON SESSION

October 2, 1958

The Nebraska State Bar Association luncheon was held in the ballroom of the Paxton Hotel, President Martin presiding.

PRESIDENT MARTIN: This luncheon session desires to take this opportunity of doing honor to the spark plugs, the real workers of the Association, so at this time I want to introduce the gentlemen at the head table to whom you owe a vote of thanks because of the work they have done during the past year and the work they are going to have to do this coming year.

I am going to start with John J. Wilson, Delegate to the American Bar Association.

Richard E. Hunter, Chairman of the House of Delegates.

Keith Miller, Chairman of the Section on Taxation.

Fred H. Richards, Chairman of the Section on Real Estate, Probate and Trust, and I don't know what all else.

MR. RICHARDS: I am merely the figurehead, gentlemen. The work was done by my three division heads and thirteen sub-committee chairmen and fifty-nine committeemen. They did the work.

PRESIDENT MARTIN: Harold Kauffman, the Insurance Section.

Robert Berkshire of the Junior Bar Association.

Robert B. Hamer of the Section on Practice and Procedure.

For the luncheon speaker today we have brought in from the eastern seaboard a long-time member of the House of Delegates of the American Bar Association, presently serving as Chairman of the House of Delegates of the American Bar Association, the Vice President and General Counsel of the Prudential Life Insurance Company of Newark, New Jersey.

I am very happy at this time to present to you Sylvester C. Smith, Jr.

## ADDRESS

Honorable Sylvester C. Smith, Jr.

Mr. President, it is a great pleasure for me to be here and to bring greetings from the American Bar Association to this excellent state bar association. The President of the Association, Ross Malone from Roswell, New Mexico, is at a regional meeting in Portland, and I know that he would make a very fine representation

and speech to you at this time, particularly in view of his great interest and extensive work in the Association.

We are very proud of course to have in the United States of America a great American Bar Association and we hope we are accomplishing something. But whatever we are accomplishing is because the obligation of the lawyer to render a public service is recognized by the members of the Bar. That work is being carried out in the local, in the state and in the national bar associations. The work has to be coordinated. I want to say I am quite certain that from the point of view of the public generally, the work that is done to improve the administration of justice and to improve the relationship between government and people done by the bar associations is worth a great deal of commendation from the public. I am not so sure it is always appreciated.

Today however I venture to suggest a field in which I believe that the organized Bar, national, state and local, can render a real public service. It is a job that needs to be done and done promptly, in my opinion, and that is the improvement of the enforcement and administration of criminal law.

This week's new issue of *Newsweek* has an item headed "Crime, Most Violent Year," and it says the number of serious crimes in the United States has risen sharply, and 1958 is well on its way to becoming the worst crime year on record. The FBI reported last week that in the first six months of this year robberies increased 19.6 per cent, major larcenies 14.4 per cent, and forcible rape 9.3 per cent, while aggravated assault and murder declined by less than 2 per cent.

The increase in serious crimes reported by the FBI comes at a time when the newspapers are reporting that witnesses are being threatened, beaten up and frightened into silence by gangsters and labor racketeers. There was a gathering of the underworld leaders believed to be the Mafia at a farm in New York State which the state police raided, connected with the peddling of narcotics. Hoodlumism and gang actions by juveniles in public schools in large cities, both in the East and in the West, and in some smaller cities have put fear in the hearts of teachers and parents and law-abiding citizens generally.

Our federal Constitution's preamble states that the purpose is to promote domestic tranquility. The state constitutions frequently avow the object of a government that will establish domestic peace and security. But I want to say that in the East, at least, in our large cities we are having constant expressions on the part of lay people that it is not safe to be on the streets at

night. We have more policemen, but the attacks that are being made on peaceful citizens are such that there is no peace and no comfort and no security in our form of government, both state and federal.

In the annual survey of American law, a project started by the late Arthur T. Vanderbilt, my colleague of whom we are very proud in New Jersey, at the time he was Dean of the New York Law School, Professor Collings, Professor of Criminal Law, wrote in March of this year, speaking of what happened in 1957: "This was a black year in law enforcement, a year dominated by United States Supreme Court decisions in which the guilty criminal was often the fond object of the court's doting tenderness. Criminals, particularly if they were Communists, found the court's decisions flowing with milk and honey, and prosecutors and public administrators read them with dismay."

We had a Bar panel of the American Bar that considered the subject at one of the regional meetings. The question was: "Are the courts handcuffing the police?" Well, the men charged with enforcement of the criminal law said, "Yes, and for some time," but they also said that the United States Supreme Court has put the police in a strait jacket. I want to indicate to some extent how that happened by a recent decision.

More than twenty years ago Dean Wigmore pointed up this problem in his book on "Evidence." He said: "The complacent sentimentality of judges in criminal cases must cease. Reverence for the Constitution is one thing, and a respect for substantial fairness of procedure is commendable, but the exaltation of technicalities of every sort merely because they are raised in behalf of an accused person is a different and a reprehensible thing. There seems to be a constant neglect of the pitiful cause of the injured victim and the solid claims of law and order. All the sentiment is thrown into the scales for the criminal. This is not for the mere accused who may be assumed to be innocent but for the man who upon the record plainly appears to be the offender the jury has pronounced him to be. We have long since passed the period, as a modern judge has pointed out, when it is possible to punish an innocent man; we are now struggling with the problem of whether it is any longer possible to punish the guilty."

I could go on. I point out that even in New Jersey our Supreme Court has recently handed down a decision with a very strong dissent in a murder case that I think deserves reading to you. Justice Wachenfeld, one of our distinguished and older judges, in dissenting in the case of *State v. White* said this: "Here the defendant was guilty without question and by his own admis-



sion—there was no evidence of third degree—of one of the most brutal murders ever recorded. His victim, a small, weak old man, was unmercifully beaten to death by a horrible onslaught with the butt end of a gun. He was battered into eternity with a savage brutality and frenzied viciousness difficult of description. The excuse for the crime was simple. The murderer wanted money to buy narcotics. And for him we have now changed the laws that have stood on our books for many years, and I wonder why.

“Our laws and our Constitution were meant for the good as well as the bad, but all interpretations of late seem constantly to benefit the criminal element and thus continue to diminish the protection the responsible citizens were to receive. Fundamental fairness is a commodity the public should occasionally have the privilege of enjoying.”

He goes on to say that when a judicial system destroys public confidence, in effect it destroys itself.

I submit that we have had in the federal Supreme Court some cases that are subject to some real criticism from the Bar, and that we have a job to see that it is corrected. Let's take up two cases decided.

In 1956 the Supreme Court held in the case of *Pennsylvania v. Nelson* that when Congress enacted the Smith Act, the anti-Communist act, it pre-empted the field of criminal law enforcement in the sedition field and the state's criminal sedition act was null and void. Therefore the conviction of Nelson, an admitted Communist, was set aside.

In 1957 in *Yates v. the United States* the Supreme Court practically repealed the Smith Act. In the Yates case fourteen Communist leaders—they were probably the second class—were tried for conspiring with the Dennis group—you remember that was the group that was tried by Judge Medina in that rather long disgraceful trial where the conduct of the attorneys was so bad—to teach and advocate the violent overthrow of the government, organized through the creation of schools, cells and recruiting activities of the Communist Party which teaches and advocates the violent overthrow of the government. In an opinion which to my simple mind is very twisted reasoning the Court held that “organized” means “create.” The Party was organized in 1919 and it was created; and in 1945 when it was reconstituted it was recreated. But the indictment was found after the statute of limitations had run against even the reorganization in the 1945 Act. Therefore the conviction was barred on that excuse.

To the layman and the Congressmen who enacted the law many years after 1919 it seems obvious that Congress in enacting the Smith law meant more than creating a party. They meant to reach groups or assemblies or societies engaged in subversive activities.

The indictment charged the defendants with conspiracy to organize units of the Party. The Court held that the jury should have been told that the Smith Act does not denounce advocacy of forcible overthrow as an abstract doctrine—that is part of free speech, I suppose—that is lawful to teach and advocate forcible overthrow even with an evil intent so long as the activity is divorced from any effort to investigate action to that end.

The Court did not stop there, and this is why I think it is subject to criticism. It became the triers of the *fact*. Contrary to anything in the past, it found that the evidence was clearly insufficient as to five of the petitioners. Mr. Justice Clark, who dissented, properly said, in my opinion: "In any event, the Court should not acquit anyone here. In its long history I find no case in which an acquittal has been ordered by this Court solely on the facts." And that seems to be what all the scholars of the Supreme Court history have found.

Oddly enough in the Nelson case there was a count alleging the Pennsylvania law which prohibited organizational activities directed at forcible overthrow of the government. The Supreme Court in reversing the Nelson conviction carefully pointed out that its decision did not affect the right of a state to enact laws against seditious conduct when the federal government had not occupied the field. Then in the Yates case they held that they hadn't occupied the field in organizational activities. So I am wondering if the Court now admits that its decision in the Nelson case was wrong. I suggest that here was an exercise by a higher Court on very technical decisions of a power, not with the restraint recommended by the conference of Chief Justices, that affected men whom the jury found guilty of conspiring to advocate the overthrow of the government by force.

Now I want to say that there are two other cases that deserve some attention because I think it indicates why the courts are subject to criticism in this law enforcement. *Mallory v. The United States* is a case that has received a great deal of comment. The facts were these: The defendant was a nineteen-year-old brother of the janitor of an apartment house in the District of Columbia. He lived in the basement with two grown nephews. A tenant asked them to help her detach a hose from the sink in the base-

ment. The defendant helped her and left. Shortly thereafter a masked man resembling either the defendant or the nephews brutally raped the tenant. This was at 6:00 o'clock at night. The defendant disappeared and was apprehended about 2:30 in the afternoon of the next day. He was questioned by the police for thirty or forty-five minutes, and so were these nephews, and at 4:00 P.M. he was asked if he would submit to lie detector tests, to which he agreed.

The nephews were questioned first. Now here was this man sitting there in the police court while the two nephews were questioned. They also submitted to the lie test. At 8:00 o'clock the operator of the lie detector test was able to question the defendant for the first time. After an hour and one-half he admitted the crime. At 10:00 P.M. the police tried to reach the Commissioner to arraign the defendant but he couldn't be reached; he was away. The confession was dictated and signed thereafter. There was no evidence of any force or coercion of any kind, and there was full advice that anything would be used against him. The following morning the defendant was arraigned, the confession was admitted in evidence and he was convicted.

The Supreme Court in 1957 reversed and held that the confession should be excluded under the McNabb rule. The Court further held that no more leeway is permitted between the arrest and the arraignment than the time necessary for the administrative steps to take a defendant before the Commissioner, and yet after the McNabb case Congress had passed a law amending the judicial code (because the McNabb case was based apparently upon a court rule) to require arraignment without "unnecessary delay." The Court's position is completely unrealistic.

I would like to quote from what was said by Scott, the deputy police chief, about this case. He said, "If we had arraigned all three men during the afternoon we were interrogating them, the two brothers might have sued us for false arrest. If we had picked out the wrong one and freed Andrew"—that is Mallory, the defendant—"we might never have gotten him again. If we had not given Mallory the lie detector test that night, he probably never would have confessed." But the confession was the principal evidence, although some supporting evidence turned up later. This man wearing the mask couldn't be identified by the face. So what happened? This man who had confessed, by reason of this decision, was set free. The government decided they didn't have enough evidence to convict him and so despite the rape, brutal, and its description was that, he is free.

A good many innocent people in Washington face prospective arraignment, if you follow the idea, because the police have to sift the chaff.

Now what happened at that time? In Washington there was a rape case. A little eight-year-old girl was found raped and murdered in the woods in Washington on the 11th of April. Hundreds of people were brought in but they couldn't arraign one of them under this decision. The police were afraid to do so. They haven't solved that case yet.

One of the great difficulties is not only the delay but I would suggest to you it is the abuse of the writ of habeas corpus in the federal courts after the matter has been heard by the state courts.

We had another decision that I think deserves some attention. It didn't happen to be the Supreme Court. *Strand v. Schmittroth* in the Ninth Circuit brought forth a new concept of law. They wouldn't permit California to try a man who was on parole and probation for suspended sentence for passing bad checks and committing some frauds because during the period when they tried to try him and had him arrested and brought in for trial he was on probation, and the Ninth Circuit held that since he was on probation he was in federal jurisdiction and they couldn't try him because of the writ of habeas corpus.

Well, the dissenting judge of the Ninth Circuit, Judge Chambers, said, "I suppose that if the state court here had a case where the fellow was on probation and he robbed the National Bank, then the federal government couldn't try him because he was under the jurisdiction of the state court."

However naive, it is an indication that these cases are interfering with the state enforcement of criminal laws.

To come to the worst case that I think we have, I want to bring up a case that I think demands the attention of the Bar and others, the Chessman case. Even Justice Douglas thinks this is scandalous but it is still with us. This case is the so-called habeas corpus merry-go-round.

Chessman was convicted in 1948, ten years ago, of seventeen felonies including kidnapping, rape, forcible acts of sexual perversion, and was sentenced to death, a crime which filled the newspapers at the time. The trial look a long time with rather eminent counsel who tried to defend him.

The Supreme Court in 1957 held that Chessman should have been present in person or by counsel at the hearing where the record for appeal was settled, and the Supreme Court remanded this case for further proceedings to the lower courts in California.

The most amazing thing about this case decided by our Supreme Court in Washington is this, that three times before, in denying certiorari, this same question had been presented to the Supreme Court of the United States, and certainly in the fourth presentation there was every indication that it had been denied and had been considered. Not a single Justice had ever voted to grant certiorari on that issue, and furthermore Chessman had repeatedly refused a court-appointed lawyer. He actively took part in the process of settlement of the record, submitting some two hundred proposed corrections. And of course Justice Douglas said in his dissent: "The conclusion is irresistible that Chessman is playing a game with the courts, stalling for time while the facts of the case grow old."

There is a tragedy in this case, too. One of the high school girl victims has grown up and is married and has children. Is she to testify ten years later? Would she want to testify? But another, unfortunately, is in a mental institution at least partially as a result of the treatment of this felon. Even if he is executed at this time, is there any deterrent penalty, something that is going to deter others from committing the same crimes?

I may be old-fashioned but I believe that deterrent to others must be one of the objects of punishment in enforcement of criminal law. But it does seem to me in my naive and simple mind that when the Chief Justice spoke to us about improving the administration of justice, and delayed justice being such injustice, that the public was entitled in the Chessman case to speedier justice and a better and squarer deal.

Now what should be done about this? I think that the public is going to look to the organized Bar to take some steps to improve the administration of justice, and particularly to improve the present delay tactics in criminal appellate practice, the misuse of habeas corpus in the federal courts and in other courts, and the reversal of convictions on technical grounds where the guilt of the defendant cannot be open to real and substantial dispute. I suggest that the American Bar Foundation survey of criminal law and its enforcement must be speeded up, but I believe that this Association and other associations must undertake in a coordinated way on the part of the Bar the public duty of seeing to it that the methods of criminal law enforcement are improved; that we unshackle the police; that we do not permit organized crime to get away with it. We do permit search warrants on reasonable grounds. Why isn't it proper for the Congress to enact and permit under court supervision and for proper cause tap-

ping of telephones, when the telephones are used in organized crime so extensively?

I think the time has come when the public expects the Bar to take action, and I think furthermore that we have to encourage one other thing in the school systems.

Those of us who visited England last year were impressed both in England and the Nordic countries by the great respect for the police officer and for law enforcement generally. It is true that in England there appears to be a slight increase in criminal law violations but the courts are expeditious in their punishment. They are fair. But I think the real answer to the lower crime rate in continental Europe is due to the fact that over there there is a respect for law.

Many years ago Dr. Angell, President of Yale, said that "public opinion enforces the law and the police take care of the exceptions." Has not the time come when we as lawyers and bar associations should see to it that there is not only a Law Day once a year, but that in the public schools and in other places there is an education and creation of public opinion for respect for law, a respect for fear of punishment of the criminal law? And has not the time come when we must take steps to see to it that our streets and our homes and our property are safe from those who are not good citizens? I suggest that this is a public job that we as lawyers must render. Thank you.

PRESIDENT MARTIN: Mr. Smith, on behalf of the Nebraska State Bar Association I want to thank you most heartily for this thought-provoking address. We appreciate it and know that it is going to do some good.

## SECTION PROCEEDINGS

THURSDAY, OCTOBER 2, 1958

SECTION ON REAL ESTATE, PROBATE AND  
TRUST LAWFred H. Richards, Esq.  
Chairman"Problems Relating to Stale Reverters and Restrictions"  
John R. Fike, Esq."Some Common Title Problems" — Panel Discussion  
Moderator, Herman Ginsburg, Esq.Panel Members, Richard C. Peck, Esq.  
Albert T. Reddish, Esq.

## REPORTS

By: George A. Farman, Jr., Esq., Real Estate Division Head  
and his Subchairmen, including:Franklin L. Pierce, Esq., Acting Chairman of Title Stand-  
ards CommitteeGeorge A. Skultety, Esq., Chairman of Committee for  
Improvements on ConveyancingLewis R. Ricketts, Esq., Chairman of Committee on Cur-  
rent LegislationBy: Lynn E. Heth, Esq., Probate Division Head and his Sub-  
chairmen, including:Fred T. Hanson, Esq., Chairman of Committee on Improve-  
ment of Probate ProcedureBy: Lewis R. Ricketts, Esq., Trust Law Division Head and  
his SubchairmenBy: John W. Delehant, Jr., Esq., Section Secretary, as to  
Minutes of SectionPROBLEMS RELATING TO STALE REVERTERS  
AND RESTRICTIONS

John R. Fike, Esq.

The topic assigned to me is "Problems Relating to Stale Re-  
verters and Restrictions."I do not know how many of you are familiar with the fact  
that at the 1957 session of our Legislature, Legislative Bill No.

200, "an Act relating to rights of entry or re-entry for breach of condition subsequent and possibilities of reverter," was put into the hopper. Without going into detail, the bill was designed to put a limitation of thirty years on such rights, irrespective of whether they had been created in the past or were created in the future, and excepted situations where the condition already had been broken but in the excepted situations specified that the right would be barred unless action to recover was instituted within one year from the effective date of the Act. That bill met with a sudden and violent death, having been killed in committee, and it was this circumstance which prompted the request for this paper.

When I got around to delving into the subject I became very much enlightened because I found that this problem has been presented and discussed by experts. Professor Lewis M. Simes of the University of Michigan, one of the country's pre-eminent authorities on real property, a teacher of that subject at the University of Michigan, a writer of textbooks and one of the writers of the Restatement of Property, presented a paper on this very subject before the Real Property, Probate and Trust Law Section of the American Bar Association at its Chicago meeting in 1954. This paper appears in the written report of those proceedings under the heading: "Elimination of Stale Restrictions on the Use of Land." I suggest to you that a reading and study of that paper will give you one hundred fold more and better information than I can hope to give you here.

Someone has said that it is well to divide a paper such as this into three parts. First, you tell the people what you are going to say. Second, you say it. And third, you tell them what you have said. In the interest of time I will skip the third part, as I shall try to keep this as brief as possible.

The first part, then, is to tell you what I am going to say. I intend to tell you something about restrictions; and in this sense I mean restrictive covenants, conditions, limitations, etc. I also intend to tell you something about reverters. As we go along I want you mentally to keep them in separate categories, although technically they all are lumped together as restrictions on the use of property.

When we get to reverters we will divide those into two classes:

Class I will be those wherein the title automatically reverts upon the happening of a certain event.

Class II will be those which require affirmative action to recapture title upon the happening of the designated event.



We cannot spend much time in analyzing the nature and kind of estates or rights created in each of these two classes because, in the first place, that would be a complete subject in itself and one which would make an interesting topic for presentation to this Section; and in the second place our problem here is not so much the nature and kind of estates or rights created, as what do we do or what can we do about them after they have been created. Particularly, we should be wondering why the law has placed no limitation whatsoever upon either restrictive covenants or reverter interests or rights, but has allowed them to run wild. In this connection I will draw for you a comparison between the restraints imposed by law upon the alienation of land by reason of the Rule against Perpetuities. Here again we haven't time to discuss the Rule itself, but I hope to give you enough to demonstrate the reason for that Rule and leave you to wonder why the law would impose such restraint upon the alienability of land, yet would leave these lesser interests or rights in the nature of restrictions and reversers uncurtailed. Lastly, I will touch upon methods which have been promulgated for the control of said lesser interests or rights.

So we come now to the second part, which is to say it.

First of all, I want to tell you something about the Rule against Perpetuities.

To me, the working of that Rule is an interesting sidelight in connection with this matter of stale reversers and restrictions. The reason for the Rule against Perpetuities goes back to feudalism. Under the old feudal system there were two interests involved, one being the status of the man on the land, the feudal tenant. In a way we might compare him to the man we now call the "owner," although there is a significant difference in that the "ownership" of the feudal tenant was composed more of obligations than rights. The other interest was that of the lord to whom these duties and obligations were owing, and the overlords on up to the king himself.

Under that system the right of alienability of land as we know it today was unknown. However, along about 1225 came the case known as D'Arundel's Case, wherein it was decided that when one of these feudal tenants held under a grant to him and his heirs, and purported to convey by a deed with warranty, his heirs could not be heard to object.

Here was the first step toward alienability, but this was merely a half step in that it applied only as against the heirs of the feudal tenant. It did not operate against the lord who could still effectively object to the transfer. This half-step situation continued

for about sixty-five years when the statute *Quia Emptores* was enacted. This statute made the half step whole, for under this statute the lord lost his standing to object and thereupon something like a free man's title to his land was born. The result was that the feudal tenant could convey, his heirs couldn't object, and the lord could not object. From here and by a series of later decisions the principle of alienability of land developed, and so alienability of land titles had won its freedom.

This newly won freedom, however, created a brand new problem. Once owners became free to convey as they pleased, the urge to control other peoples' lives began to crop out and all kinds of schemes and devices were created to satisfy man's urge to control from the grave and to dictate how and by whom property should be used in generations to come. Soon it became evident that this unrestricted freedom to convey, unless controlled, would defeat its own purpose. Under the old feudal system they at least had some definitely known, uniform, systematic rules. But with this new freedom and the variations of interests devised there were as many kinds of restraints, restrictions and interests as there were landowners to think them up, and so the brakes had to be put on and the Rule against Perpetuities came into being for that purpose.

I will not go into the history of the development of the Perpetuities Rule. Suffice it to say that it was a long time in coming to maturity and developed case by case to its present status of lives in being, plus twenty-one years, plus periods of gestation. Here, then, in a nutshell is the history of land conveyancing and title: first, bondage under feudalism; then uncontrolled freedom; followed by freedom controlled by the Rule against Perpetuities.

If you would like to read a most entertaining and informative article on the development of the Rule against Perpetuities, see the paper by Frank H. Detweiler of the New York Bar, entitled, "The Owner's Control over Property Use and Disposition after His Death." Mr. Detweiler's paper was presented at one of the conferences celebrating the fiftieth anniversary of the founding of the University of Chicago Law School. It was published in pamphlet form by the University of Chicago Law School along with other papers on other topics presented at that conference. That's where I got my information.

It seems to me the Rule against Perpetuities furnishes a moral for our problem. If a restraint on the freedom of alienability of land has been imposed for centuries by the development of the Rule against Perpetuities, how come that reverter interests and

restrictive covenants and conditions as to the use of land have escaped any restraining influences? If it was deemed wise hundreds of years ago to restrain owners in alienating their land to a limited period of time by the Rule against Perpetuities, might it not be wise to impose some such reasonable restraint in the creation of reverters and restrictive covenants and conditions? Had some such restraint similar to the Rule against Perpetuities been applied centuries ago to reverter interests and restrictive covenants and conditions, we would not now be confronted with the problem of stale reverters and stale restrictive covenants and conditions.

Now, a quick look at reverter interests and how they operate, followed by some examples of restrictive covenants. If we are to devise some control over these interests or rights we should know something about them.

An article in 53 A. L. R. 2d - page 224 on Reverters or Re-Entry points out there are two sorts of conveyances: in one class there is a fee simple so limited that the grantee's interest will at once terminate on the happening of an indicated event, not certain to occur, causing title to automatically revert. An example is a conveyance to A to have and to hold so long as the property shall be used for a specified purpose, and if not used for that purpose, title shall revert to the grantor. The key words here are the words "so long as." This sort of a conveyance creates in the grantee a determinable fee. Why? Because this fee simple title may continue forever and yet it may terminate immediately upon discontinuance of the designated use. The contingency here is not a condition; it is part of the limitation.

Restatement of Property at Section 44 tells us that a fee simple determinable is created by any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that the estate shall automatically expire upon the occurrence of an indicated event.

So the above example—conveyance to A so long as the property is used for a certain purpose falls into what I have designated as Class I, being the automatic reverter class. This fee title can go on forever or it can terminate at any moment. Title can revert today or 10,000 years from today, depending upon when the event occurs. In this type of conveyance the grantor has retained a possibility of reverter; i.e., the possibility of an automatic return of the title to himself or heirs today, tomorrow, next week, next year or 10,000 years from today without anything to be done on his part. In this type of conveyance the grantee has a determinable fee and the grantor has a possibility of reverter.

In Class II there is a fee simple in terms imposing conditions subsequent. An example would be a deed to a village for use as a town hall, waterworks, etc., conditioned on such use of the property with a provision for forfeiture of title in case of breach. Here the grantee takes a fee simple subject to condition subsequent. The grantor retains what is commonly called a right of re-entry. This is something which he must exert. It doesn't happen automatically. If, after the violation, he acts in a timely manner and takes affirmative action, he may terminate the grantee's estate and re-invest the title in himself.

Restatement of Property, Section 160, aptly calls this "a power of termination." The grantor by his action and because of breach may re-enter; so in effect he has the power to terminate the grantee's estate; hence, his right of re-entry is a power of termination, while the grantee has a fee simple subject to condition subsequent.

It is a simple matter to mention and analyze the above two types of conveyances. It is quite a different matter and many times most difficult to determine into which class a particular instrument falls. Instruments of the two sorts are sometimes very similar in their language, but the construction of the instrument as falling into one class or the other determines both the nature of the grantee's estate (fee simple determinable or fee simple subject to condition subsequent) and the nature of the interest or right left in or retained by the grantor (possibility of reverter or right of re-entry—otherwise known as a power of termination). While the two types of reverter interests or rights are similar in that they both may come into play, either immediately or at any time in the future without restriction, each is a completely different kind of estate or right. The Class I automatic reverter defined as a possibility of reverter is a reversionary interest because it is something which the instrument leaves in the grantor, hence it is a future interest left in the grantor. The Class II reverter is just the opposite. It is not a reversionary interest. It is not something left in the grantor. It is a right to re-enter—hence a power of termination. It is a contingent right of re-entry and is not an interest in the premises. These distinctions become of importance if you recall that the bill submitted to our 1957 Legislature related to "rights of entry or re-entry for breach of condition subsequent and possibilities of reverter." It is obvious the proposed bill was appropriately designed to cover both types.

Now for some examples:

I presume all of you at some time have been confronted with bothersome restrictive covenants or with reverter provisions and know what a headache they can be. Here is one I picked up in an abstract a short time ago:

The grantee herein as part of the consideration hereof does hereby agree not to build any wooden fences or any outbuildings, or sheds, or any such buildings of other material upon the above described premises or any portion thereof, without the consent of the parties owning the adjoining lots, and such consent must be first filed with the grantor herein or its assigns.

This provision appeared in a deed from a now extinct corporation to an individual, dated and recorded in 1909, almost fifty years ago. The restrictions are not too bad, yet you will notice they run forever, so we know that the present and future ownership of that lot is restricted. As an owner today—fifty years later—you cannot build a fence, a garage, a child's playhouse or any kind of an outbuilding if your adjoining neighbors refuse permission.

Here is one sent to me by one of my outstate attorney friends involving property which the purchaser would like to use for business purposes:

It is agreed by the parties hereto for themselves, their heirs, assigns, successors and legal representatives, that intoxicating liquors shall never be manufactured, sold or otherwise disposed of, or as a beverage in any place of public resort in or upon said premises, or any building or structure thereon be used or occupied as or for gaming or gambling house or as a place to which persons are permitted to resort for the purpose of gambling nor shall said premises or any structure thereon ever be occupied or used as or for a house of ill-fame or a place to which persons are allowed or permitted to resort for the purpose of prostitution or lewdness, nor shall any business house on said premises be opened on the first day of the week.

It goes on:

If any of the above restrictions are broken by the grantees, assigns, successors or legal representatives, then this deed shall become null and void and all right, title and interest of, in and to said premises hereby conveyed shall revert to the grantor, Jane Doe, her heirs, legal representatives or assigns.

The deed containing this recital has been of record for more than forty years, and again you will notice there is no time limitation, so this title remains clogged and cluttered and forever is subject to being defeated in event of violation of any of the restrictions. Practically, there is no problem with respect to the liquor, gambling, or house of ill-fame provisions. The property is now appropriately located for business purposes and the restriction against opening for business on Sundays is of vital importance, yet they dare not open on that day.

If my memory serves me correctly, there is a town in Burt County where the man who owned and laid out the townsite included in the deed to each lot in the town a restriction against the use of intoxicating liquor, with no limitation as to time, and specified a reversion of title for violation. So far as I know that restriction still is being enforced with respect to every lot in the town. No one wishes to pioneer the testing of it.

Professor Simes in his article previously referred to mentioned a condition subsequent imposed many years ago on a lot in the Beacon Hill district in Boston which restricted the height of any buildings to thirteen feet. The restriction was originally imposed so that an owner of land on the opposite side of the street could keep his cattle in view while they grazed on the Boston Common.

Some of you may recall a case in Lancaster County where a restriction limited the use of an entire addition to residential and church purposes—again with no time limitation. To the extent that lots had been sold, there had been full compliance with the restriction. The addition consisted of homes and a church. As the city grew and expanded, the surrounding territory became more business and commercial than residential. The church ultimately decided to sell and move to a different location. A group interested in little theater work wished to buy the church building as it was adaptable and could easily be converted into a community theater. What happened? The transaction was stymied because of the use restriction limiting the tract to residential and church purposes only and not permitting theaters.

Law books and abstracts are full of examples where the restrictions on use have become completely obsolete and are a deterrent in connection with the sale of property. Yet we go merrily on our way creating more and more of them according to the particular whims and desires of the respective grantors and without limitation as to time, knowing full well that someday they, in turn, may become outmoded and inappropriate to thus create more clogs and burdens upon the ownership and marketability

of real estate titles. Should the law permit this to go on and on without exerting any controls, and if not, what is the remedy?

In the absence of legislation the only legal remedy is a suit in equity based upon the doctrine that a change in the character of the neighborhood warrants a decree eliminating the clogging restrictions. There are two or three drawbacks to this procedure. Such a suit takes time and in most real estate transactions the parties do not wish to be delayed. Such a suit also costs money, and on top of that there is no assurance the court will agree that the character of the neighborhood has changed sufficiently to justify a cancellation of the restriction. Of course, you can attempt to buy a cancellation from all interested parties, but many times this is impractical, particularly if a long period of time has elapsed and it is a matter of tracing heirs.

In the above-mentioned Lancaster County church case you would have needed a release from the owners of every lot in the addition. I might report they solved their problem in that case by a suit in equity which joined all owners in the addition. The court granted the requested decree but the litigation was expensive and took time.

While the courts have been rather lenient in cancelling stale restrictions, there is a question whether the same doctrine will apply to a possibility of reverter or a right of re-entry. Professor Simes tells us California has applied the doctrine in the case of a right of re-entry. Remember, a right of entry is not an interest in the real estate as is the possibility of reverter. He likewise tells us there is dictum in a Missouri case which is similar to California, and an article in 54 *Harvard Law Review* 248 which presents a strong case for the application of the doctrine both as to possibilities of reverter and rights of entry. I gather, however, that Professor Simes has not been persuaded. He mentions that so far as he knows, no court has applied the doctrine to both interests or rights, and he thinks the probability of any court, other than California, so holding is not very great. So in the absence of legislation we have the remedy of a suit in equity to dispose of restrictions but a question as to whether that doctrine will extend to reverter rights.

Legislation seems to be the appropriate remedy. Even here, however, there are problems as to what kind of legislation should be enacted. Generally these statutes may be divided into three groups according to their type:

Arizona, Michigan, Minnesota and Wisconsin have statutes which are practically identical and which follow what is called

the substantial benefit approach. These are old statutes, the youngest, Arizona, dated 1913. They undertake to eliminate conditions annexed to a grant or conveyance of land which are merely nominal and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed. Under these statutes it is provided that such conditions may be wholly disregarded, and a failure to perform same shall in no case operate as a forfeiture of title. This is a great improvement over nothing, but there is a serious objection to this form of statute in that it is a fact question whether a condition is merely nominal and confers no substantial benefit, which means there is no conclusive way to determine the question other than to submit it to a court. Again, time, expense and delay.

In a Michigan case under their statute the condition was similar to our Burt County situation—liquor could not be sold on the premises. After breach had occurred plaintiff sought to evict the defendant but lost because the record did not show that plaintiff had any other land in the vicinity or that he had any special interest in enforcing the condition. In a re-trial, however, plaintiff showed that he had a special interest and was allowed to recover. So we see that the substantial benefit statutory approach leads to lawsuits.

Minnesota amended its statute in 1937 and improved it by having it apply to conditions which “are or *shall become* merely nominal” and by extending it to specifically cover not only conditions but “all covenants, conditions or restrictions” and by including, in addition to the substantial benefit approach, a thirty-year limitation period. This takes us to the next classification, which is the fixed period of duration approach.

Connecticut, Illinois, Maine, Massachusetts and Rhode Island have statutes which are alike in setting time limits for the duration of possibilities of reverter and rights of entry. With the exception of Illinois, these statutes are designed to operate prospectively and apply to interests thereafter created. Illinois differs from all others in groups 1 and 2, in that Illinois applies the time limit to interests or rights already in existence, as well as those thereafter created. In other words, the Illinois statute is designed to operate both prospectively and retroactively. This, of course, raises a constitutional question, but there is no problem so far as Illinois is concerned, as the Illinois court in 1956 in the case of *Trustee of Schools v. Batdorf*, 6 Ill. 2d 486, 130 N.E. 2d 111 held their Reverter Act to be constitutional. The explanation seems to be that Illinois has a line of cases defining reverter interests and rights as being future interests which are incapable of aliena-



tion and which are expectancies only, until breach has occurred. Being merely expectancies under Illinois law, the Illinois court held they were subject to change, modification or abolition by legislative action, and therefore the Reverter Act was not an unconstitutional taking of property.

Query: Do other courts have a similar background of cases characterizing reverters as mere expectancies incapable of alienation, hence something less than property rights?

Second Query: Is there adequate pressure being built up to solve the problems created by stale restrictions and reverters unlimited as to time, so that other courts will follow the Illinois pattern of upholding both the retroactive and prospective application of such statutes?

A third type is demonstrated by the Florida statute enacted in 1951. The Florida statute abolished all reverter or forfeiture provisions of unlimited duration embodied in any plat or deed executed more than twenty-one years prior to the passage of the Act. This was a retroactive provision. It then went on to accomplish many other things such as fixing a time limit for the operation of newly created interests (prospective operation), allowing the enforcement of restrictions as covenants if substantial interest could be shown and, *mark this, gave* the holder of a possibility of reverter one year from its effective date *to institute suit to establish or enforce such right*. The Florida court held the Act unconstitutional because of this latter clause which cut off the right in one year unless suit was brought to enforce it. The court said the saving provision would not afford a remedy in situations where no breach had occurred to actuate the enforcement of the right of reverter.

This leaves Illinois standing alone with the only retroactive act in this field which has been upheld by its highest court. The Illinois court appeared to be impressed with the same reasoning which is found in the decisions of other courts to the effect that titles are impaired by stale conditions, restrictions and reverters which affect marketability and that it is proper for legislatures to require those owning interests in old conditions and restrictions which burden title, to be required to give some record notice of the continued existence of such rights or suffer them to be extinguished as the Illinois court commented as follows:

It has been said that the Reverter Act was passed in recognition of the operation of possibilities of reverter as "clogs on title, withdrawing property thus encumbered from the commercial mortgage market long after the individual, social or

economic reason for their creation had ceased, and at a time when the heirs from whom a release could be obtained would be so numerous as to be virtually impossible to locate."

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The statute reflects the General Assembly's appraisal of the economic significance of these interests weighed against the inconvenience and expense caused by their continued existence for unlimited periods of time without regard to altered circumstances.

It seems to follow that those who have such statutes are pleased with them.

In summing up, I believe there are a couple of conclusions which must be obvious to all of us:

*First*, allowing conditions, restrictions, limitations, etc., as well as rights of entry and possibilities of reverter to run wild without some time-control is a mistake. Just as the Rule against Perpetuities had to come into play to curtail unbridled freedom with respect to alienability of land titles, so must there come into play some limiting rule to rid us of and prevent the further creation of what ultimately will become stale and obsolete restrictions and reverters to further clog and fetter our titles; and, *second*, the only satisfactory solution lies in well-drawn legislation.

The article by Professor Simes gives some valuable pointers as to what is appropriate legislation and points out that all these matters should not be lumped together in one cure-all act, that possibility of reverter and right of re-entry cases require a different approach from the restriction of use cases and should be treated separately. It would appear the introducers of the proposed Nebraska legislation were on the right track in directing their proposed act to reverter and re-entry cases only.

I hope all of you will give some thought to this problem, and having thought about it will conclude, when the time comes, that you should speak out in favor of the passage of appropriate legislation.

CHAIRMAN RICHARDS: A very fine paper, John. It will appear in the *Nebraska Law Review*.

Does everyone have a ballot now to vote for two members of our Executive Committee for this coming year?

We are sorry to say that Lynn Heth, one of the members of our Executive Committee, is not here today. He is seriously ill. We hope for his recovery. His term on the Executive Committee expires this year.

George Farman, also a member of our Executive Committee, goes out this year, so we are losing two very fine men.

Our Section this year has developed a system of committees. We have divided the Section into three division heads—the real estate, probate, and trust—and they in turn have created thirteen subcommittee chairmen who have fifty-nine committee members. This committee setup has worked hard throughout the year and I think has done a fine job.

If you will please look at your ballot, for the purpose of aiding you as to the location of these nominees I will refresh your memory by calling to your attention the fact that Paul Chaney who is a nominee hails from Falls City; James Lane is from Ogallala; Franklin Pierce from Grand Island; John Powers of Ogallala; Albert T. Reddish, Alliance; and George A. Skultety, Fairbury. Please mark your ballots and the tellers will take them up in a few minutes. They can count the ballots and we will have the outcome before the termination of our meeting.

It is a distinct pleasure to introduce to you at this time Herman Ginsburg who is going to be the moderator of our next fine panel. Herman was chairman of our Section for the last two years. He is outstanding in all fields of legal endeavors, but I feel he is par excellence when it comes to the matters covered by our Section on Real Estate, Probate, and Trust.

I am going to turn the program over to you, Herman, to announce and pronounce and carry on the panel.

**MODERATOR HERMAN GINSBURG:** As always we are running short of time, so I won't delay the presentation of the members of the panel who are going to speak. You will notice that I am simply serving as moderator. I have the easy job.

They say that the best way to learn anything in the law business is to have somebody beat you in a lawsuit. And that is where I learned about government liens from Dick Peck, the first member of our panel who is going to talk to you.

Before calling on Dick I want to say this: I think that I am speaking for every member who practices real estate law when I say that this matter of federal tax liens has become more and more worrisome. It shows up in more and more abstracts, and the government is involved in more and more of our foreclosures. It is interesting to observe that so many of us do not know what we have to do in order to get rid of the government, nor do we know just how far the government can go in getting rid of us.

I think we are extremely fortunate in having with us today Richard C. Peck who has made a study of this subject and who, I am sure, will give you a wonderful explanation. Mr. Peck.

**FEDERAL TAX LIENS—THEIR REMOVAL OR FORECLOSURE,  
PRIORITY THEREOF, AND THE PROBLEM OF  
CIRCUIITY OF PRIORITIES**

**Richard C. Peck, Esq.**

Thank you very much, Herman. I have a feeling that you may be more optimistic than you should be about what we will learn in the course of this discussion this afternoon.

What Herman says about getting beat in a lawsuit is partially true. He did all right in that particular case himself.

I want you to understand that I do not appear with this panel under any claim of being the last word as an expert on the subject of federal tax liens, yet I am glad to share with you some experience which I have had from the standpoint of the government's position in litigation involving such liens. I will attempt as best I can to deal with this subject in a manner designed to bring the discussion into the greatest practical application possible; but first it becomes necessary to lay some foundation by making a brief examination of the nature of this thing known as the federal tax lien.

**LIMITATION OF THE DISCUSSION**

Since the legal aspects of federal revenue liens and their priority are so numerous, we must at the outset define some limits to the scope of our deliberations here. To this end a generalization can be made that there are three principal factual situations or categories which call for the application of differing federal statutes concerning priority of tax liens.

First, there is the situation of an insolvent or deceased taxpayer, or an act of bankruptcy of the taxpayer has been committed but no bankruptcy proceeding has been instituted. In these situations the applicable statute is not found as a part of the Internal Revenue Code, but is rather a part of the Chapter of the Revised Statutes entitled "Debts due by, or to, the United States." The cases frequently refer to this statute as "Section 3466" and it appears in 31 USCA 191. Time will not permit any extended discussion of the ramifications of this "priority statute." It will only be observed here that by its terms, in the situations named, debts due the United States, and this includes unpaid taxes, shall first be satisfied in preference to *all* other debts. As to the success of the federal government in maintaining priority under Section 3466, the cases of *U. S. v. Gilbert Associates*, 345 U. S. 361, and *U. S. v. Texas*, 314 U. S. 480, would bear your examination.

Secondly, there is the situation of the taxpayer who is involved in proceedings taken under the various chapters of the Bankruptcy Act. In this situation the applicable statutes for determination of priority to be accorded federal tax liens are found in the Bankruptcy Act itself. Again, time does not permit exploration of the incidents of priority provided for by these statutes. It will be observed, however, that in an ordinary bankruptcy proceeding, it has been held that the Act does not give the federal tax lien priority over other valid liens (see *United States Fidelity and Guaranty Co. v. Sweeney*, 80 F2d 235); but in special bankruptcy proceedings, while existing liens are not to be disturbed, provision must be made for payment of federal taxes before confirmation of any reorganization plan can be obtained. Thus as a practical matter, in special proceedings, the federal tax lien is in a position to exercise great leverage to require its payment.

The third situation is the more typical one and represents the cases most frequently encountered by the lawyer engaged in real estate practice. It does not concern death or insolvency of the taxpayer or any proceedings under the Bankruptcy Act. It involves the existence of unpaid federal taxes, the general lien resulting therefor, and the priority accorded that lien when in competition with private liens whose existence is dependent upon state law. It is to this situation that this discussion is directed; and in this connection it must be noted that time does not permit any consideration of problems incident to the special liens for estate and gift taxes created by 26 USCA 6324.

### THE GENERAL LIEN STATUTES

The statutes commonly referred to as the "General Lien Provisions" are Sections 6321, 6322 and 6323 of Title 26, United States Code. These sections replace Sections 3670, 3671 and 3672 of the 1939 Code and this replacement must be so understood when considering the controlling case law.

Section 6321 creates the general lien for unpaid federal taxes in the following language:

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person \* \* \*

It will be noted that the lien is for *any* unpaid taxes and that it is impressed upon *all* property and rights to property, real or personal, belonging to the taxpayer. Since we are here assembled as a Real Estate Section we will confine the discussion to the operation of the lien upon real property only.

Section 6322 provides that the duration of the lien, unless otherwise fixed by law, shall be from the time assessment is made and continuing until the liability is satisfied or becomes unenforceable by reason of lapse of time. In most instances this period of limitation is six years from the date of assessment of the tax, but this time limit may be extended by consent or by other circumstances which may not appear of record. Since the lien arises at the time of assessment of the tax, a mere administrative act upon the part of the Internal Revenue Service, it is obvious that the lien is a secret one. It remains so until the veil of secrecy is lifted by the local Director of Internal Revenue when he causes a Notice of Lien to be recorded. This period of secrecy can be of some concern to a practitioner who must advise his clients with respect to property rights which may be subject to existing federal tax liens but which are unknown to him and about which he can learn nothing until the recording of the Notice of Lien actually occurs. The force of this observation will be amply illustrated subsequently in our consideration of mechanics' liens and the fate to which they have been relegated by the United States Supreme Court.

The next statute to be noted is Section 6323. It provides in relevant part as follows:

(a) \* \* \* the lien imposed by Section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the secretary or his delegate \* \* \*.

(1) \* \* \* in the office designated by the law of the state or territory in which the property subject to the lien is situated \* \* \*.

We can summarize, then, as follows: The lien for unpaid federal taxes is provided by Section 6321. By Section 6322, it commences at the time assessment is made and continues until paid or it becomes unenforceable by reason of lapse of time. By Section 6323, the lien is not valid against a mortgagee, pledgee, purchaser or judgment creditor until Notice of Lien is filed in the office of the register of deeds of the county in which the property subject to the lien is situated.

## FORECLOSURE—PROCEDURE AND PRIORITY

Now let us consider a practical example. Suppose the taxpayer *A* owns a house worth \$20,000. *B* holds a real estate mortgage recorded January 2, 1957, upon which there is due \$15,000 and *A* has defaulted in his payments under circumstances permitting the mortgagee to declare the entire balance of the debt due. *C* is a judgment creditor of *A* having obtained a judgment in the district court of the county on February 2, 1957, in the amount of \$2,500. *D* has a mechanic's lien in the sum of \$2,500 which he recorded January 30, 1957, for materials furnished in improving the property commencing September 1, 1956, and ending December 1, 1956. In addition, on March 1, 1957, a Notice of Lien is filed by the Director of Internal Revenue for unpaid taxes owing by *A* in the amount of \$1,500 which were assessed on January 15, 1957. *B* wants to bring proceedings to foreclose his mortgage. How shall he proceed and what are the priorities to be accorded these liens? First, we will consider the procedural problems.

Since the claim for unpaid taxes and the resulting lien belongs to the United States, the plaintiff mortgagee, in order to sue the United States, must bring himself clearly within the provisions of a federal statute which authorizes such a suit. There are two such consent statutes.

One is 26 USCA 7424, but the procedure there provided is so slow and cumbersome that it is rarely used. It is hard to imagine a situation where this statute could be of use to you and we will accordingly waste no further time with it except to mention its existence.

The other consent statute is 28 USCA 2410. By the provisions of this section the consent of the United States is given to be named a party defendant in any suit instituted in federal or state court for the purpose of quieting title or for the foreclosure of a mortgage or any other lien where the United States claims a lien upon the property involved.

The Director of Internal Revenue is not a proper party defendant and if he is so named it will only result in appropriate steps being taken to secure dismissal of the case as to him. The net result will be the waste of time and effort on the part of everyone concerned.

If I may digress here, believe me, too often that mistake is made, making the Director of Internal Revenue as a proper party defendant, and I can assure you it will result in a great deal of loss for you, backing up and starting all over again.

This statute prescribes the procedure for service of process and its provisions must be strictly complied with as a condition of consent to be sued. Summons and a copy of the petition must be served upon the United States Attorney and copies of the summons and petition must be sent by *registered mail* to the Attorney General at Washington, D. C.—certified mail is not sufficient to meet the jurisdictional requirement of the statute.

The petition must set forth with *particularity* the lien of the United States attaching to the property. This requirement is also jurisdictional and failure to meet it by proper allegations will only result in more delay to the plaintiff. It is not enough to merely allege that the United States claims a lien for taxes. The safest course to follow is to set forth the lien number as shown on the Notice of Lien of record in the register of deeds office, the date, book and page number of its filing, the amount and nature of taxes, and date of assessment specified in the Notice of Lien. If no Notice of Lien is of record, there is no consent to be sued afforded by this statute and nothing will be accomplished by attempting to name the United States as a party defendant with a general allegation that the government may claim some interest in the property by reason of a possible lien for unpaid taxes.

The statute grants the United States sixty days from date service is completed to appear, answer or otherwise plead. Many clerks of state district courts do not know this and must, therefore, be instructed as to the proper answer day to be fixed in the summons. Where error in this respect occurs we have ordinarily solved the problem by stipulation with counsel, but where counsel refuses to respond to a request for such a stipulation, the remedy must be the filing of a pleading attacking the sufficiency of service.

Strange as it may seem, I have had several counsel out-state<sup>o</sup> who have refused to stipulate for that sixty days' time, so we make them back up and start all over again.

If the plaintiff properly initiates his action pursuant to the provisions of the consent statute, the United States Attorney's office will file responsive pleading and generally will make cross-petition for foreclosure of the tax lien. The case then comes to issue for disposition by trial, or as is more often the case, entry of decree either by consent or upon a stipulation of facts.

So in our hypothetical case let us assume that B, the mortgagee, has filed his petition for foreclosure in state district court, it is properly brought pursuant to the consent statute, all parties in interest have been served and have filed answers together with cross-petitions for foreclosure of their respective liens. We come



now to the problem of determination of the priority to be accorded all liens and particularly the priority to be accorded the federal tax lien.

At first blush it might appear that the federal lien can attach only to the equity which the taxpayer possessed at the time of creation of the lien, whatever that equity is pursuant to the laws of the state jurisdiction, and that any lien existent under state law should hold the priority accorded it by the local law. However, the Supreme Court has consistently rejected any concept which would permit state law to interfere with the consequences of attachment of the tax lien or to effect the determination of the priority of that lien when in competition with private liens. This position is succinctly stated in the case of *United States v. Acri*, 348 U. S. 211 in this language:

The relative priority of the lien of the United States for unpaid taxes is \* \* \* *always a federal question to be determined finally by the Federal Courts.* The state's characterization of its liens, while good for all state purposes, does not necessarily bind this court. [Emphasis supplied]

By this and many other decisions the rule is firmly established that the determination of the priority to be accorded the federal tax lien is a federal question to be resolved pursuant to federal law. The net result is that to be capable of interfering with the federal lien, competing private liens must have some federal basis.

When the contest is between the federal lien and those liens mentioned in 26 USCA 6323, no particular problem is presented. The provisions of that section, which we have previously noted, declare that the federal tax lien shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice of the lien has been filed in the office of the register of deeds of the county in which the property is situated. Therefore, in all of these instances the date of filing is controlling and the rule to be applied is "first in time, prior in right."

But with respect to all other types of liens, the determination of priority of the federal tax lien has been a source of repeated litigation. The reported decisions involving myriad types of private liens and their consistent defeat in contest for priority with the tax lien will not be catalogued here, but we will move immediately to consideration of the question as to what has happened to mechanics' liens in this struggle for supremacy.

The answer is found in the case of *United States v. White Bear Brewing Company*, 350 U.S. 1010. The facts in this case are re-

ported in the opinion of the Court of Appeals for the 7th Circuit at 227 F.2d 359. Simply stated they are as follows: The mechanics' lienholder had furnished labor and materials, filed his lien of record and instituted his suit to foreclose the lien all before the federal taxes were assessed and before Notice of Liens were filed. After Notice of Liens were filed the mechanic's lienholder obtained decree of foreclosure, sale of the property was held and two subsequent transfers by deed were recorded. The United States then filed an action to foreclose the tax liens. The trial court and the Court of Appeals denied relief to the government by sustaining defendant's motion to dismiss, held that the mechanic's lienholder had done all that could be done to perfect his lien, thus he held priority over the tax lien, and the sale on foreclosure of the mechanic's lien effectively cut off the government's interest.

But the Supreme Court by per curiam order summarily reversed and the full import of this action is clearly stated by Justice Douglas in a dissenting opinion which he filed, using this language:

The Court apparently holds that under 26 USC 3670 a lien that is specific and choate under State law, no matter how diligently enforced, can never prevail against a subsequent Federal tax lien, short of reducing the lien to final judgment.

That the Court meant exactly that seems clear from its like decisions made in like manner in the case of *United States v. Colotta*, 350 U.S. 808 and *United States v. Vorrieter*, 355 U.S. 15. It seems beyond dispute, then, that a mechanic's lien is always, under federal law, junior to a federal tax lien unless the mechanic's lien has first been reduced to judgment.

Now let us return to the hypothetical case and by application of these rules determine what problems, if any, confront us. Under Section 6323 we have no problem with B's mortgage for \$15,000 recorded January 2, 1957, or with C's judgment for \$2,500 dated February 2, 1957, or with the federal tax lien for \$1,500, notice of which was filed on March 1, 1957. These priorities are in that order determined by their filing dates.

But D's mechanic's lien was filed January 30, 1957, and attaches as of September 1, 1956, the date of furnishing the first material. Under Nebraska law D's lien is prior to that of B, the mortgagee, and also prior to that of C, the judgment creditor; but the federal law does not permit him to enjoy a like priority over the tax lien. Under federal law the mechanic's lien is junior to the tax lien while the mortgage lien and judgment lien are prior to the tax lien; but at the same time the state law grants to the

mechanics' lien a priority over the mortgage and the judgment. All liens total \$21,500 and the property will bring only \$20,000 at sale. So we come face to face with the dilemma of a circuity of priorities created by the application of differing rules of law. In this situation how shall distribution of sale proceeds be made?

### SOLUTION TO THE CIRCUITY OF PRIORITIES

Several solutions other than that which will be discussed here have been presented by various text writers and authors of law review articles. However, they are not supported by recent judicial determinations. On the basis of the reported decisions the position taken by the government is this, as related to our hypothetical case:

From the proceeds of the foreclosure sale, which we assume to be \$20,000, there should be set aside the following: \$15,000 due *B* on his mortgage lien, \$2,500 due *C* on his judgment lien, or a total of \$17,500 for payment of liens recognized by the federal law as being prior to the tax lien. From proceeds then remaining there should be ordered paid the tax lien in the sum of \$1,500. This will leave a balance of \$1,000 which should then be added to the sum of \$17,500 already set aside and makes a total of \$18,500.

From the \$18,500, distribution is then to be made to the private lienholders in the order of priority created by the applicable state law. In our example this means that *D*'s mechanic's lien in the sum of \$2,500 shall first be paid; then *B*'s mortgage lien in the sum of \$15,000, and the remaining \$1,000 shall be paid to *C* upon his judgment lien. Of course it will be recognized that for convenience in computations we have in our example ignored court costs. In an actual situation these are to be paid first out of the total proceeds of sale.

This solution finds judicial sanction in the following cases: *United States v. Lord, et al.*, 155 F. Supp. 105; *Samms v. Chicago Title and Trust Co., et al.*, (Ill.) 111 N.E. 2d 172, *Brown v. General Laundry Service, Inc.*, (Conn.) 133 A2d 601, which is the order of distribution entered on remand of the case of *United States v. New Britain*, 347 U.S. 81, and *Southern Ohio Savings' Bank & Trust Co. v. Bolce*, (Ohio) 135 N.E.2d 382.

The judgment creditor in our example will find small comfort in this solution, but probably the only appropriate answer to him is that given by the courts in the *Lord* case and the *Samms* case, cited *supra*, where it is said: "This is the inevitable result of the application of the Act of Congress and of the state law."

## STATUTORY DISCHARGE

A discussion of the practical aspects of enforcement of federal tax liens is incomplete unless some reference is made to the statutory procedure for discharge of these liens without necessity of suit. Authority for full or partial discharge appears in 26 USCA 6325 (b). Of particular interest is the provision for discharge where it can be shown that the interest of the United States in the property involved is valueless—in other words, where payment of prior liens will exhaust the fair market value of the property.

Application for discharge is made in letter form addressed to the local Director of Internal Revenue setting forth the facts upon which discharge is requested. The Director has a prepared outline of items necessary to include in such an application which he will send upon request. It will simplify and expedite the procedure if this outline is followed. In response to such an application the Director will cause an inspection to be made and if it clearly appears that the interest of the United States is valueless, a discharge will be issued.

Some attorneys have been hesitant in using this procedure, fearing that it will only occasion untimely delay capped with ultimate denial of the application. This might well be true where the question of value is a close one, but in those cases where the facts are clear, discharges can be obtained within thirty to sixty days' time from the date of application. This is actually no longer than the time given the United States to file answer in the foreclosure suit and it would seem, therefore, that the procedure should be utilized in appropriate cases. Needless to say, we in the United States Attorney's office would encourage attorneys to avail themselves of this statute.

One other point in this regard should be observed. A discharge made under this section is conclusive to extinguish the lien upon the property involved. A foreclosure proceeding brought pursuant to 28 USCA 2410 does not so effectively extinguish the government's interest at foreclosure sale as might be supposed. Appearing in subsection (c) of that section is this provision:

Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem.

It appears that there is no statutory authority for a release of this right of redemption.

## CERTIFICATE OF NONATTACHMENT

One other situation often arises. A tax lien is filed against John Smith. Another taxpayer with the same name who owes no taxes holds title to property which becomes the subject of foreclosure proceedings or transfer. To remove the cloud of this lien an application in affidavit form can be made to the local Director who, upon being satisfied as to its accuracy, will issue what is known as a "Certificate of Nonattachment." This certificate is not authorized by the Code, but is available to cure a practical and oft-repeated problem. Its use can save the practitioner from the needless task of naming the United States as a defendant in a foreclosure action where this situation exists.

## CONCLUSION

By way of conclusion I wish you to know that I have enjoyed preparing and presenting this discussion to you. It has been done with the desire that some practical value may have been incorporated in it for you who are engaged in the day-to-day problems of real property practice; and it is hoped that at least some such success has been attained.

MODERATOR GINSBURG: I think I can truthfully say for all of us that we really have learned something from that paper.

By way of emphasizing what Mr. Peck has said, you want to watch out because it can very well happen that B, who has what he thinks is a first mortgage and that all he has to do is pay off the prior mechanic's lien, may find that he doesn't even collect his mortgage debt in full. So it is something that is of vital importance to all of us.

We have one other member of our Section who has always been very active in doing work for the Section and I knew I could call on him to help us in development of our program today. Al Reddish is always ready to be imposed on. I did impose on him and asked him to present for your consideration some problems arising out of open-end mortgages and priority problems in connection with open-end mortgages. Mr. Al Reddish.

## OPEN-END MORTGAGES AND PRIORITIES IN NEBRASKA

Albert T. Reddish, Esq.

Thank you, Herman. It is a great relief to me to have you on the platform so that if I get myself in any holes I know that you can get me out of them.

The topic assigned to me is Open-End Mortgages, Installation of Fixtures, and Mechanic's Lien Priorities in relation thereto.

The subjects assigned for this paper are so broad that time permits hitting only a few of the high spots. As excellent general discussions appear in 19 Legal Bulletin, United States Savings and Loan League, 73 and in 65 Harvard Law Review 478, I will restrict my discussion primarily to the Nebraska situation.

The construction boom, coupled with the competition of modern finance, has popularized the "open-end" mortgage. This device traditionally goes under the more formal title of a mortgage to secure future advances.

Three major types of future advance include: (1) where the mortgage obligates the lender to make certain advances, such as progress payments under a construction loan; (2) where the mortgagee reserves the right, at its option, to make advances to protect the security, such as payment of delinquent taxes and assessments, and procuring of insurance; (3) where by agreement of the parties the mortgagee may or may not make future advances to the mortgagor.

Held in disrepute is a fourth type, the "dragnet" clause. Here the mortgagee attempts to phrase the mortgage to cover any debt the mortgagor may owe the mortgagee, irrespective of its nature or however created.<sup>1</sup> I will not lend dignity to this type of agreement by further discussion.

Neither will I devote more than passing attention to the obligatory and protection types of future advances. As stated by the Nebraska Court, "Where the mortgagee is legally obligated to make further advances, he may make them, even after notice of the attaching of a junior lien, and his mortgage will be prior thereto as to such later advances."<sup>2</sup>

Optional future advance mortgages, however, present innumerable problems and many fine distinctions. Business problems, such as financial risk and business procedure, are outside the scope of this paper.<sup>3</sup> Lawyers frequently approach the legal problems with extreme caution and see great obstacles to successful ap-

<sup>1</sup> First v. Byrne, 238 IA. 1060, 28 NW 2d 509, 172 ALR 1072. Anno. 172 ALR 1079.

<sup>2</sup> Omaha Coal, Coke & Lime Co. v. Suess, 54 Neb 379, 74 NW 620, discussing Henry & Coatsworth Co. v. Fisherick, 37 Neb 207, 55 NW 643.

<sup>3</sup> For discussion, see Mintz, Open-End Mortgages, The Ohio Savings & Loan Record, November, 1954, p. 17.

plication of the open-end mortgage.<sup>4</sup> This attitude has been characterized as "hair-splitting," with the warning that "the lawyer must judicially temper his pursuit of riskless perfection, lest his client end up in a glass jug, safe but sterile."<sup>5</sup>

Despite enthusiasm displayed for the open-end mortgage as part of the modern flexible mortgage contract,<sup>6</sup> its use does require careful study as to legality, language to be employed, application, priorities, notice and attendant problems. Once informed, the lawyer in Nebraska can approach the open-end mortgage problem with confidence.

In 1890 in *Wagner v. Breed*,<sup>7</sup> the Nebraska Supreme Court sustained validity of a mortgage for future advances. The Court subsequently proceeded to explain "that a mortgage to secure future advances is valid between the parties and as to third persons; that if the mortgage on its face states that it is for that purpose, or if it appears to be a mortgage for a sum certain, and the actual debt does not exceed that sum, a junior lienor takes subject thereto for all moneys then advanced or which may be advanced after the junior lien attaches and before the senior mortgagee has notice thereof."<sup>8</sup>

As against the intervening judgment lien, the Nebraska Court in *Omaha Coal, Coke, and Lime Co.* dismissed any question arising from the fact a deed, construed as a mortgage, did not show it was for future advances and did not specify an amount which it secured. As this holding is limited to the precise situation considered, better practice dictates, however, that the mortgage specifically state the intent to secure future optional advances, together with the aggregate amount or upper limit of the advances which may be covered.

Creditors and subsequent purchasers are charged with notice of the open-end mortgage and the possibility of future optional advances by the mortgagee from the time of delivering the mortgage to the register of deeds for recording.<sup>9</sup> The general rule

<sup>4</sup> Lochner, Open-End Mortgages in New York, *The American Banker*, in two parts, Nov. 3, 1954, p. 6; Nov. 4, 1954, p. 7.

<sup>5</sup> Mintz, *supra*.

<sup>6</sup> The Flexible Mortgage Contract (Russell and Prather), 19 *Legal Bulletin*, United States Saving & Loan League, 73.

<sup>7</sup> 29 Neb. 720, 46 NW 286.

<sup>8</sup> *Omaha Coal, Coke & Lime Co. v. Suess*, *supra*, Note 2.

<sup>9</sup> § 76-238, RRS Nebr., 1943; *Henry & Coatsworth Co. v. Fisher*, *supra*, Note 2; *Wagner v. Breed*, *supra*, Note 7; *Omaha Coal, Coke & Lime Co. v. Suess*, *supra*, Note 2.

has been stated that an optional advance is superior to an intervening claim if the mortgagee has no *actual* notice or knowledge of the intervening lien.<sup>10</sup>

Suppose that A gives a mortgage for future advances. Subsequently B becomes a judgment creditor. The mortgagee has no notice of the judgment creditor's lien. Mortgagee thereafter makes an optional advance to A, the mortgagor. Generally the courts have held, and in Nebraska they have held, that the future optional advance is still a prior lien to the intervening judgment creditor.

More properly, the Nebraska rule may be stated that the lien of the advances will take priority unless the mortgagee had "notice" of the intervening lien: "The recording of a junior lien, or the rendition of a judgment against the mortgagor, does not charge the mortgagee with notice of such junior lien."<sup>11</sup> The court here omits use of the expression "actual notice." Query: Would the Nebraska Court apply the "actual notice" rule if the question were directly presented?

Priority will be limited only to the amount stated in the mortgage. In *Wagner v. Breed* the actual indebtedness of the mortgagor to the mortgagee substantially exceeded the \$1,500 limit stated in the instrument. The Court held that as between the parties to it, the mortgage secured the entire indebtedness; but as between the mortgagee and third persons, whose liens were established, the lien of the mortgagee would have priority only to the amount of \$1,500, interest and costs. The instrument need not reflect the present true amount of the indebtedness.

As recording does not charge the mortgagee with notice of the junior lien, examination of the records or extension and re-examination of the abstract of title would not appear to be a necessary prerequisite to making of future advances. Actual practice as to title examination may vary within different localities, as business risks and good will may dictate the practice.<sup>12</sup> Certainly one examining the record would be charged with notice of any instrument on record.<sup>13</sup>

Although federal tax liens are outside the scope of this paper, the lawyer should note the Internal Revenue Service has ruled

<sup>10</sup> The Flexible Mortgage Contract, p. 84, *supra*, Note 6.

<sup>11</sup> Omaha Coal, Coke & Lime Co. v. Suess, *supra*, Note 2; Anno. 138 ALR 566.

<sup>12</sup> See discussion Wisconsin problem, 21 Legal Bulletin, U. S. Savings & Loan League, pp. 46 and 143.

<sup>13</sup> Mulligan v. Snavelly, 117 Neb 765, 223 NW 8.



an advance of money by a mortgagee under an "open-end mortgage" providing for subsequent loans to a mortgagor secured by the original mortgage does not have priority over an intervening recorded federal tax lien.<sup>14</sup> This ruling has been bitterly attacked<sup>15</sup> and does not appear to be in accord with substantive law of states holding on priorities in accord with Nebraska law,<sup>16</sup> and also does not seem to be in accord with the ruling in cases actually presented.

Extra caution may destroy the priority of the earlier recorded open-end mortgage. Where a mortgage recited that it secured optional future advances, but after other liens had attached to the mortgaged property the mortgagee advanced additional sums and took second and third mortgages, it was held the mortgagee was precluded from relying on the open-end mortgage as security for the subsequent loans. The second and third mortgages provided security for the subsequent loans, and were junior incumbrances to the intervening liens.<sup>17</sup>

Bitter controversy and confusion may arise between a mortgagee and the conditional sales vendor of a fixture, such as a furnace. Common adoption of the package mortgage, intended to include improvements to a home and their replacement items, can multiply the problem.<sup>18</sup>

Some package clauses have been so broadly drawn as to attempt to incorporate items attached only by an electric cord, as table lamps, refrigerators, and radios. Confusion has been compounded to the point some mortgagees have filed their instruments on chattel records as well as recorded on real estate records. Even if these mortgagees have bound the mortgagor, there are serious doubts as to the soundness of the practice. Treating certain articles as part of the real estate and concurrently treating them as chattels is patently contradictory. The wise mortgagee will determine what is part of the real estate, take a real estate mortgage and rely on it. Some re-enforce their position by tagging items such as furnaces and hot water heaters with metal

<sup>14</sup> Rev. Rul. 56-41, 1956-1 CB 562.

<sup>15</sup> 22 Legal Bulletin, U. S. Savings & Loan League 111; see also 20 Legal Bulletin 69.

<sup>16</sup> *People's Bank v. U. S.*, 98 FSupp 874, holding mortgage has priority. Reversed on other grounds, 197 F2d 898.

<sup>17</sup> *Garey v. Rufus Willard Co.*, 196 Okla. 421, 165 P2d 344; 2d National Bank of Warren v. Boyle (Ohio) 99 NE 2d 474.

<sup>18</sup> See: *The Flexible Mortgage Contract*, p. 77, *supra*, Note 6; and "The Package Mortgage and Optional Future Advances," 65 Harvard Law Rev. 478.

notices of the package mortgage, thereby providing protection as to notice to a purchaser.

Whether an article annexed to realty has become part thereof is a mixed question of law and fact, and must be determined in each case. The Nebraska court has held that where removal of a fixture will not materially injure premises, the seller thereof retaining title thereto may assert his rights as against a prior mortgagee or vendor of the realty.<sup>19</sup> Where, however, the realty vendor made advancements for the improvements without notice of the conditional character of the sale, he has prevailed over the conditional seller.<sup>20</sup> If properly in issue, conditional vendor may be permitted to remove new equipment replacing old equipment, but rights of the parties on account of the removal of the old equipment would be equitably adjusted.<sup>21</sup> Should the court deny the conditional vendor the right to remove his appliance, courts have held he should be protected to the extent the mortgagee may have been unjustly enriched.<sup>22</sup>

The fact a vendor sold under a conditional sales contract has been reluctantly held in Nebraska not a waiver of the vendor's right to a materialman's lien on the building and land occupied by it.<sup>23</sup>

Much of the law of priorities with regard to mechanic's liens was settled in Nebraska in the involved case of *Henry & Coatsworth Co. v. Bond*. As stated in Headnote 6:

Under the Nebraska statute there are no priorities among liens for material furnished or labor performed, but this rule of equality applies only to those lienors who commenced the furnishing of material, or commenced the performance of labor on the faith of the same estate,—as, if A., B., and C. commence the furnishing of material for an improvement on certain real estate, and afterwards the owner mortgages to D., and thereafter E., F., and G. commence the performance of labor on the improvement, here the liens of A., B., and C. are prior to D.'s mortgage, and prorate among themselves, being of the same class, and attaching to the same estate; while the liens of E., F., and G. would be subject to D.'s mort-

<sup>19</sup> *Swift Lumber & Fuel Co. v. Elwanger*, 127 Neb 740, 256 NW 875; *Omaha Loan & Building Ass'n. v. Bigelow*, 133 Neb 275, 274 NW 574.

<sup>20</sup> *Swift Lumber & Fuel Co. v. Elwanger*, *supra*.

<sup>21</sup> *Omaha Loan & Building Ass'n. v. Bigelow*, *supra*.

<sup>22</sup> *Hurxthal v. Hurxthal*, 45 WVa 584, 32 SE 237.

<sup>23</sup> *Henry & Coatsworth Co. v. Bond*, *supra*, Note 2.

gage, but would prorate among themselves, being of the same class, and attaching to the same estate.

The court there further held the mechanic's lien laws<sup>24</sup> should receive the most liberal construction to give full effect to their provisions; also where there is an interval between furnishing items on an account for material, a mechanic's lien will not attach for the items preceding the hiatus, unless it appears that all items were furnished under one contract; the assignee of a mechanic's lien is subrogated to all the rights of the assignor, and the taking of a mortgage by the assignee will not merge the mechanic's lien in the mortgage unless merger was intended by the parties and justice requires it.

As shown earlier, the mortgagee making advances under an obligatory future advance contract had priority over junior mechanic's lienors, even though the mortgagee had notice of the junior lien. It would seem the mortgagee making optional future advances after the attachment of the junior lien without notice thereof would likewise appear to have priority.<sup>25</sup>

Based upon the language of Sec. 6323, IRC 1954, that the federal tax lien shall not be valid as against any "mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed" as provided by law, the United States Supreme Court has given federal tax liens recorded after filing of mechanics' liens but before the mechanics' liens were reduced to judgment priority over the mechanics' liens.<sup>26</sup> This priority applies, even though it is contrary to established state property rules.<sup>27</sup> This presents the incongruous situation discussed by Mr. Peck that the mechanics' lien may be prior to a mortgage, the mortgage prior to the federal tax lien, and the federal tax lien prior to the mechanics' lien.

The two-year period established for the duration of the mechanics' lien<sup>28</sup> is not merely a statute of limitation, which bars the remedy, but also operates to extinguish the right.<sup>29</sup> The lien statute fixing the duration of the right, the lien becomes void for all purposes as to any person not made a party to an enforce-

<sup>24</sup> §§ 52-101, et seq., RRS, 1943, and RRSupp, 1957.

<sup>25</sup> Omaha Coal, Coke & Lime Co. v. Suess, *supra*, Note 2.

<sup>26</sup> U. S. v. Security Trust and Savings Bank, 340 U.S. 47, 95 LEd 53; Anno. 95 LEd 59.

<sup>27</sup> U. S. v. Vorreiter, 355 U.S. 15, 57-2 USTC (CCH) Para 9956, reversing Sup. Court of Colo., 57-1 USTC (CCH) Para. 9415, 307 P2d 475.

<sup>28</sup> § 52-103 RRS, 1943.

<sup>29</sup> Goodwin v. Cunningham, 54 Neb 11, 74 NW 315, Anno. 139 ALR 903.

ment suit within that time. Assignment of a mechanics' lien to a party not subject to a statute of limitations such as the federal government therefore could not serve to extend the duration of the lien beyond the statutory period.

Properly prepared and planned, the open-end mortgage can provide an economical and simple device for refinancing. The mortgage should be carefully prepared to reflect its security for optional future advances, the limit as to the time and the amount of future advances, and also should provide some method of ascertaining the due date.<sup>30</sup> An affidavit that there are no intervening liens may be required of the mortgagor. The mortgagor should make express written application for the future advance. A formal future advance agreement form should be prepared and signed, with clear statement of any extension of due date; this should be in recordable form, and should be recorded if period of notice or of statute of limitations is approached. The mortgagee should make careful note of anything which might constitute notice of intervening claimants. Title examination would be discretionary with the mortgagee, depending somewhat on the size and practice of the community, and risks of imputation of notice. An intervening incumbrancer may protect his interest by giving actual notice (preferably in writing) to the mortgagee.

The modern mortgage has been hailed as streamlined, self-liquidating, flexible, as a result of "imagination, practical planning and testing in practice."<sup>31</sup> The modern mortgage, however, does not eliminate source of controversy or longstanding conflict over facts. For success, the modern mortgage still requires sound, thoughtful planning.

MODERATOR GINSBURG: Thank you.

There have been some mighty kind things said about me here this afternoon. Of course I am very grateful for them but I don't deserve them. I do deserve a great deal of credit however for being able to corral two such excellent papers as we have had this afternoon. I think they are as fine as anything that has been prepared for this Section and of practical value for many, many years.

My panelists want to get away and I decided that before I let them get away I would invite any questions from the floor, if any of you have questions. This is your chance to fire away

<sup>30</sup> Notice: § 76-239, RRSupp, 1957; Limitations: § 25-202 RRS, 1943.

<sup>31</sup> The Flexible Mortgage Contract, *supra*, Note 6.

at the panelists if you have any questions that you want to bring up at this time.

FRANKLIN L. PIERCE: What is the predicament of delinquent state taxes in this situation of the federal tax lien? Assume you had a 1956 delinquent state tax.

MODERATOR GINSBURG: Mr Peck.

MR. PECK: With reference to local taxes, those taxes which have already become what the court has called choate, in that they have attached to the property will have priority over the federal tax lien. To get down specifically to it, the taxes do not attach to the property at the time of the lien but at the time they become due and payable, which in the case of real estate taxes would be after January 1 of that year. If it is after January 1, 1957, the taxes of 1956 would have priority over a tax lien that was not filed until January 1 of that year.

MODERATOR GINSBURG: Are there any other questions? If not, I will excuse the panelists with the deep thanks of all the members of this Section, and then I will pre-empt five or ten minutes of your time to talk about some of the experiences I have had in connection with legislation that this Section has been interested in and try to get a message across to you.

You all may remember that in 1957 we got a bill through the Legislature, L.B. 197, referring to vacated streets. I am not sure just who drew that statute. I do remember however that as a representative of this Association I lobbied for it and said that we wanted it. We got it through. Then I had it kick me in the face a couple of times, and I would like to submit to you some observations concerning that section.

After one year from the effective date of this Act when (1) all or any part of an adjoining street has been vacated, under the applicable law that the vacated portion reverted to the owners of adjoining property; (2) a deed or deeds executed subsequent to such vacation and covering such platted lot—and covering such platted lot; bear that in mind—have been of record more than ten years; and (3) there has been filed of record no instrument purporting to establish a contrary intent, the deed or deeds to the platted lot, without describing the vacated streets, shall irrevocably be deemed to constitute a conveyance of the platted lot together with the reverted portion.

I submit to you two questions. I had this problem come up. We had a lot that was 140 feet east and west. It was bounded on the east by an alley which had been vacated. The owner of

the lot conveyed the west 90 feet and that went down one chain of title. Then later on he conveyed the east 50 feet.

Now, does that east 50 feet comply with this section of the Act, and could the vacated alley go along with the east 50 feet? As a matter of fact we were in a muddle, if I may say so, because the statute says "convey the platted lot." Well, the east 50 feet is not the platted lot. Secondly, we are now confronted with the situation: What did he convey when he conveyed the east 50 feet? Did he convey seven feet of the alley and 43 feet of the original lot, thereby leaving a seven-foot hiatus? Or did he convey 50 feet of the original platted lot and leave the alley as it was?

I commend that to your attention in the matter of bill drafting.

Then we have another situation with reference to this. You notice it says "deed or deeds have been of record more than ten years"; if you have those then such deeds shall be irrevocably deemed to have conveyed the adjoining property.

Suppose you have deeds of record for twenty or thirty years down to A, for example; and then eight years ago A conveyed the lot without saying anything about the vacated alley. Now you don't have a deed there that has been of record more than ten years. What is the situation there? You've got the title down to A through those previous deeds but you haven't got it out of A.

I submit, gentlemen, that this is indicative of the fact that what we have tried to do is to operate under too great speed. We have seen a problem but nobody wanted to devote the time and effort that it takes to develop proper legislation. We have grabbed the first thing we could, and perhaps we have developed more problems than we answered.

It ill behooves me to come up and make such a statement about a bill like this since I lobbied for it, but candor compells me to do so.

There is one other situation. You all heard John Fike's presentation on reverts. Barney Pierson and I appeared before the Legislature with a bill that I think was an exact copy of an Illinois or a Florida act, I forget which, and we said, "Look, here's the situation. In Lincoln we have an addition, East Lawn Terrace, platted a number of years ago, and they have in that addition that if a lot is used for anything other than residential, the property shall revert."

Fortunately the original platter of that subdivision was a corporation which is still in existence. For mortgage purposes

you can, for a fee of \$50.00, get a waiver of that reverter for the purpose of a mortgage, but they won't waive that reverter for any other purpose.

So we go up to the Legislature and say, "Here is the ideal situation. Here was a subdivision that was platted forty years ago; it's no longer applicable. It is in a part of town where, not industry but like business is acting proper; it is not an exclusive neighborhood any more; let's get rid of this restriction."

We got along very well with the Judiciary Committee until they got to reading the bill which says that after thirty years all restrictions are absolutely barred. Then, if I remember rightly, Senator Wagner of Columbus said, "My gosh, does this mean that on these conveyances to railroads where they are given certain grounds so long as they use it for the railroad right-of-way or so long as they use it for a depot, etc., that the railroads will get that property?"

I had to admit that I didn't know there had been such conveyances to railroads, but in the second place I had to admit that if there was, apparently the railroads would get it. Senator Wagner said, "No, I don't think so."

Now there again was an instance where we went up there unprepared. That problem has been taken care of in other states through making exceptions to take care of public utilities and grants to states, etc. I cite that merely as an indication to you of the fact that we need help in this legislative process. As John Fike mentioned, we've got a problem there that must be taken care of. I am even more convinced than he is that there is only one way to take care of that problem and that is by legislation, but it cannot be done by legislation prepared by a couple of members of our Association getting together for a day or a half hour or an hour to prepare some bill that we copied from some place and then run up there to the Legislature and say, "This is it." Things don't work that way. They have complications and implications. They require study, and that study has got to be by all of us here, not by one or two or three members of the Legislative Committee.

There is one more thing I want to mention and then I am through.

I got a blistering copy of a resolution and, boy, what little hair I did have really stood on end. It was from the Dodge County Bar Association, condemning the Nebraska Bar Association for the adoption of LB 589. You all know what I am speaking of when I mention LB 589. Let me say for the benefit of the Dodge County

Bar and for the benefit of anybody else who does not know the situation, that bill was not a Bar Association bill; that bill was a Judicial Council bill.

Secondly, let me say that the resolution that was submitted was that we should repeal the damn thing and go back to where we were. That would be wonderful! You can bury your head in the sand, and it would be wonderful if you could get away with it. But unfortunately you can't do it.

I meant to bring with me today, but I forgot it, a study that was made by the University of Michigan on this matter of jurisdictional requirements, getting jurisdiction by publication. Gentlemen, almost universally throughout the United States every jurisdiction requires that if you know where the defendant is, or where the interested party is, service by publication alone is not enough. Now there is no use of our saying, "Well, we don't care what the United States Supreme Court says, or we don't care what other states do, this has been good law in Nebraska in the past and therefore we are going to stay with it." It is not for us to thumb our nose at the United States Supreme Court any more than it is for Governor Faubus, and the Supreme Court has said that jurisdiction cannot be acquired by publication where there is another way of getting actual notice to the party. So let's forget that.

But there are some legitimate complaints against LB 589, and that is the burden of my song. We did with LB 589 the same thing we did with these other statutes that I am talking about.

There were two cases that came out by the United States Supreme Court I believe in the early part of January. The Legislature was in session and they even had to manipulate to get some extension of time so they could get a bill in because we were confronted with a crisis. So a bill was worked out in a short period of time to do what we thought was required, without, in my opinion—and I hope I am not taken to task for this—adequate opportunity for study.

There are some questions in that bill, and I think it behooves the membership of this Section to think about ways and means of perhaps amending the bill to take care of certain problems that have arisen.

For example, there is one problem that I think we are all in accord with; at least in my experience I have found we are all having the same problem. You file a foreclosure case, for example. You comply with LB 589 when you file your foreclosure and then when you have the sheriff's sale you do it again. That hadn't ought to be. The Supreme Court has said that once a court has gotten



jurisdiction properly then the defendant is bound by everything that happens in the case. Our bill is drawn so that we don't know it and now out of caution all of us are sending out notices of the sheriff's sale; in estates every time there is a published notice we send out that for fear that the bill requires it—and perhaps it does.

I say that that bill should and could be modified so as to make it clear that it is only the first time the court acquires jurisdiction of the subject matter that is the time we should send out the notice and not after that.

Then I had an interesting argument with a lawyer from out in the state who—what did he call my thinking? He had a very interesting way of phrasing it—anyway, my thinking was backwards. He filed a proceeding in 1958 to have heirship determined of a party who had died in 1942. The alleged heirs, two of them, had deeded in 1944, and that is all the abstract showed about them. Somebody read the abstract and said, "Here, you've got to have determination of heirship shown that these two people were the sole and only heirs."

This lawyer from out-state went ahead and filed proceeding to have determination of heirship and didn't file any affidavit under LB 589 at all. The abstract came to my desk and I turned it down. This lawyer wrote me back and said, "How stupid can you be?" He said, "There wasn't anybody I could send notice to. Both of these heirs died in 1945 or 1946, so I didn't have anybody I could send notice to."

Well, there might be something there in our statute. Our statute makes no exceptions. I told the man that I interpreted LB 589 as meaning that you should have filed an affidavit to that effect, that there had been an inquiry made and that after due investigation he couldn't find anybody.

All I am getting at is that there are things in that statute that do require consideration and possible amendment, but let's not leap before we study the matter thoroughly, and let's try to do these things by unified effort of all of us rather than work by one or two. I know we are all busy. We all have to earn our livelihood. We all have to take care of our clients' business, and these things that come up gratuitously we try to get rid of just as quickly as we can, and maybe we will take thirty minutes sometime to dash off something and run up and say, "This ought to be it." Then we get into trouble, and that is not lawyer-like thing to do.

What I have been talking about is not on the paper that I was going to discuss, but I think I have taken enough of your time.

But I do ask for the cooperation of this Section with our Legislative Committee. It is the most active Legislative Committee of any of the Sections of the Association, to my knowledge. I am pleading and asking that all the members of this Section who have doubts and problems with this LB 589 or any of these other bills would spend some time, some time over a period of months, and come up with a suggested bill and then work with the committee on it.

CHAIRMAN RICHARDS: Thank you very much, Herman. You did, as always, an excellent job.

### SOME COMMON TITLE PROBLEMS

Herman Ginsburg, Esq.

There are two problems concerning fines. One, when and where do they become a lien; and two, does this lien outlaw?

It will be noted that Section 29-2407 provides that

Judgments for fines and costs in criminal cases shall be a lien upon all the property of the defendant within the county from the time of docketing the case by the Clerk of the proper court, and judgments upon forfeited recognizance shall be a like lien from the time of forfeiture.

This would indicate that a judgment for a fine in a magistrate or county or municipal court would be a lien upon all the property in the county.

Section 29-2413 provides, however, that

In every case, whenever it is desirable to obtain execution \* \* \* against the lands or real estate of any person against whom a judgment for fine or costs has been rendered by a magistrate, the magistrate may file with the Clerk of the District Court of the county \* \* \* a transcript of the judgment \* \* \*.

This would indicate that the land could not be sold until a transcript has been filed in the office of the clerk of the district court. This transcript, however, is to be filed in the office of the clerk of the district court of the county wherein the magistrate holds his office. While the actual sale, therefore, could not be held without the filing of the transcript in the office of the clerk of the district court, the previous statute would indicate that the lien was imposed as soon as the fine was rendered.

Section 29-2441 provides that execution may be issued into any county in the state.

Section 29-2412 provides that the district court or the county court has the duty to discharge fines and costs, which discharge shall operate as a complete release thereof when certain conditions have been met. Advantage should be taken of this statute in order to clear up the record as to unpaid fines.

On the question as to whether the fine could be a general lien, the case of *State v. McCulloch*, 42 NW 367, is interesting. In that case the statute provided that the judgment rendered by the magistrate shall be a lien upon all the premises and property, personal and real of the defendant, all of which shall be liable . . . and that all such fines, costs and judgments shall be a lien on the real estate until paid.

The Iowa Supreme Court said,

The language of the section considered alone is broad enough to make judgments rendered by justice's courts liens upon real estate from date of their rendition \* \* \*. But that was not the effect intended by the general assembly is evident when other provisions of the code are considered.

The Court then went on to mention the fact that the general code of Iowa, the same as Nebraska, provided that judgments of inferior courts could not be liens upon real estate and provided for transcripts of judgments to be filed in the office of the clerk of the district court before real estate could be sold generally. The Court further pointed out that in justice courts the question of title to real estate could not be investigated and that when the title to real estate is put in issue it becomes the duty of the justice to certify the cause and the papers to the district court. The Court pointed out that executions against real estate could only be issued out of the district court. The Court then said,

In our opinion, the statute under consideration was not designed to make judgments of justice courts liens on real estate \* \* \*.

We believe that by a parity of reasoning the same rule should apply in Nebraska.

As to the matter of the duration of the lien, you can pay your money and take your choice. In *Mancuso v. State*, 123 Neb. 204, the Supreme Court pointed out that the statute relating to fines is "complete in itself and is limited in special cases in favor of the sovereign state." This would indicate that the laws generally concerning judgments do not apply to the case of fines.

In *Predohl v. O'Sullivan*, 59 Neb. 311, the court pointed out that the statute of limitations did not begin to run against a judg-

ment for costs for a fine in favor of the state until the judgment was assigned. In that case the state had assigned the judgment; and the court held that the five-year period began to run from the date of the assignment. This is a clear indication that the five-year period did not run so long as the judgment was owned by the state.

In *Allen v. Holt County*, however, 81 Neb. 198, without any citation of authority, the court said,

It appears that more than five years has elapsed after the rendition of a judgment in favor of the state and without any execution having been issued thereon previous to the conveyance to the appellant. This judgment had, therefore, ceased to be a lien upon the property.

However, the nature of the judgment in favor of the state is not shown. For all that appears, the judgment may have been a civil judgment obtained in Douglas County and not a judgment for costs or a fine.

In view of the general law to the effect that statutes of limitation do not ordinarily run against the sovereigns, it would be the safe procedure to assume, until the court has acted, that the five-year statute does not apply to fines, levied in cases under the state statutes.

However, a different rule would apply with reference to fines levied under municipal ordinances. In the case of *Cleaver v. Jenkins*, 84 Neb. 565, the Supreme Court said,

A prosecution for the violation of an ordinance \* \* \* is a civil action, and it is quite probable that the provisions of \* \* \* the Code giving authority to justices of the peace to enforce their judgments by execution might be applicable.

Since such a prosecution is deemed to be a civil action it would follow that the general rules relative to civil actions might apply.

In the case of *Campagna v. Home Owners Loan Corporation*, 141 Neb. 429, the Supreme Court, impliedly at least, held that the dormancy statute applied to judgments for fines. However, the Court pointed out in that case that the federal statutes provide "for the collection of a fine by execution as in case of civil judgments." The difference in the statutory provisions may call for a different result in the case of fines in federal court.

In the light of all the authorities up to the present date it would seem that a title examiner could not safely assume that a fine levied in a court for violation of a state statute could be barred

by the dormancy statutes. It would seem that steps should be taken under the statutes above quoted to obtain a release of record. (See also the discussion on this subject in Sec. 656 of Patton On Titles).

As to vacated streets and public ways, it will be noted that there are different statutes applicable to different situations. Where the plat as a whole has been vacated, or where only the street or public way has been vacated, Section 14-115 and 14-324 are applicable in the case of metropolitan cities. Generally, these provide for reversion to the abutting owners. With reference to primary cities, Section 15-701 is applicable, providing for reversion to the abutting owners—one-half on each side. With reference to second class cities and villages, Section 17-421 and 17-558 are applicable and generally provide for reverting to the abutting owners. With reference to first class cities, however, there is some difference.

Section 16-113, referring to the vacation of an entire addition, states that the ordinance vacating the addition shall specify what shall be done with the public highways, streets, alleys, etc., and if no such provision is made, then the same shall revert to the owner or owners of the abutting property in proportion to the respective ownership of their lots.

Section 16-611 provides that upon the vacation of any street or avenue the same shall remain the property of the city, subject to sale by the city; but that upon vacation of an alley, the same shall revert to the abutting owners.

It will thus be noted that attention must first be given to the applicable law with reference to the specific situation. The questions with reference to vacated ways then, are: who has title; and then, what it conveys so as to give marketable title.

Since the title to the public way was in the municipality it was never a part of the abutting lot. And, as is stated by Patton On Titles in Section 143, page 378:

From the time of its vacation, the street or alley is a separate tract of land, in that it is no longer appurtenant to the lot or land abutting upon it.

It will be noted further that the statutes with reference to the reverter to the abutting owners provides that the vacated street or alley shall revert to the owner of the abutting lot, not to the lot itself. Since this ground never constituted a part of the lot itself, a conveyance of the lot could not convey the vacated portion of the street or public way.

Section 76-275.03 now takes care of this situation. Where by law the vacated street did revert to the owner of the adjoining property and a deed executed subsequent to such vacation has been of record for more than ten years, then it shall be conclusively presumed that the conveyance of the title lot included a conveyance of the reverted portion of the vacated way. This statute allows one year for anyone affected thereby to come in and set aside or make a showing against the irrefutable presumption, and would therefore seem to be constitutional.

However, some questions arise under this statute. The statute does not explicitly say that anyone making a claim will be barred if he does not present his claim within the one-year period. Furthermore, while the statute would be applicable to the case of deeds which have been of record more than ten years, and it would thereby be presumed that the reverted portion passes with those deeds, what about the deeds that were thereafter executed by the owners, whose deeds have not been of record ten years?

Let us assume that there was a deed for Lot 1 that has been on record for eleven years, running to John Doe. It will now be presumed that John Doe received Lot 1 plus the vacated portion of the street adjoining. Let us say, however, that John Doe conveyed Lot 1 only eight years ago. Did he thereby convey the vacated portion of the street adjoining his property? There is no provision anywhere in our statutes that the vacated portion of the property became a part of the lot itself; and as a matter of fact because of the fact that the fee in the streets was in the municipality, the lot itself by its description includes no part of the street. Therefore, what is the situation as to the vacated portion of the street? Of course where the conveyance is recent there is much more chance of being able to obtain a deed from the party than would be the case where the conveyance was several years old. This statute, however, leaves a question.

Furthermore, what is the situation where only a part of the lot has been conveyed? Let us say that the deed conveyed the east 50 feet of the lot. Does that include the part of the vacated street? It will be noted that the statutes provide that the deed must cover the platted lot. Does the statute apply to a deed covering less than a platted lot?

It is submitted that the difficulty inherent in the problem of vacated streets has not yet been solved.

With reference to rights-of-way for railroads or other public utilities, there is an entirely different position. Where the utility acquires its rights by eminent domain the interest it acquires is

as an easement only. See *Roberts v. Sioux City & Pacific Railroad*, 73 Neb. 8, page 14, wherein the court said,

The right thus obtained was only an easement under which the railroad company was entitled to use the land thus condemned as a highway for the purpose of operating its road, but the fee remained in the holders of the legal title.

- In case of the abandonment of the right-of-way the easement would simply be terminated and the owner of the land would own the land formerly covered by the right-of-way free from the easements.

In cases where there was no condemnation the railroad or public utility acquired only an easement or acquired the fee depending upon the form of the convenience to it. In *Blakely v. Chicago, Kansas, Nebraska Railroad*, 46 Neb. 272, where the conveyance was for right-of-way only, it was held that the railroad acquired only an easement.

In *Carr v. Miller*, 105 Neb. 623, where the conveyance was without restrictions it was held that the general rules applied and the railroad acquired the fee.

Since 1912 there has been an Act of Congress providing that when any part of the right-of-way was abandoned, title thereto was ganted to the owner of the land abutting thereon. Abandonment requires more than mere nonusage for a period of time. (See *Union Pacific R. R. v. Wooster*, 104 Neb. 421).

The last-mentioned case also raises a speculation as to the constitutionality of the 1957 Act 76-275.03. In this case it is pointed out that the Act must be given prospective effect only in order to keep it from being unconstitutional. It would seem that a similar question might apply to the Nebraska Act referred to since it purports to grant title to the grantee and perhaps invade the vested rights of the former owner.

As to reverters and restrictions, the paper by Mr. Fike should clarify that problem for all of us. The power of a court of equity to remove a restriction as to use which has become outmoded is well recognized and has been exercised on many occasions. The removal of provisions for reverter or rights of re-entry for breach of conditions subsequent is however a much more complicated question.

As to the fact that restrictive covenants can be limited to a reasonable period by action of the court (see 14 Am. Jur. 615). While possibilities of reverter or rights of entry for condition broken are inheritable (see 77 A.L.R. 344), they are not alienable or assign-

able (see 109 A.L.R. 1148). They do not even constitute such an estate as are subject to constitutional limitations against the state removing such interest (see 33 Am. Jur. 684-691). Therefore, legislation in this field can extend as far as is desirable.

As has been pointed out, these rights of entry or reverter are clouds upon the title and in many instances clog titles. In most instances they have exhausted the reason for their being and no longer serve a useful purpose. The action which has been taken in a number of states to eliminate these stale restrictions by legislation is splendidly discussed in an article which will be found in the 1954 proceedings of the American Bar Association, Section of Real Property, Probate and Trust Law, at page 4, by Professor Lewis M. Sines. A splendid discussion of the effect of these outstanding rights on marketability of titles will be found in the 1957 Proceedings of the American Bar Association, Section on Real Property Probate and Trust Law, commencing at page 11 in a discussion by Professor C. Payne. All experts are agreed that remedial legislation is necessary.

The Minnesota act was considered by the Supreme Court of Minnesota and was approved in every respect. An even simpler act was adopted in Massachusetts which simply provided that every possibility of reverter, every right of entry or power of termination for breach of conditions subsequent and every restrictive covenant affecting the title or use of real property shall cease to be valid or operative at the expiration of thirty years after the effective date of the instrument creating it, notwithstanding any provisions in such instrument. This statute exempted from its application, however, any provision contained in any grant from the state or in any gift or devise for public, charitable, religious or educational purposes, and further exempted any easement or right of way connected with any communication, transmission or transportation line or any public highway or right to take minerals. A handbook on proposed legislation was prepared by the committee on rules against perpetuities of the American Bar Association of Real Property, Probate and Trust Law, and is available for use of our Association in connection with any proposed legislation on this subject.

Turning to the subject of L.B. 589, the following matters have come to the attention of the writer:

First, the Act is rather indefinite as to the procedure in cases where the parties named may have been in existence, but are now no longer in existence. For example, the matter came to the attention of the writer in connection with the determination of heirship in an estate. The party in question died in 1942, leaving



two heirs who conveyed in 1944. Some time after 1944 these two heirs died. In 1958 a determination of heirship was had and of course the court found that these two heirs were the heirs who took. However, no notice was mailed under L.B. 589. So far as the examiner of title was concerned, he had no way of knowing that the heirs had died prior to the institution of the proceedings. On the other hand, the attorney who handled the estate proceedings claims that the reason he did not mail out notice was for the reason that the heirs named in the proceedings were dead. It is the contention of the writer that an affidavit should have been filed to the effect that there was no one to whom notice could have been mailed. I believe this to be the intent of the Act. However, it is true that the Act could have been made a little more definite on this point.

Second, there have been complaints about the fact that repeated mailings are required where more than one publication is required in the case. For instance, in the case of a foreclosure there is the original publication of notice at which time mailing is required; and then there is the notice of sheriff's sale. Does the Act require the mailing of notice of the sheriff's sale? It is the contention of the writer that the Act does not so require, but until the Act has received interpretation by the court the safe thing to do is to mail notices again. The Act should be more definite on this point.

Third: perhaps the greatest difficulty has been in connection with publication in estate proceedings. Do creditors have to be notified by mail? It is submitted that the Act as drawn does require new mailings at every instance when publication is had. It is suggested that it would have been preferable if the Act would have provided only for the mailing of notice at the inception of the proceedings when the court acquired jurisdiction in the first instance. It is rather elementary law that once a court acquires jurisdiction and the parties have been notified thereof, the parties are bound by all further proceedings in the cause, even though they receive no further actual notice. It would seem that the Act could be amended to provide that the mailing need only occur at the time when the court takes original jurisdiction in the cause, and that thereafter the parties shall be bound by all subsequent proceedings.

The fourth question which has arisen is with reference to the requirement of the statutes that the mailing be made within five days and the affidavit be filed within ten days. It is contended that the five-day limitation is too short a period of time; however, it must be remembered that the purpose of the mailing is to give

the interested parties notice. The publications themselves, and the period of time over which they run, are usually not very long; and it is therefore necessary that the notice be mailed as soon as possible. I know of no reason why the notice cannot be mailed out within five days of the date of the first publication. It must be borne in mind that if the notice is not mailed sufficiently ahead of the time fixed for hearing, a constitutional question will again arise as to whether the party has had adequate notice. Relative to the time fixed for filing the affidavit, it has been pretty well agreed that that is not jurisdictional. If the notice was actually given within the time prescribed, the fact that the affidavit was filed after the time would not invalidate the proceedings.

Finally, there has been complaint against the Act as a whole; simply that the entire Act should be repealed. Any such contention is simply "whistling in the dark." As far back as in 1953 the attention of the Nebraska Bar was called to the rulings of the United States Supreme Court and the necessity of providing for a different form of notice. (See N.L.R., Vol. 32, #3, p. 432). As stated in Current Trends in States Legislation, 1952, page 74, "The fallacy in the argument upholding notice by publication lies in the assumption that such notice has always been considered reasonable. That assumption may have been made by numerous lower courts; but as we have seen it is based on at most dictum and implications by the Supreme Court \* \* \* on the contrary the Supreme Court has indicated \* \* \* now \* \* \* that notice by publication is not reasonable as to known parties and should be allowed only when conditions do not reasonably permit a form of notice likely to convey actual warning to the parties in interest." This same study shows that a large number of the states now require mailing of notice. It may even now be said that such personal notice is required in a majority of the states. The repeal of the statute would be a step backwards and would lead to the possible unsettlement of Nebraska titles generally. L.B. 589 may leave room for improvement, and perhaps additional study should be had looking toward the possible refinement and improvement of said Act. A repeal of the Act, as a whole, however, would be unthinkable.

CHAIRMAN RICHARDS: The outcome of our election: Paul Chaney of Falls City and Franklin L. Pierce of Grand Island are our newly elected members of our Executive Committee.

It is my pleasure at this time to turn the program over to George Farman, who is the division head of the Real Estate Section, and he in turn will introduce his subcommitteemen and will have reports under his division. George Farman.

GEORGE A. FARMAN: The first subcommittee I would like to have submit their report is the Title Standards Committee. Originally this year it was headed by Walter Raecke of Central City but because of illness Franklin L. Pierce of Grand Island was designated as acting chairman.

The Title Standards Committee has six proposed standards which they wish to submit to you at this time for adoption or rejection. For that purpose I call upon Mr. Pierce, who will handle the matter of presenting the report of the Title Standards Committee.

### REPORT OF TITLE STANDARDS COMMITTEE

Franklin L. Pierce, Esq.

The committee met at Fremont, Nebraska, on June 7, 1958, to develop subjects for standards.

Following that meeting proposed Standards were drafted by various members of the committee and submitted to all the members of the committee.

An Index of the 1957 Standards has been prepared and arrangements are being made for including such index; the 1957 Standards when approved by the House of Delegates; and such Standards as are adopted in 1958 together with Index, in the Lawyer's Desk Book.

A meeting of the committee was held in the Lawyers' Room of the Supreme Court Department at the State Capitol Building in Lincoln. The members present unanimously agreed to submit proposed Standards numbered 62 to 67 inclusive, to the Executive Committee of the Section at the meeting of such Executive Committee to be held at Ainsworth, Nebraska, on September 6, 1958.

Such proposed Standards are as follows:

#### PROPOSED STANDARD NO. 62

Where all persons having or claiming any interest in real estate are made defendants in an action under the provisions of Section 25-321 or Section 25-21,113, the spouses of known and named defendants whose whereabouts and residence are unknown are not necessary defendants in such action unless such spouses are in possession of the real estate involved or their interest affirmatively appears of record.

COMMENT: R.R.S. 1943 - Section 25-321 and 25-21, 113 State ex rel. *Conkey v. Ryan*, 136 Neb. 334, 285 N.W. 923

What is your pleasure with respect to Proposed Standard No. 62?

A. J. WHALEN: Mr. Pierce, what is the significance of the language in the fourth line "whose whereabouts and residence are unknown"? Why is that necessary?

MR. PIERCE: I would suggest that the reason is that if you do not know the name you join them by names specifically; if you know the residence then you know where to make your service. That would determine how you would make your service. If you know the defendant has a spouse you enjoin the spouse.

MR. WHALEN: It says "of known and named defendants whose whereabouts and residence are unknown."

MR. PIERCE: Well, you can have a situation where you know the name of the defendant, it appears in the record, but you still do not know his whereabouts, so you get back to relying on your service by publication.

MR. WHALEN: What I am trying to say is: Is it necessary to make spouses of named defendants parties merely because they are spouses?

MR. PIERCE: I think it is the view of the committee, yes, if you know the name—know that there is a spouse.

MR. WHALEN: They are covered, I think, under "all persons having claim to any interest."

MR. PIERCE: There is another statute, if you know the name of a person . . .

A. J. WEAVER: I move it be adopted.

C. M. PIERSON: I second the motion.

MR. PIERCE: Is there any further comment? If not, all in favor of the motion signify by saying "aye"; all opposed, same sign. Carried.

#### PROPOSED STANDARD NO. 63

Sections 30-601 and 30-603, R.R.S. Neb. should be construed *in pari materia*, and, the publishing of the notice to creditors and the running of the time for creditors to present their claims may run concurrently.

COMMENT: Such sections of the Revised Statutes do not require a minimum of three months to present claims subsequent to the giving of statutory notices.

The significant requirement is that the notice must be published within forty days of the date of issuance of letters.

See Standard No. 26 (e) Sec. 30-609, R.R.S. 1943, pertaining to phases of the subject of this Standard.

Do you get the significance of that Standard? The reason for this Proposed Standard is that in quite a few counties, the notices, the publication is completed before the time fixed by the court for creditors to file, the three months, commences. There are some counties in which the time to file your claim, the three months, is set by order of the court to commence with the publication of the notice. This Standard is intended to take care of any difficulties that might arise with respect to that, appearing in abstract title.

EARL J. LEE: I move the adoption.

CLEMENT B. PEDERSEN: I second the motion.

MR. PIERCE: You have heard the motion. Is there any further comment? If not, all in favor say "aye"; all opposed, the same sign. Carried.

#### PROPOSED STANDARD NO. 64

Where the court in a duly conducted proceeding determines the Nebraska state inheritance tax status of the property included in said proceeding and when thereafter said property, or a portion thereof, is sold to a bona fide purchaser for value, said Nebraska inheritance tax status of said property so sold is not changed in a subsequent inheritance tax proceeding.

COMMENT: See Section 77-2037, Cum. Supp. 1957.

Where court has jurisdiction of a subject matter and the parties, it has power to decide, and judgment rendered is *never void*. *Wistrom v. Forsling, Sheriff*, 144 Neb. 638, 14 N.W. 2d 217. A judgment by court of competent jurisdiction affords complete protection to one who relies on it. *Bank of U. S. v. Bank of Washington*, 6 Pet. 8, 8 L. Ed. 299.

A purchaser, having notice, who purchases from one without notice, will be protected in his title by the want of notice in his vendor. *Mingus v. Bell*, 148 Neb. 735, 29 N.W. 2d 332.

Now the incidence of this Standard is that there are situations where there will be a proceeding and then it develops there is some further property and there is a proceeding of some kind to assess additional taxes.

There is a correction in the third line of your copy: "proceeding and when thereafter said property, or a portion thereof" instead of "proportion."

W. H. HEISS: How does that affect the situation where the state is not satisfied with the valuation placed on there and the valuation of the same property was later raised? Does that mean they ignore it?

MR. PIERCE: I would suggest the answer to that is you would not pass it if the thirty days for an appeal had not gone by. If the time for an appeal on the determination that the county court, for instance, had passed then . . .

MR. HEISS: After appeal time has passed, but you couldn't pass it prior to that time.

MR. PIERCE: That's until the final determination.

QUESTION: I take it that this would mean when a petitioner comes in and describes a certain part of the property, say one son, and doesn't report what goes to the other son, later on his title would still be good; you can't assess him later on for what might be due on the other property.

MR. PIERCE: I would say that is the general theme of it, but I would suggest, aren't the individual portions in your problem subject to separate tax, depending upon how the title passes? If A gets a piece of land by devise, his is subject to tax, which would not be a lien on the portion of B.

WALTER G. HUBER: I move its adoption.

CLEMENT B. PEDERSEN: I second the motion.

MR. PIERCE: Are you ready for the question? All in favor of the motion signify by saying "aye"; opposed, same sign. Carried.

#### PROPOSED STANDARD NO. 65

##### Process-Constructive—Non-necessity of Fictitious Defendants in Quiet Title Actions

In the situations where a defendant is not known to exist and where a defendant is known to exist but his real name is unknown, and his residence and whereabouts are unknown, it is not necessary to join them under fictitious names but complying with the provisions of R.R.S. 1943, Sec. 25-21, 113 culminating in proper constructive service under R.R.S. 1943, Sec. 25-21, 118 is sufficient.

COMMENT: In the first situation the real names of these defendants would necessarily be unknown and we would have a pure *in rem* case. However, the provisions of Section 25-21, 113 literally cover the defendants in the second situation also under the phrase "all persons." In this instance this designation appears to be preferable as giving a better notice because of the description of the land which follows it. Only where the plaintiff knows

enough of the defendant's true name as to be able to designate him by a name approximating his true name, followed by the words "real name unknown," would defendant be apt to receive actual notice. In this case the fictitious name device would have its place and both the above method and compliance with R.R.S. 1943, Sec. 25-321 resulting in constructive service also under the provisions of R.R.S. 1943, Sec. 25-517 (Subdivision 6) could be utilized in the interest of safety.

See *Filley v. Dickinson*, 110 Neb. 356, 193 N.W. 913, cited by Dysart, *Foreclosures in Nebraska*, Sec. 15, page 27, to the effect that the spouse of a party having an interest in real estate that would give rise to a statutory interest in the spouse would be cut off by decree against the party while living as completely as though made a party if the land is non-homestead.

It should not be implied from the foregoing Standard that it lessens the need for fictitious defendants who have possessory rights.

Is that clear? Sometimes we see in, we'll say, a quiet title petition "John Johns if living; and if deceased, his heirs, etc."

Is there any one on the committee who would like to make further comment or suggestion about this?

WALTER HUBER: This Standard is designed to get rid of duplication also, where you would say "Blank Jones, real name unknown, spouse of Wesley Jones," where you also bring the land in. It is very analogous to one that we have now with regard to not be required to put in "the heirs of so-and-so, deceased" but merely make the land a party. I might say in addition to the authorities here given that the article by Mr. Finnigan in the *Nebraska Law Review* is right in line with this.

MR. PIERCE: Any further questions?

MR. WEAVER: I move its adoption.

MR. PEDERSEN: I second the motion.

MR. PIERCE: Are you ready for the question? All in favor of the motion signify by saying "aye"; opposed, same sign. The motion carried.

#### PROPOSED STANDARD NO. 66, INHERITANCE TAX LIEN

When the death of a title holder occurred prior to September 14, 1953, and five years have elapsed since the date of death, no determination of state inheritance tax shall be required.

COMMENT: Original Section 77-2037, (R.S. of Nebr. 1943) provided that unless the tax was ascertained and assessed by the

court within five years after the death of any decedent, his or her estate shall not be liable for any inheritance tax. Sec. 77-2037 was repealed in 1953 and now provides that no liability for inheritance tax exists if not sued for within five years after the tax is ascertained and assessed. The enactment of 1953 further provides: "This section shall be applicable to all property subject to inheritance taxes of individuals dying after the effective date of this act" (Sept. 14, 1953).

Thus Section 77-2037, R.S. of Nebr. 1943, which was enacted in 1943 applies to property of persons dying before its repeal (Sept. 14, 1953).

I suggest that this problem has been wrestled out primarily in Lancaster County. It is adopted there and it is now being proposed by the committee for the state.

WALTER RAECKE: I move its adoption.

LESLIE H. NOBLE: I second the motion.

QUESTION: In the second line it says "and five years have elapsed"; five years would have had to elapse. Should it be "or"?

MR. PIERCE: Mr. Pierson? Is he here? Barney, is there a typographical error there? Should that be "and five years have elapsed" or "or five years have elapsed"?

CLARENCE M. PIERSON: You have to have the "and" because you have to have the death prior to September 14, 1953, and five years for the statute to run. If the death occurs after September 14, 1953, under our present statute you have to have both.

MR. PEDERSEN: Yes but, Barney, if the death occurs prior to September 14, 1953, your five years are all gone already because we are now in October of 1958. You see, we worked on this last spring and fall and the five years hadn't gone by yet at that time.

CHAIRMAN RICHARDS: If I may make a suggestion, Mr. Chairman, because of the fact that it is hooked up with that five-year rule which applied prior to 1953, I think it would be well to leave it in. Legally we could leave it out, but we are used to it. In any instance where you have a death prior to September 14, 1953, and five years have elapsed thereafter, I think it is better since we are used to that five-year part that we leave it in.

HOWARD KANOUFF: I had to go in and determine a tax for a very good title examiner on that situation where the party died before 1953 but the five years had not elapsed before the passage of the 1953 act. The question raised there was the question of whether or not the elimination of the five-year statute of limita-



tions before the five-year period had run didn't eliminate any limitation upon the collection of the lien. There was a very good title examiner on the other side and we wound up determining the tax. I wonder if there is still any question in the mind of the attorneys in that regard.

MR. PEDERSEN: I had a little something to do with that, Howard. I think sometime or other we've got to let a sleeping dog lie. This thing is getting older and older all the time. There has been a difference of opinion, I think, between a number of the examiners in Omaha and those in Lincoln. We can adopt a standard like this one here. A good many of the lawyers in Omaha have taken the opposite view. I think this standard is a kind of compromise. As this thing gets older and older we are going to feel more foolish in raising objections.

MR. KANOUFF: I was only bringing up the question of whether all title examiners will go along with it. I'll have to go tell my client now who very recently paid a couple hundred dollars tax that you have now changed your mind.

MR. PEDERSEN: I haven't changed my mind—I'm giving in!

MR. KANOUFF: My only thought is, how is everyone going to go along with this standard?

ALBERT T. REDDISH: I might point out that the Attorney General has had a letter opinion, I don't know if it has been formalized into a general ruling, in which he holds in accord with this, and most of the county attorneys are going along with that ruling.

I might also say that in an actual case, which was contested in Sheridan County, Judge Myer held in our favor and held that the lien was barred by reason of the fact that although they hadn't died five years prior to September 14, 1953, five years had elapsed since death prior to that date, and permitted us to quiet title on that basis.

I think in view of that it would be best to pass this particular standard and help give some certainty to those titles.

MR. PIERCE: Do you so move?

MR. REDDISH: I so move.

CHARLES F. ADAMS: I second the motion.

MR. PIERCE: Are you ready for the question? All in favor of the motion signify by saying "aye"; opposed, same sign. Carried unanimously.

## PROPOSED STANDARD NO. 67, PROOF OF MAILING OF COPY OF PUBLISHED NOTICE

The requirement of Section 25-520.01, R.S. Sup., 1957, Nebr. of filing proof by affidavit of the mailing of a copy of published notice in any action or proceeding of any kind or nature within ten days after the mailing of notice is not jurisdictional, so long as the notice was mailed within the five-day period required by such Section.

COMMENT: In *Pitman v. Heumeier*, 81 Neb. 338, 115 N.W. 1083, the Nebraska Supreme Court held the county court acquired jurisdiction by reason of the service of summons, and, as it acquired jurisdiction by service of summons, it was not divested of jurisdiction by reason of the failure of the sheriff to make and file his return, although the language of Section 25-510, R.R.S. Nebr., 1943 there construed includes the word "must."

Likewise, the purpose of mailing of notice is officially to notify the party to whom the notice is mailed of the action or proceeding. The making and filing of the affidavit of mailing a copy of the notice is immaterial to the party to whom it is mailed, and is for the purpose of furnishing proper evidence that the party has been mailed notice as required by law.

MERLE M. RUNYAN: Is the meaning of that as follows: The requirement of Section 25-520.01, R.S. Sup., 1957, Nebr. of filing proof by affidavit of the mailing of a copy of published notice in any action or proceeding of any kind or nature within ten days after the mailing of the notice is not jurisdictional, so long as a proper affidavit showing that notice was mailed within the five-day period required by such Section is filed during the pendency of the action or proceeding?

MR. PIERCE: You ask if that is the meaning of it? It contemplates that an affidavit is filed.

W. H. HEISS: What if it is filed afterwards rather than during pendency?

MR. RUNYAN: In other words, can the affidavit be filed after judgment?

MR. PIERCE: I think that is the view that the committee has.

MR. CLARK: We had quite a discussion in our local bar association about that. To put it simply, mailing within time is jurisdictional; the filing with the court is not. You can be late in getting your affidavit up to court but the affidavit must actually show that the mailing did occur on time. That is something that will throw you out.

MR. PIERCE: The record has to show that there was a mailing in time.

MR. PEDERSEN: Frank, you refer in your Comment that it goes back to the Supreme Court ruling on service of summons, based upon a consistent holding of the Supreme Court of Nebraska in an analogous situation.

LESLIE H. NOBLE: I move adoption of Standard No. 67.

WALTER G. HUBER: I second the motion.

MR. PIERCE: Are you ready for the question? All in favor signify by saying "aye"; opposed, same sign. Carried unanimously.

ANTHONY ZALESKI: Mr. Chairman, I wonder if we could refer back to Proposed Standard No. 62 for reconsideration. I didn't get hold of this right away but I have been reading it over carefully and I want to make some suggestions.

MR. PIERCE: Do you want to move for reconsideration?

MR. ZALESKI: I just want to make these suggestions and if you think I am in line, I might make a motion for reconsideration.

I believe that under Section 321—that's the unknown defendants—and then under Section 25-21—that's the statute on quiet title action—and I believe that in the statute on quiet title action it is said there that if you alleged in the petition that there are persons whose names are unknown and whose interest in the real estate does not appear of record, then you may allege and designate them as defendants as "all persons having or claiming any interest in the described real estate, real names unknown"; and I think the statute on unknown defendants is practically the same.

As I read it, it says, "Where all persons having or claiming any interest in real estate are made defendants in an action under these sections I referred to, the spouses of known and named defendants whose whereabouts and residence are unknown . . ." you have left out the word "name"—whose name, whereabouts, and residence are unknown.

If I may illustrate: I am bringing an action to quiet title. John Doe appears to have had some interest away back in 1890. I don't know whether he is married or not but I do know that he was one of the heirs. I say, "John Doe"—naming him; I don't know whether he is married or not; I don't know his wife's name, whereabouts or residence. I don't think it is necessary for me to allege "John Doe, blank, space, his wife," because I think the phraseology of the statute on quiet title says that if you don't know the name or the whereabouts or place of residence, you can

make all these persons defendants under the designation of "all persons having or claiming any interest in this real estate, real names unknown." This seems to imply that if there is a wife whose first name happens to be "Mary" but nowhere in the record is there any notice that Mary had any interest in land, you have to make her a party.

I think we should have the words "whose name, whereabouts, and residence," which is the phraseology in the statute.

MR. PIERCE: Mr. Zaleski, I would suggest that this Standard is intended to accomplish just what you say that your view is in construction of those statutes.

MR. ZALESKI: My contention is that by leaving out the word "name"—if you knew the name of the spouse . . .

MR. PIERCE: The point is, if her name doesn't appear of record "joiners unknown" takes care of it.

MR. ZALESKI: You don't have to have "John Doe, blank, wife"? That's not necessary?

MR. PIERCE: That is the very point of the Standard.

WILLIAM H. HEISS: Mr. Pierce, I think Mr. Zaleski has a point there. If you knew John Doe had a wife named Mary but you didn't know her whereabouts or residence, this just says "whereabouts and residence" and you wouldn't have to make Mary a party under this, and I think probably you would unless you didn't know where Mary lives. Wouldn't you have to have "name" there?

MR. PIERCE: It depends on whether she has interest of record. If she has interest of record, this doesn't apply because she is a person whose name appears in the record and you name her.

WALTER G. HUBER: I might say that I got knocked down on that same thing. I think the committee was right when we talked about it. This Standard and No. 65 do overlap a little bit, but No. 62 covers 25-321 also as far as the spouse is concerned. I believe that it is all right.

MR. PIERCE: Mr. Chairman, may I be discharged from my responsibility?

MR. FARMAN: I want to thank Mr. Pierce and his committee for the work that they have done. They have had at least two meetings this year, one at Fremont and one at Lincoln.

The next subcommittee that we have is the Committee on Improvement of Real Estate Conveyancing, of which George Skultety of Fairbury is chairman. Mr. Skultety.

**COMMITTEE FOR IMPROVEMENTS ON CONVEYANCING****George A. Skultety, Esq.**

The Committee for Improvements on Conveyancing has submitted eight forms of deeds for your consideration. On the Quitclaim Deed, which is the first form, there is an error of printing in the acknowledgment; the first line was left out. If you will look at the Warranty Deed, Form 2, you will see the complete form of acknowledgment.

This is the first time the Section of Real Estate, Probate and Trust Law has had a Committee on Improvement of Conveyancing Practices. We are inclined to move slowly. The committee has drafted these eight forms of deeds. We do not ask that these forms be approved at this time. We only submit them to the lawyers of Nebraska and to this Section for your consideration and study.

The forms of deeds now commonly in use in Nebraska are those printed by Felton & Wolf Company (formerly Huffman), Omaha Printing Co., Omaha Stationery Co., and many other printers producing substantially the same forms. Our committee has refrained from changing the substance of these forms. We have tried to improve the phraseology and the style of these forms, but we did not tamper with the content.

Form 1 is a quitclaim deed. The words "quitclaim, bargain, sell and convey" should probably be shortened to "quitclaim and convey." The word "convey" is used intentionally in order to make this instrument a conveyance as distinguished from a mere disclaimer so that after acquired title will inure to the benefit of the grantee. Some forms of quitclaim deed convey all the interest of the grantor in the described property. This would not include after acquired title.

It has been suggested to us that the habendum clause be eliminated as unnecessary surplusage.

Form 2 is a warranty deed. The words "grant, bargain, sell, convey and confirm" should probably be shortened to "convey." In the next line the word "real estate" might be changed to "real property."

The habendum could be omitted under the provisions of the Uniform Property Act, Sec. 76-104, which states that no words of inheritance or other special words are necessary to transfer a fee simple.

Nebraska forms of warranty deeds now in use warrant that the grantor is "lawfully seized." Sec. 76-206 interprets this to mean that he has "good title." The deed could state "has good

title" in the first place. The word "seized" has been changed to the correct spelling, "seised."

When the parties wish to make a conveyance subject to a certain encumbrance, the blank space for that purpose may be filled in as, for example, free from encumbrance "except a mortgage recorded in Book 80 of Mortgages at Page 340."

All the Nebraska forms use a covenant that the grantor has good right and lawful authority to "sell." Some deeds are gifts instead of sales. This word has been changed to "convey."

The body of the deed refers to both the masculine and feminine and to the singular as well as the plural so there are no blanks to be filled.

The marital clause relinquishing the rights of the spouse has been omitted. The clause has been obsolete ever since dower and curtesy were abolished.

After we had drafted the Warranty Deed, additional suggestions were made to our committee which we consider valuable. At this time we also submit for your consideration Form 2.1 Warranty Deed (incorporating additional suggestions). This form starts with the names of the grantors and continues with the words, "herein called the grantors whether singular or plural." The habendum omits the phrase, "for him, her or themselves and his, her or their executors and administrators." The acknowledgment changes the words, "whose name or names are subscribed to" so it reads, "who executed."

Form 3 is a Special Warranty Deed. This form limits the warranty to claims made through or under the grantors.

Form 4 is a Survivorship Warranty Deed. Most lawyers would refer to this instrument as a joint tenancy warranty deed. Huffman uses the title "WARRANTY DEED—Joint Tenancy—Vesting Entire Title in Survivor." Omaha Printing Company uses the title "WARRANTY DEED, Vesting Entire Title in Survivor." State Journal Printing Co. uses "WARRANTY DEED, Joint Tenancy with Survivorship." The titles now in use are too long and should be shortened. Use of the word "survivor" has the merit of being more explanatory to a layman.

The designation of the grantees as joint tenants "with right of survivorship" and not as tenants in common is another concession to clearness for the layman.

The statement of the intention of the parties appears as the last paragraph of the deed instead of being forced into the same space as the description of the real estate where it is completely

out of context. This enables one to word it as a direct statement instead of a recital in a participle clause.

This form eliminates the usual blanks in the body of the deed.

Form 5 is a Survivorship Quitclaim Deed. This form has not been furnished by commercial printers. The committee thought there was a demand for such a form.

Forms 6, 7 and 8 are a Corporation Quitclaim Deed, Corporation Warranty Deed and Corporation Survivorship Warranty Deed. These forms employ the same improvements but are adapted for use where a corporation is the grantor.

It would be well to draft a form of deed for a partnership.

The venue in the acknowledgments on these deeds is on one line instead of being written on two lines with a brace. The brace was a fine device for instruments written in longhand but it can only be simulated in typewritten work and serves no useful purpose in printed work. The venue omits "ss" and uses a colon instead.

The acknowledgments in the deeds to be executed by individuals refer to the grantor in both the singular and plural and the masculine as well as the feminine so there are no blanks to be filled other than the names and dates.

The title of each instrument is in the center of the page to give the deed a heading rather than putting a form number and the name of the instrument in the upper left-hand corner in small letters as most Nebraska printing firms have done.

The first line of the body of the instrument omits the customary verbiage, "Know All Men by These Presents." Some deeds in Nebraska start as an indenture between party of the first part and party of the second part, but the second party never signs a deed so it should not be necessary to refer to him in the preamble.

The printing conforms to typewriter spacing of 1/6 inch for each line so that when the typewriter is once adjusted to the first line the entire instrument can be typed without readjusting the platen of the typewriter with the variable line spacer. This line spacing is also maintained on the reverse side of the instrument.

The signature lines are triple spaced to make sufficient room to type the names of the grantors in parentheses under the signature lines. There is sufficient space under the signature line of the notary public to type his name in parentheses. The typing of these signatures is recommended to enable the recorder to get the correct spelling into the record.

On the reverse side of each deed is printed the title of the instrument, the form number, and the words, "Approved by Nebraska State Bar Association." The purpose here is to use the prestige of this Association to win acceptance of these forms for general use.

The printed space for the recording data is made for use either by a county clerk or a register of deeds. The blank area of one-fourth of the length of the sheet on the reverse side is placed at the top of the instrument so that nothing is obscured if the instrument is fastened at the top in a file folder. In some counties this blank space will be used for a recording stamp. It may on occasion be used for an extra typewritten acknowledgment.

On the reverse side of the sheet there are two acknowledgments. One acknowledgment appears at the bottom of the face of most forms of deeds. The space for the description of the real estate may be lengthened by eliminating this acknowledgment. Lawyers in counties where photocopy equipment is used in the recorder's office and lawyers who have copy equipment in their own office cannot attach riders and they want long spaces for descriptions. Other lawyers insist an acknowledgment should appear on the face of every deed because nearly all descriptions are short and one can type the entire deed when there is a long description.

The print job is styled after the printing used by the Indianapolis Bar Association for the forms it approved. The type is plain instead of italics. There is no fancy border on the margin of the form. The body of the instrument is set in ten-point type. It has been suggested that words in the body of the deed should not be capitalized.

We ask that you study these deeds. We welcome your criticisms and suggestions. We want the final drafts which are submitted to this Section next year to be satisfactory for regular use by all the lawyers in Nebraska.

Mr. Chairman, I move that the report of the committee be placed on file and that action on the forms submitted by the committee be delayed for a year so that the lawyers of Nebraska will have adequate opportunity to study the forms.

MR. FARMAN: Do I hear a second?

A. J. WEAVER: I second the motion.

MR. FARMAN: You have heard the motion. Is there any discussion? If not, all those in favor of the motion will say "aye"; contrary, the same. Carried.



In the interim between now and the meeting next year it is the desire of this committee that you submit to them, after you have had a chance to study these instruments, any suggestions that you might have concerning the same.

We have a report from the Committee on Recent Decisions on Probate Law and Real Estate Law which will require no action by this Section. I will simply place this in the record, if there is no objection. I feel sure this will appear in the *Nebraska Law Review*.

### REPORT ON RECENT DECISIONS ON PROBATE LAW

This report covers the decisions of the Nebraska Supreme Court on probate matters during the September, 1957 and January, 1958 terms of court. During that period there are but four decisions that are deemed to be worth mentioning in this field. It appears that only two of these decisions in any way determine new principles of law. The cases were *In re Estate of Crane, Lutcavish v. Eaton*, 166 Neb. 268, 89 N.W. 2d 44, and *In re Estate of Applegate, Brown v. Applegate*, 166 Neb. 432, 89 N.W. 2d 233.

In the Crane estate case the court defined the power of the county court to construe a will. The court determined that this power, which is incidental to its administration in the county court, was not binding in controversies between an executor or administrator and one claiming adversely to the estate, or between adverse claimants under the will. In such cases the action to construe the will should be commenced in district court.

In the Applegate case the court found that a legatee or devisee who seeks to probate a claimed will carried only the burden of alleging and proving that the testator was possessed of authority and capacity to make the will and that the instrument is in legal form. The former language in the case of *In re Estate of Strelow*, 117 Neb. 168, 220 N.W. 251, which required the devisee or legatee to also allege and prove that he is entitled to the legacy or devise under the law as well as under the will was disapproved.

A brief digest of these two cases and two other cases, which are deemed to be of general interest, follow.

*In re Estate of Crane, Lutcavish v. Eaton*, 166 Neb. 268, 89 N.W. 2d 44.

One Fred Crane died testate leaving his property to his second wife with the provision "it is my will that she sell or dispose of any of said property as she may see fit. It is my will that should there be any property, real or personal, remaining, at the time

of the death of my said wife Maude Crane as a result of this bequeath (bequest) shall be given to my daughter Faye Crane." Pursuant to this provision Maude received the testator's personal estate and converted it and commingled it with her own funds. Subsequently Maude died intestate and this action resulted from a claim filed by the daughter, Faye Crane Lutcavish, in the Estate of Maude Crane, in county court.

The daughter claimed that the above provision gave Maude a life interest only in the property and Maude was not privileged to convert any of the property of such estate to her own use or to commingle the same with funds of her own and by so doing she wrongfully violated the rights of the claimant under the will of Fred Crane. On the other hand the administrator claimed that the will created a life estate coupled with the power to sell and dispose of any of the property left under the will for the purposes stated therein. It was further contended that Maude had a right to commingle the funds with her own funds, and to use the property for her own wants and needs and any residue would belong to the daughter.

The county court allowed the claim and the action was appealed to the district court which, on motion, dismissed the claim on the basis that the county court did not have jurisdiction to allow the claim and therefore there was no jurisdiction in the district court. The Supreme Court affirmed the action of the district court.

It was determined that the adverse contentions regarding the will of Fred A. Crane were adverse to such an extent that the contentions could only be resolved by a construction of the will. This, the court held, could not be done by the filing of a claim in county court, but that the proper court having original jurisdiction to determine the rights of the residuary legatee was the district court.

*In re Estate of Applegate, Brown v. Applegate*, 166 Neb. 432, 89 N.W. 2d 233

Over objections the will herein was admitted to probate. The relatives surviving the testator were his mother, brothers and sisters, nieces and nephews and other more distant relatives. It was contended that the instrument, though testamentary in form, failed to make a valid disposition of the property or to name a devisee or legatee capable of taking under it, and was therefore not entitled to be admitted to probate.

The will left the property to two sisters in trust for the use, benefit, comfort and maintenance of testator's nieces and nephews

and such other of his relatives "as may in the discretion of my said sisters warrant and require financial aid and assistance" and directed that the estate be reduced to money and the funds invested and the income thereof "be used for the benefit of such of my relatives as may require financial aid and assistance."

The court stated that an examination of the provisions of the will presented questions of construction and interpretation, and also questions as to validity of particular provisions, bequests and devises, particularly as they bear upon the trust purported to have been created by the will. The court further pointed out that the reasons the contestant gave for holding the will invalid were matters which the county court could not properly consider in determining whether or not the will should be admitted to probate, as this would require the county court to construe such provisions in violation of the principle stated in the case of *In re Estate of Crane*.

The court also disapproved the language in the case of *In re Estate of Strelow*, 117 Neb. 168, 220 N.W. 251, which required that a devisee or legatee must allege and prove, in order to obtain the admission of a will to probate, "that he as such legatee or devisee, under the law as well as under the will, is entitled to the legacy or devise." The reason given being that this language would require a construction of the will, the jurisdiction for the determination of which is in the district court insofar as the rights of the legatee or devisee are concerned.

*State ex rel Coulter v. McFarland*, 166 Neb. 242, 88 N.W. 2d 892

The deceased died presumably intestate. A petition was filed for the administration of her estate and an administrator was appointed in 1956. Subsequently the respondent became the county judge, and found in the office a document that appeared to be the will of the deceased. He called the administrator who got the will and took it from the county court to prepare copies and a petition for probate. Later a petition was filed for the probate of the will on behalf of a sister of the deceased by two other attorneys. A time and place for the hearing on the petition were fixed by the respondent and notice was ordered published. After this was done, the administrator filed his petition for probate of the will and tendered two orders: one, to fix the date for hearing on the petition, an earlier date than that fixed by the first order, and, two, a "notice of hearing." The respondent county judge filed the petition but refused to sign the order on the basis that such an order and notice had already been fixed.

On this the administrator brought this action in mandamus to compel the county judge to sign this order. Eventually a peremptory writ of mandamus was issued and the respondent refused to obey the writ and he was ordered committed to jail until he signed. After this he signed the second order.

The court held that once an order fixing the time and place of hearing on a petition to probate a will has been entered, that the filing of additional petitions for the same purpose, by others entitled to do so, does not require the county court to issue additional orders to do the same thing. The court also pointed out that when a will is deposited with the county court according to law that it is in its legal custody and the court has the authority to fix a time and place proving it and to cause public notice to be given. The filing of a petition for the probate of a will is not an action in the ordinary meaning of the word but is for the benefit of all interested parties.

*Dunlap v. Lynn*, 166 Neb. 342, 89 N.W. 2d 58

Testatrix died in 1956 survived by one brother and one sister, who had a daughter living, and four nieces and nephews, who were children of a deceased brother and a deceased sister. Christina C. Dunlap was the mother of the testatrix and of the four brothers and sisters mentioned. The provision of the will in question is as follows:

If Christina C. Dunlap shall die before I do and there shall be no heirs born to me, then and in that case all of my property above described and all other property, both real and personal which shall belong to me at my demise shall descent to the heirs of Christina C. Dunlap share and share alike, and should there be grand children of the said Christina C. Dunlap they shall share and share alike of the share falling to their parent, under this will.

The will was made in 1913 and at this time all of the grandchildren of Christina, the nieces and nephews mentioned above, were born. Christina, the mother, died in 1924 survived by the father of the testatrix. The father died in 1929. One of the brothers died in 1930 leaving two children and one of the sisters died in 1942 also leaving two children.

The trial court gave one-fourth of the estate to the living brother, one-fourth to the living sister, and one-eighth to each of the children of the deceased brother and sister. The daughter of the living sister received nothing.

The appellants, the living sister and her daughter, contended that this language, "they [grandchildren] shall share and share alike of the share falling to their parent" should be construed to mean that the gift to the grandchildren and their parents is an original gift to the former subject to the condition that they take only if the parents were living at the time of the death of the testatrix. That, since the deceased brother and sister died prior to the testatrix, their gifts lapsed and their children should receive nothing. Thus the living brother would receive the fee interest in one-half of the estate and the living sister would have a life interest in the remaining one-half and her daughter would have the remainder in fee of this half.

The trial court was affirmed. The court found that there was a patent ambiguity in this language and that the intention of the testatrix must be found within the four corners of the will in accordance with well established legal principles. The court further found that the word "heirs" was used in an inaccurate sense to denote a hypothetical and artificial class composed of those who would have been heirs if their ancestor had lived until then some future time.

David Dow, Chairman  
Lad V. Tesar  
Gerald S. Vitamvas

MR. FARMAN: The last subcommittee is headed by Dick Ricketts of Lincoln. It is on Current Legislation. He is also sub-chairman of the same committee under Probate Law. He is likewise the chairman of the Trust branch of our Section.

At this time I will introduce Dick Ricketts who will give his Legislation report and then take over and carry on with Trust.

## REPORT OF COMMITTEE ON CURRENT LEGISLATION

L. R. Ricketts, Esq.

We are working under severe limitations of time here. I believe you have all received a mimeographed copy of the subcommittee's report on Current Legislation.

The first three paragraphs are the ones that are of major importance. The report in these three paragraphs has been approved by the Executive Committee.

The first involves legislation to protect land titles against references and recitals in instruments not of record which should be recorded. A bill, a form of which Mr. Ginsburg was good

enough to give to the committee, we think will be valuable for Nebraska land titles.

The second has to do with the preparation and sponsoring of a bill on stale reverters and restrictions, about which Mr. Fike talked earlier this afternoon.

The third has to do with the development of a statute of limitations on child support and alimony judgments, which I think has been more talked about by lawyers in this state than almost any other subject.

We had a form of bill developed for No. 1; we are working on forms of bills for Nos. 2 and 3. I would like to move at this time that this Section recommend to the House of Delegates that the State Bar Association sponsor legislation before the next Legislature on the subjects covered in Paragraphs 1 to 3 inclusive of this report.

A. J. WEAVER: I'll second that.

MR. FARMAN: Is there any question?

GEORGE O. KANOUFF: I have just one thought in connection with the third. I'm up against this situation at this time, and that's the question of an unpaid bastard judgment. I am wondering if, in order to clear any old titles of that nature, that shouldn't be included with child support judgments and alimony? I know there is a question but what that might be covered by your ordinary dormancy of judgments, depending upon its nature, but it is a very close question and I simply ask that Mr O'Gara investigate the matter.

MR. RICKETTS: The committee will investigate that matter. I myself am not familiar with it so I wouldn't know the problem but we will certainly make a note of it and consider it, along with the state Legislative Committee at the time we try to recommend the form of bill.

Are there any other questions? Are you ready for the question? All in favor signify by saying "aye"; opposed. The motion is unanimously carried.

## TRUST LAW DIVISION

MR. RICKETTS: Now with reference to the Trust Division, because of the fact there are limitations of time, we have several reports of subcommittees, two of which really do not require any action, but I would like to have Mr. Richard Berkheimer, who is the chairman of the subcommittee having to do with significant trust legislation, present as briefly as possible his report, because

it has to do with the amendment of the "pour-over" statute which was adopted at the last Legislature and about which you will remember Judge Troyer commented at our meeting last year. We have some very serious problems in connection with that. We do believe that corrective legislation should be sponsored at the next Legislature. Mr. Berkheimer.

RICHARD L. BERKHEIMER: As Mr. Ricketts stated, the Trust Division felt that this matter of amending the "pour-over" trust statute was probably the most urgent matter of legislation in the trust field.

You will recall that the "pour-over" statute deals with the situation where property passes by will to an existing living trust. The last Legislature passed a statute which validated that type of bequest. So far as our committee is aware there is no opposition to that phase of the statute.

However, once the validity is established the question remains as to whether this property that passes by will to a living trust is to be administered as a testamentary trust under the supervision of the county court or whether it is to be administered as a part of the living trust, over which only the district court has jurisdiction, and over which there is no supervision.

The bill which the Bar Association sponsored last year provided that generally it would be administered as an inter vivos trust with no county court supervision. Some opposition developed in the Legislature; many members of the Bar and perhaps the county judges felt that the supervision of the county court over this trust property should not be dismissed too lightly, especially in the case of the individual trustee.

What they ended up with was a statute that said that if you had an individual trustee, the county court did have jurisdiction and would supervise it. If you had a corporate trustee it was an inter vivos trust. Judge Troyer pointed out the inconsistencies and the problems that were raised by that last year.

We have endeavored to reconcile these two views because we feel that if we would go in again with the Bar Association bill which was sponsored in the last Legislature perhaps we would meet the same opposition we did before.

What we have proposed is an amendment to the statute which will provide that the matter of county court supervision be left to the testator, but in such a way that he will not be likely to unwittingly waive what many consider to be a valuable protection for his property. Under the statute that we propose the

testamentary property will be subject to county court supervision unless the testator's will provides otherwise.

We have proposed a statute which reads pretty much as follows—which is the way the statute will read after the amendment:

A testator may by will devise and bequeath real and personal property to a trustee of a trust (including an unfunded life insurance trust) which is evidenced by a written instrument in existence when the will is made and which is identified in the will, even though the trust is subject to amendment, modification, revocation, or termination. [Now we come to the main amendment contemplated] The property so devised and bequeathed shall be deemed held under a testamentary trust, and such property shall be subject to the provisions of Sections 30-1801 to 30-1805 unless the testator shall by will provide that the property devised or bequeathed shall not be subject to supervision by the county court; and if the testator shall so provide in his will, the property so devised or bequeathed shall not be subject to the provisions of Sections 30-1801 to 30-1805. An entire revocation of the trust prior to the testator's death shall invalidate the devise or bequest.

Sections 30-1801 to 30-1805 are the county court supervision statutes.

You will also note that we made a reference to an unfunded life insurance trust. Most authorities agree that it should be treated the same as any other trust but some members of the Bar occasionally raise a question about an unfunded life insurance trust as to whether or not there is sufficient corpus there to sustain that trust. So we have made it clear that this legislation applies to an unfunded life insurance trust, which is the type of trust most often involved in pouring over.

I would like to move that this Section recommend this amendment to the pour-over trust statute in substance; namely, to provide generally that pour-over trusts shall be subject to county court supervision unless the testator by his will provides otherwise.

I will move that we recommend to the House of Delegates that the Association sponsor the legislation which I have described.

MR. PAYNE: I will second the motion.

RICHARD A. VESTECKA: I was wondering if this group had reconciled this proposal with the constitutional provision as to jurisdiction of county courts probate and estate matters. I



have no personal objection to handling it in this way or to having the testator indicate a desire to have it handled that way, but I just wanted to be sure that the committee had investigated that fully before they proceed with this.

MR. RICKETTS: I think that is a good question, Vic. Clearly we are not talking now about the property that is in the living trust; we are only talking about the property that passes by will over which the county court takes jurisdiction there, and the administration of that property under a trust instrument, whether it be in the will or some place else. Historically this business of pouring-over was accomplished through maybe one of two methods, principally by the one which we refer to as incorporation by reference; that is, that the trust, the living trust instrument is incorporated in the will by reference. That, historically at least, brings it within the traditional idea of estate jurisdiction. I think the Legislature can legitimately provide that it be retained there, under the theory that it is a trust created by a will, which is what our statute actually gives the county court jurisdiction of.

MR. VESTECKA: Then you are only considering here what is in a will that became part of an old living trust.

MR. RICKETTS: That is right. There is no question of bringing the living trust into the jurisdiction of the county court. I don't think we could do it constitutionally and I don't think it is anything we want to do.

MR. VESTECKA: I take it that the committee has considered that.

MR. RICKETTS: That is correct.

Are there any other questions? Are you ready to vote on the question? All in favor signify by saying "aye"; opposed. The motion is unanimously carried.

There are two other reports here which do not require action and which, if there is no objection, I will merely file with the reporter, and we hope they wind up by being published in the record of this session.

One has to do with the Trust Committee on Drafting, a joint committee of Trust and Probate, which are going to draft some recommended forms of administrative provisions in trusts, which I think will be very helpful to the lawyers of this state. John Mason and Varro Rhodes are the co-chairmen of that joint committee. They have done a lot of work and they are going to be doing a lot more work.

Mr. Bob McNutt has a report here also on tax features of Trusts. That committee is busy at work on that. This is, of course, a long-range project and I think that a lot of good will come out of it.

## COMMITTEE OF TAXATION ON TRUSTS

Robert D. McNutt

This is my report as chairman under the Trust Law Division of the Committee of Taxation on Trusts. This committee is made up of myself as chairman, John N. Gradwohl and Philip G. Johnson of Lincoln, Otto Kotouc, Jr., of Humboldt and Keith Miller of Omaha.

On June 7 this committee, except for Mr. Kotouc and Mr. Miller, met in Fremont, Nebraska, in company with the members of the Real Property Probate and Trust Law section of the Nebraska State Bar Association.

In the meeting there was a good deal of discussion on many different items as they affect trusts and the taxation of trusts. Insofar as the discussion touched the taxation of trusts, there were two subjects of discussion and two areas of agreement reached by the committee.

1. That this committee on behalf of the Nebraska State Bar Association cooperate in every possible way with the American Bar Association in its work and in regard to the bills which it watches in the Congress of the United States.

2. That this committee cooperate with the taxation committee of the Nebraska State Bar Association on bills with which they are concerned which may come before the 1959 session of the Nebraska State Legislature.

The committee discussed at great length the intangible tax as it applies to trusts in the State of Nebraska. Concern was voiced over the fact that the unsettled conditions in regard to the intangible tax in the State of Nebraska drive a good deal of trust business from the state to trust companies in other states where the intangible tax situation is much clearer and much more favorable. No further action of this committee, however, was taken upon this subject.

## JOINT REPORT OF COMMITTEE ON DRAFTING TRUSTS AND COMMITTEE ON WILL DRAFTING

At the organizational and planning meeting of the division heads, subcommittee chairmen and committeemen of the Real

Estate, Probate and Trust Law Section of the Nebraska State Bar Association held in Fremont, Nebraska, on June 7, 1958, it was determined by the Probate Division and Trust Law Division that the Committee on Will Drafting of the Probate Division and the Committee on Drafting Trusts of the Trust Law Division should work together on the problem of the preparation of suitable forms to be circulated among the Nebraska lawyers as an aid in the proper and effective drafting of wills and trust instruments. It was decided that the first work would be in connection with the drafting of trust instruments, both inter vivos and testamentary, and that the work could be divided into two classifications: (1) the drafting of suitable forms for administrative provisions of trust; (2) the drafting of suitable forms for distributive provisions of trusts.

The committees recognized that the preparation of a set of forms for use by the lawyers of the state would be very difficult because of the varying conditions and circumstances pertaining to individual clients' trust problems. However, it was determined that if some standard forms could be developed it might be of considerable help to the lawyers of the state who are called upon more and more to consider the drafting of testamentary and inter vivos trust instruments.

The committees determined that the first efforts should probably be devoted to the preparation of forms for administrative provisions. They have subsequently undertaken the task of circulating samples of trust agreements among the committee members for comment and suggestion. There has not been much progress in this direction, although two forms have been circulated to the members of the committee by other committee members. The committees feel that this program should be considered by next year's committees and that the committees should undertake the assembling of various sample forms of trust instruments soon after the State Bar Association meeting so that there will be ample time by the end of next year to settle upon sample forms which could be distributed to Nebraska lawyers.

Committee on Drafting Trusts  
John C. Mason, Chairman  
William H. Heiss  
Julius D. Cronin  
John R. Cockle  
Paul P. Chaney

Committee on Drafting Wills  
Varro H. Rhodes, Chairman

Charles A. Nye  
Robert H. Beatty  
Frank D. Williams

MR. RICHARDS: The next division head who would be here if he were able is Mr. Heth, who is the division head of the Probate Section. He is seriously ill. I am pinch-hitting for him.

We have one more report under his division. I will ask Fred Hanson to make his report as subcommittee chairman of the Committee on Improvement of Probate Procedure. It is an important report. Fred Hanson.

# COMMITTEE ON IMPROVEMENT OF PROBATE PROCEDURE

Fred T. Hanson, Esq.

Mr. Chairman, since no action on this is contemplated I want to make it very short. The Committee on Improvement of Probate Procedure is a new committee, and as you can see from the report we have come up with five proposals for legislation. We had one or two more but the fathers of the Executive Committee turned thumbs down on them, but they were so nice about it that it reminded me of the indulgent father who put a silencer on his shotgun because his daughter wanted a quiet wedding.

I am not going to go through this report. I just want to make one or two comments on it because you have the report before you.

The first one of these is a combination of notice to creditors and notice of administration or notice of probate. This isn't a new idea even to this Section because in one of the papers delivered before this Section eighteen years ago that and the two following proposals were made. This one becomes more desirable now because pressures from the Supreme Court of the United States made the statute on mailing necessary. I just want to make this additional comment in line with what Mr. Ginsburg had to say: If you have this combined notice to the heirs, devisees, legatees and creditors at the beginning combined with the mailing of notice, then the Statute 589, or whatever statute takes its place, could safely dispense with any further mailing in connection with that particular case.

As to No. 2, statutory authority for authorizing a personal representative to continue a going business of the deceased, I think a lot of personal representatives through the years have taken care of that situation without realizing the risk that they take. You only have to look in the texts on the subject to see that they do take risks. This idea is found in the Model Probate Code. It

not only allows the court to authorize the personal representative to continue the business as a going business, to buy merchandise as well as to sell, but it outlines briefly what the order may do. It may authorize the operation by the personal representative solely or jointly with somebody else; it may provide the extent of the liability that may be incurred by the estate in connection with the business. It may limit that liability to the assets of the business.

The others I think need no particular comment.

No. 4 is designed to get some protection for guardians in payment or settlement of claims existing prior to guardianship, so the guardian doesn't have to stick his neck out and hope that his action will be approved when his next account is presented, or when his final account is presented. We have limited that to a proceeding for that purpose. We haven't made it a blanket notice to creditors although just in the last day or two I got quite an argument from one of our district judges that we ought to have a notice to creditors and a hearing just as you do in an estate matter. His argument was that the guardian will frequently be somebody who isn't entirely familiar with the affairs that he has to handle. If he is going to make plans, decide what he is going to do, decide how much he can spend for the maintenance of the work, he needs that in order to know what there is in the kitty to start with.

The last one was a suggestion that we received from Paul Good with reference to the gift to minors act. That is a uniform act and applies only to gifts inter vivos. The suggestion is that another act, a companion to that, ought to be enacted to give the same privilege of making gifts to minors to a testator.

We didn't seem to have any trouble coming up with ideas for improvement. It's like finding fleas on a healthy dog.

MR. RICHARDS: Do you want to move the adoption of your report, and that it be placed on file for further consideration?

MR. HANSON; Thanks for stating my motion.

ROBERT M. HARRISS: I second the motion.

MR. RICHARDS: All in favor signify by saying "aye"; contrary-minded, the same sign. Unanimously carried.

Now we come to the main part of our program. We haven't been too busy this last year, and I move that the Secretary read the minutes of our Executive Committee for the last year.

JOHN W. DELEHANT, Jr.: As Secretary it is my duty to read these minutes which now consist of 268 pages. However as

a human being I now move that the report of the Secretary be dispensed with. Do I have a second? All in favor.

MR. RICHARDS: Gentlemen, that concludes our meeting. I think we had a very successful one.

Will the members of the Executive Committee, including Franklin Pierce and Paul Chaney, come up front for a short meeting

**SECTION ON MUNICIPAL AND PUBLIC CORPORATIONS****Harold Rice, Esq.****Chairman****Municipal Sanitation**

A. From the Viewpoint of the State—T. A. Filipi, Director, Div. of Sanitation, Dept. of Health, State of Nebraska

B. From the Viewpoint of a Municipal Engineer—Robert L. Reins, Vice President, Henningson, Durham & Richardson, Engineers and Architects, Omaha

C. From the Viewpoint of a Lawyer—William J. Baird, Esq., Omaha

**MUNICIPAL SANITATION****T. A. Filipi**

It is most interesting to notice that as soon as two or more persons assemble, they first appoint a chairman and then draw up rules for operation. The next step is to select or appoint someone to interpret and enforce the rules.

The first assembled set of rules or laws relating to municipal sanitation were those recorded by Moses. These laws were indeed appropriate for the occasion and can be used today as a basis of laws, regulations and codes.

The idea of Health boards, departments, and advisory councils is nothing new; they have been in existence for hundreds of years. The need for specific health measures likewise is nothing new. In 1850 a report of the Sanitary Commission of Massachusetts included 50 items of municipal sanitation all of which are applicable one hundred years later. I regret to admit many of the recommendations listed in that report are still not followed out but sorely needed.

A State Department of Health was organized in Nebraska in 1891. Since then just about every session of Legislature passed one or more laws relating to health. Today, the entire subject is covered for every granted subdivision. The subject of sanitation always infers to the environment, be it home, camp, community, state, county, world and now universe. It never involves a person, always the environment. There is no healing phase—only abatement and prevention of undesirable and unhealthful conditions.

The scope of environmental health as applied to municipalities will include air, water and objects. This subject of air in turn can be divided into dust, odors, radiological fission products, sights and noises.

Water in turn poses problems in drinking supply, sewage, swimming pools, drainage, flooding, mosquitoes, odors and sights.

Objects will include all nuisances. Stray animals, rubbish, garbage, slums and sights.

Visualize any situation in your community and it will fall into one of the above three areas.

The Statutes include provisions for health work including sanitation to cover just about every area. For purpose of quick reference these are listed:

- 14 - Metropolitan Cities
- 15 - Primary Cities
- 16 - Cities of First Class
- 17 - Cities of Second Class
- 18 - Sanitary Districts
- 19 - Villages
- 81 - Engineer's
- 71 - State - County - District

In all of these Statutes cognizance is taken of health and authority is given when specific directions are not provided for the adoption of rules, regulations and ordinances abating and preventing potential hazards and for the promotion of sanitation. Inasmuch as foresight is always lacking, a review of local ordinances usually has not provided for the abatement of a specific problem affecting the health and welfare of persons in a specific area. Is there not some quick means by which problems can be connected quickly when arrangements have not been made by specific ordinances? This in my opinion is the biggest problem affecting municipalities.

Being in health work, I agree that we perhaps lean over to abate unsanitary conditions and urge adoption of measures for promotion. This led to the adoption and promulgation of State Rules and Regulations. These regulations were processed in accordance with legal directives and have been published. To date about 2,000 copies have been distributed throughout the states. Yet instead of promoting sanitation, it appears they are being used to determine what does not have to be done.

It is quite interesting to observe the people's attitude toward some functions of government. I believe I would be well liked by all municipal officials if I went on a year's vacation and would pay no interest to municipal sanitation. It would then be possible to drill the new well, buy the pump, forget about chlorination, stop operating the sewage treating plant, locate the city dump right in town, discontinue daily burial, etc., etc.



Please bear one thought in mind, municipal sanitation affects persons in your community. Starting the swimming pool chlorinator just before our representative visits the pool is not protecting your children. Building a swimming pool by a community pool committee to avoid the hiring of a registered engineer is bypassing legislation passed to protect not only municipal officials but those persons dependent on the project. The breaking up of a project into three portions to avoid the thousand-dollar bid limit is really hoodwinking your citizens.

As stated in the law—the “City Attorney shall attend council meetings and give his opinion.” It is well recognized that the retaining of a village or city attorney is lacking. When a subject brought to us by municipal officials is referred back through them to their attorney, they answer, “we have none.” Why? A selling job for this professional service should be an objective of this group.

In addressing municipal officials, the over-all welfare of the citizens should be kept foremost in mind, along with the long-time effects of the situation at hand. When advice is given that “you don’t have to do this,” is it good for the program or is it temporary relief?

Since most municipalities have few ordinances relating to health, it is their obligation to enforce state regulations. Are you as city attorney advising to this effect? Did you ever read these Rules and Regulations? Where are the 2,000 copies we distributed?

Municipal sanitation is a growing problem; more persons are moving to villages, and villages and cities are growing in size.

## **MUNICIPAL SANITATION - ROLE OF THE ENGINEER**

**Robert L. Reins**

The preceding paper by Mr. Filipi, Director of Sanitation, State Department of Health, has outlined the various problems that are encountered in municipal sanitation, and once the problem has been recognized, the engineer enters the picture to assist in the solution of these problems.

Through the years in many discussions with municipal officials, planning boards and members of the community that are interested in solving the type of problem that we’re discussing today, I’ve made a definite effort to get across the one point that I feel is most important in solving these problems.

The most important of all activities of an engineer, particularly a consulting engineer working with the city, is to provide sound

planning. In other words, sound planning in my opinion is the most important phase of engineering work and there are many reasons why I believe this so strongly and I would like to elaborate on a few of these:

1. *Establish the exact problem.* Many times because of political overtones, local influences and fixed ideas that have entered the picture, the viewpoint is distorted and the sights are not set on the true problem that exists.

This, I believe, can be evaluated better by a so-called outsider—someone who can take a fresh look at the problems and not be influenced by other than engineering facts in evaluating the true picture.

2. *Proper solution.* Once the problem has been established, the next phase of the engineering is the determination of a proper solution to the problem. In case of sanitary engineering problems, the solution may be influenced by what has been done in the past with little thinking as to modern methods of tackling the problem. Regardless of whether it's a question of solving the problem in one operation or of building in stages and actually developing the over-all plan as economics will allow or as growth will demand, the proper over-all plan is of prime importance in the solution to the problem.

3. *Realistic costs.* Considering this point, one may say, "We'll get plenty of money into the project so we know we won't be short." or "Cut it to the bone so the bond election will carry." Neither one of these ideas in my opinion is sound because, in the first place, if too much money is designated for the project it may restrict the activity of other projects that are needed in the community. On the other hand, if not enough money is available, after going through the legal procedure, hearings, votes and similar activities, then to end up receiving bids for a contract and not having enough for the project is most embarrassing and disconcerting. These ideas are not sound planning and would jeopardize the success of the project and therefore it seems to me that realistic costs are a very definite link in the chain that's a part of the complete program of sound planning.

4. *Equitable financing.* The complete plan also includes a method of financing, and in this there should be methods suggested that are fair to all parties concerned. I am referring to special assessments as an example, or revenue financing with a sewer service charge that will be enacted and various charges made to the users of the sewer.

An unfair basis of charge jeopardizes the completion of the financing picture and in turn, has its effect on the over-all project.

I have spent considerable time on this phase of sound planning, but I firmly believe, considering the foregoing points, that without it, municipal projects are in jeopardy from the very beginning and could become victims of any one of these pitfalls while traveling the course from start to finish in any sanitary engineering project.

### *Final Design*

Once the scope of the project has been determined through the planning stage, the final design demands a close coordination between the city attorney and the engineer to assure a successful completion of the project.

1. *Proper procedure.* This, as you probably realize, is dependent upon the class of the municipality and I'm not suggesting that the engineer anticipate in setting up this procedure, but he should be in a position to assist the attorney in doing so.

What I am referring to are such things as hearings, to have a clear cut description of the project, to define the boundaries and the scope of the work proposed, so that the individual property owner will have an opportunity to vote intelligently and to express an opinion based on facts. He will clearly understand the problem and make his decision accordingly.

Other things such as publication dates are of prime importance. Some are statutory in their requirements and others from a practical standpoint are adjusted, such as contractor's time for figuring a job for bids.

The engineer assists in the preparation of the assessment schedule, considering the legal limit as well as the equitable charge that is proposed. He should be in a position not only to present the information but to back it up and explain it to the various people that are involved in paying for this project through the special assessment.

Other items of concern through this final design stage are the acquisition of right-of-ways and easements. The engineer should provide the attorney with his descriptions, should assist in land acquisition, and in the event of condemnation procedure should act as a liaison between the property owner and the board which is establishing the value. A clear picture of the function of this project is presented to both sides and a fair value established.

It is necessary for the engineer to obtain approval from various agencies in this final design work; included are county, state and federal health authorities. These approvals should be prior to

the actual advertising and receiving of bids to clear the way for further action upon the receipt of a desirable bid.

### *Construction Program*

Regardless of the detailed planning and the time and effort spent preparing the final design and specifications, a very basic and important link in this chain of events is the proper supervision of construction. I do not mean to infer that this in every case is a check on the contractor for fear that he would not be honest in his activities, but rather an assistance and aid in expediting the successful completion of the project.

He should process any changes of construction or rerouting that may be brought about by encountering unforeseen obstacles.

### *Close-Out of the Project*

This is a relatively minor phase that the engineer handles; however, he does prepare the final costs and submits the complete records of the plans, etc., to the municipality for their record and reference in the future.

The major part of this phase is to assist in the start-up and operation procedure. This can be done by instructing the city and the various personnel that are involved in this utility and follow up with the manufacturer's representative of certain equipment used on the project.

### *Financing*

Based on the planning, the financing has been established, and many times rate structures have been reviewed and revised to support this project and the final cost being established should tie in with the preliminary planning. Then coordinate the proposed change with the actual costs as they have been established.

Special assessments are now ready to be levied and certain hearings are necessary where the engineer should attend and assist the city and the city attorney in handling this phase of the project.

### *Additional Services*

Regardless of how complete a project is, there are always possibilities of extensions and additions and expansions to the program and the engineer should be available to assist in taking care of this phase. Also, there'll be connections to the system such as service lines for sanitary sewers, and the records are available to the city for their use through the engineer's file.

*Summary*

The role of the engineer in municipal sanitation with particular emphasis on sanitary sewers and sewage treatment can be separated into five or six different phases. The first and most important in my estimation is the planning stage; next we have final design, then come construction, close-out, financing and extensions and additions to the facility.

These services are rendered as part of a joint venture by the city, the city attorney and the engineer to the successful completion of municipal sanitary work.

### MUNICIPAL SANITATION FROM THE VIEWPOINT OF A LAWYER

William J. Baird, Esq.

It is with somewhat of a feeling of trepidation that I get up in the role of a so-called "bond attorney" before a group consisting largely of city attorneys, because I have a strong suspicion that there are many occasions when the bond examiner is not a city attorney's favorite species of animal. However, I want you to know that there are many times when you "deal us a fit" with the transcripts which are presented, so this occasion appears to be an appropriate time to discuss some of the common problems involved in the subject of municipal sanitation which is under discussion this afternoon.

We lawyers have one advantage over both state and private engineers in wrestling with municipal sanitation problems—we at least can solve our problems sitting in our offices and do not have to don boots and slosh around, risking injury to our delicate olfactory nerves.

What the lawyer is primarily concerned with is seeing that a municipality in dealing with its sewage problems proceeds in accordance with the requirements and restrictions of the applicable statutes. I am going to confine my remarks to the problems as they affect cities of the first and second class and villages on the assumption that they are of more general interest.

When a city or village decides to construct a sewerage system or to extend, enlarge or improve an existing one, we ordinarily think of Section 16-667 as concerns cities of the first class and of Section 17-913 as governing cities of the second class and villages. These are the sections which authorize the creation of sewer districts and the following sections of the respective statutes prescribe the procedures for setting up the districts and operating under them.

There is, however, another chapter of the Statutes with which we should be familiar, and that is Chapter 18, Article 5, as adopted in 1951 and amended in 1957. This Article applies to all cities and villages in the State and sets forth a procedure for constructing, equipping and operating a sewerage system and treatment and disposal plant, or extension or improvements thereof, without the necessity of creating one or more sewer districts. It prescribes a method of financing the construction or improvement, and authorizes the making of a rental or use charge to take care of the maintenance and operation as well as of bond retirement. Two different kinds of bond financing are permitted: revenue bonds which can be issued by the governing body without any authority other than its own authorizing ordinance, and general obligation bonds which can be issued only after a vote of the people, with more than 60 per cent of the electors voting being required to approve the issue. Such general obligation bonds are limited in amount so as not to be in excess of 10 per cent of the assessed valuation of the city or village.

While the provisions of this Chapter 18, Article 5, are useful and are quite frequently being resorted to today by municipalities who find the need of extending and enlarging their sewerage systems, the "Sewer District" route prescribed by Articles 16 and 17 is more often followed for several reasons, the most important of which is that in a properly created sewer district, special assessments can be levied to help defray the expense of construction. This appears to be a more equitable arrangement in many cases, as it results in the property owners whose property is specially benefited by the improvement being called upon to pay for such benefit. Another major reason for proceeding under the "Sewer District" sections is that the council or board of trustees can act upon its own initiative and issue the resulting general obligation bonds without the expense and risk of submitting the matter to a public vote, as is required under Section 18-506.

So far as cities of the first class are concerned, the statutory provisions governing the formation of sewer districts and the subsequent procedures under them are quite sketchy. The council simply sets up the districts by ordinance, then by vote of three-fourths of all members elected to the council orders the sewer mains to be laid and assesses the cost against the abutting property. If two-thirds of the foot frontage abutting streets in the district petition the council for the work to be done, then the council can act by a majority vote only. The general provisions of 16-321 applying to city contracts for general improvements in excess of \$1,000 must, of course, be complied with, and the city engineer

must submit his plans and estimate of cost. From a strict reading of 16-667 to 672 governing first class city sewer districts, it would appear that the entire cost of the sewer system must be borne by abutting property and paid for by special assessments, even though some parts of the system are of general as distinguished from special benefits. When the sewer bonds authorized by 16-670 are subsequently issued, the question arises as to whether they are valid general obligation bonds of the city in view of the fact that the statute contemplates payment by special assessments only. In reliance upon the case of *Miller v. City of Scottsbluff*, 133 Neb 547 and cases therein cited, however, we consider properly issued sewer bonds of cities of the first class to be valid general obligation bonds and if the special assessments levied are insufficient to pay the same, whether from a failure to collect them or otherwise, the city is liable to the bondholder to make up any deficiency through means of ad valorem taxes.

Another point causing some confusion in the procedures under cities of the first class sewer districts is the amortization schedule required by the statute authorizing issuance of the sewer bonds. Section 16-670 provides in part that "after the expiration of five years an equal amount of said bonds shall be redeemable each year," which gives rise to the question of whether this means that no bonds can mature prior to the five years. We have interpreted this section to mean that any amount of the bonds can be due at any time during the first five years, and that only those, the maturities of which exceed five years, must be scheduled so as to fall due in equal amounts each year.

The majority of legal problems arising today in connection with municipal sanitation appear to be those affecting cities of the second class and villages. This is naturally so because it is the smaller but growing communities which are coming up to the point already passed by larger cities where a municipal sewerage system becomes a "must." Unlike the sketchy requirements for sewer districts in cities of the first class, the provisions of 17-913 and following which control the construction of sewerage systems via the sewer district route in cities of the second class and villages are quite complete and explicit as to procedures. Despite this fact, however, the sections in question probably cause more headaches for the municipal attorney than any other statutory provisions under which he works.

To begin with, the proceedings are initiated by the council or board of trustees declaring the advisability and necessity for a sanitary or storm sewer system in a "proposed resolution." Such "proposed resolution" must set forth a number of factual items

such as the kind of pipe proposed to be used, the size and kind of sewers to be constructed, the location and terminal points, the engineer's estimate of cost, and the outer boundaries of the district or districts in which special assessments will be levied. Prescribed notice when the proposed resolution will be considered for passage must then be given, and at the hearing affected property owners may be heard.

From the standpoint of the draftsman of these initiating proceedings this presents a somewhat clumsy situation, for at the first meeting the council or trustees in effect must adopt a resolution which proposes to adopt a resolution. Recently, one village attorney drew his preliminary resolution so that it simply provided that on such and such a date there would be a hearing at which a resolution of necessity would be considered and acted upon without setting forth the terms which were proposed to be in the resolution of necessity, and he argued with some merit that this is all that Section 17-913 requires. It is considered better practice, however, and certainly is much safer, to set forth the complete terms of the resolution of necessity as proposed at the initial meeting, especially since the notice which is immediately thereafter published or posted must contain the entire wording of the resolution to be acted upon.

One minor point can appropriately be mentioned at this time: quite often the draftsman will include in the proposed resolution of necessity a section which calls for the publication or posting of notice, the terms of such notice and the time when the hearing will be held. This is not correct draftsmanship as there is no reason that the "proposed resolution" when it is finally adopted should contain any provisions relative to the notice and hearing thereon. It is better practice at the initial meeting to have the council or trustees act on the proposed resolution, then adopt a separate resolution providing for the publication or posting of notice, etc. In any event even though such provisions regarding notice are included in the body of the resolution as originally proposed, they should be eliminated when the resolution of necessity is finally adopted under the authority given in Section 17-914 which provides that "the resolution may be amended and passed or passed as proposed."

One other troublesome problem confronting the municipal attorney who is proceeding under the sections under discussion is the requirement that the "proposed" resolution set forth the outer boundaries of the district or districts. Does this mean that each lateral sewer must be treated as a separate sewer district, with the consequent necessity for possibly a large number of separate



proceedings, separate publications, separate contracts, etc.? A fairly recent case of *Hutton v. Village of Cairo*, 159 Neb. 342, is considered as answering this query in the negative, and as authorizing the entire sewer project to be included in a single district, with it being sufficient to describe the outer boundaries of the entire project. There have been a number of instances where a village which has had no municipal sewerage system decides to construct a system to serve the entire village. It is proper in such a case and less cumbersome to form one sanitary sewer district, making the village limits the "outer boundaries" of the district. For purposes of clarity in drawing the proceedings it is proper to define and describe the various laterals within the district as "Lateral Sewer District No. 1, Lateral Sewer District No. 2," etc.

Speaking of laterals, it is in order to say a word about what powers property owners have to prevent construction of the sewers. Section 17-914 requiring notice of the proposed resolution of necessity to be published states: "\* \* \* at which hearing the owners of property which might become subject to assessment for the contemplated improvement may appear and make objections to the proposed improvement."

Section 17-916 provides that "If a petition approving the resolution signed by property owners representing a majority of the front footage which may become subject to assessment for the cost in any proposed lateral sewer district be filed with the Clerk within three days before the date of the meeting for the hearing on such resolution, such resolution shall not be passed."

The effect of these two sections is that only the owners abutting a lateral sewer can act to prevent its construction, while the owners abutting the main sewer—even though they may be subject to special assessments—can do not more than appear and voice their objections. The city council or village board has the complete discretion as to the construction of the main sewer.

There is one other point I would like to mention before leaving the subject of sewer districts for cities of the second class and villages and that is in connection with the time for publishing the notice to contractors. Section 17-918 requires that the notice shall be published "in at least two issues" which is inconsistent with the provisions of the general statute covering public improvements over \$1,000 for cities of the second class and villages. Such statute last referred to is Section 17-568.01, and it calls for the advertisement to bidders to be published "once each week for three consecutive weeks." While Chapter 17, Article 9, would likely be considered a complete and independent act so that the "two-publication" requirement of 17-918 would, if met, be held sufficient,

it is deemed the safer practice to take no chances and to publish the notice to contractors three consecutive times so that both statutory requirements are satisfied.

Finally, a word about the problem of maintaining a sewerage system once it is constructed. The governing bodies are vested with discretion to make reasonable charges for rental or use of the system, but care must be taken to follow the applicable statutes. Section 17-925.01 authorizes cities of the second class and villages to fix and collect rates to be devoted to repair and maintenance, and 17-925.02 gives authority to charge use fees which must be used to reduce ad valorem taxes levied for the purpose of paying sewer bonds. The two different charges can be made concurrently, but they must be kept separate and no surplus which accumulates in the repair and maintenance account, for example, can properly be applied against interest or principal on bonds.

If, instead of constructing the sanitary system by means of one or more districts, a municipality proceeds under the provisions of Chapter 18, Article 5, previously referred to, similar authority to charge use fees to defray the cost of operation as well as of the bonds is granted. Section 18-509 provides in Sub-section 2 that the funds so raised shall be used for maintenance or operation, for payment of principal and interest on bonds issued pursuant to such chapter, or to create a reserve fund for the purpose of future maintenance or construction of a new sewer system. The moneys so raised must be placed in a separate fund and cannot be diverted to any other fund. While this section, unlike the sewer district sections, might appear at first glance not to require a segregation of charges for the different purposes, the use of the word "or" instead of "and" in setting forth the different objectives indicates caution should be used in enacting ordinances under this authority, and it is thought better to levy separate charges for the different purposes and to keep the proceeds thereby raised distinct from each other. Note also that use fees and rentals collected under 18-511 to retire bond interest and principal are restricted to general obligation bonds issued under Chapter 18; such money apparently cannot be applied to reduction or payment of general obligation sewer bonds issued pursuant to Chapter 17, Article 9, as the result of creation of sewer districts.

The foregoing is, of course, not intended to be an all-inclusive examination of the problems confronting a municipal attorney or other lawyer who deals with the legal aspects of the somewhat uninspiring topic of municipal sanitation. They are so multiple that to cover them properly would require the entire convention to be devoted to the subject. The engineers are of sturdier stock

and they can grapple with such problems day after day without it fazing them; we lawyers are more daintily constituted and I think three papers and one and one-half hours of it is enough, so I will close.

# THURSDAY EVENING

## ASSOCIATION DINNER FOR MEMBERS AND THEIR LADIES

Presiding—Paul L. Martin, Esq., President of the Nebraska State Bar Association

Introduction of Guests

Address—Hon. C. Campbell McLaurin, Calgary, Chief Justice of Alberta

PRESIDENT MARTIN: When considering what I should say in the way of introducing our speaker of the evening, I requested someone who knew him well and far more than I did as to just what I should say about him. He reminded me that it would be of far more interest to the group here if I would just give that time to him, and pass any formal introduction.

I will say that I found him out in Disneyland in California where he and his good wife were touring the sights of Disneyland. We have learned to love him and we know that you will after you hear from him.

I wish to introduce the Honorable C. Campbell McLaurin, Chief Justice of Alberta, Calgary, Canada.

## ADDRESS

Honorable C. Campbell McLaurin

Mr. President, Chief Justice of the State of Nebraska, distinguished guests, and distinguished members of my own union who pay no check-off dues: It is a pleasure for Mrs. McLaurin and myself to be in Nebraska again. I have accused some of your authorities of the Nebraska Bar Association of being in a conspiracy to make sure that you had at least somebody to visit you who wears out his welcome. This is the third occasion when I have been present with lawyers of your great state. I am glad to say that the first occasion was so long ago that the older charitable members, generally, and the other members of the Bar weren't here to hear me. I will do my best this evening to improve on that effort.

I might also at the outset of these remarks assure you that one of the reasons that they invited me here was that I had a reputation for terminal limits in public speaking. In the haste of coming down here I was unable to prepare a manuscript, so I have a few notes that I may look at once or twice before my remarks are concluded. I hope you won't think that in doing that I am cheating.

There comes to my mind the occasion when a woman who was a diabetic went to her doctor and they found a rather alarming condition and he said, "You have to get to the hospital right away. We have to get you on a strict regimen. We have to get you back on your diet."

She was agreeable. She was a kind of gay blade who had been taking things in her diet that she shouldn't have been taking. The only place available in the hospital was the maternity ward. She said, "That's fine!"

The doctor said, "I can look after you there just as well as anywhere else."

So in a day or two she was in good shape. Her granddaughter came around to see her and she went to the nurse and said, "I want to see my grandmother."

The nurse said, "Darling, you don't want to see your grandmother! How would your grandmother get in here?"

She said, "I want to see my grandmother."

"Your grandmother can't be in here."

"Yes she is."

"How did she get in here?"

"Well . . . she's been cheating again."

So I hope you won't think I am cheating if on this occasion where I feel I am with cordial folk I talk about a few things that concern you and also concern my country, because in truth Canada and the United States in the last fifteen years have become partners in a sense that never existed in the preceding one hundred twenty-five years.

There is an enormous reservoir of good will in this generous United States towards us Canadians, but we are now confronting problems where we must not be content with just good will but meet our problems in some instances where there may be some conflict. So this evening I hope you will bear with me when, as a judge, I talk not about our courts or our institutions, Congressional or Parliamentary, but talk about some of the things that confront you and confront us in a troubled world. And that necessitates, if you will permit me and bear with me, my making a few remarks about my own country.

We, I think, are the third greatest world trading country, only 17,000,000 people. We are your best customer; you are our best customer.

Are you hearing me? What I say may not be very important but if you are going to suffer you might as well hear it.

Your investments in Canada have been tremendous in recent years. Our resources have to be developed. There has been Canadian criticism of the amount of money that is coming into Canada. In my own Province of Alberta all the major oil companies are there. It is said they are stealing our birthright. The same is true of eastern Canada and the development of some of their resources, but you went through the same experience at or about immediately prior to the Civil War when your railways and various resources were developed with capital in sterling from Great Britain. No Canadian should fear the investment of foreign capital. It comes to us under our jurisdiction, and some of the Canadian gripes in recent months in that regard, very many of you may not be familiar with them, seem to me to be completely unfounded and are calculated to make us Canadians sound as cry-babies.

There are some differences between us of a more serious nature which I will mention but we, as I have said before, are partners.

Our resources are of tremendous import to you, particularly we might say in iron. Labrador, Steep Rock in Northern Ontario will be the future source of the blast furnaces of Pittsburgh and Cleveland and Chicago when the Mesabi Range finally is depleted. Though the resource is in my country it is a joint resource for the beneficial use of two friendly countries.

Now I want to say a word or two about some things that may not sometimes be completely understood even in Canada.

During World War II we were never under lend lease. Whilst you were making lend lease payments around the world, we Canadians were making donations under the term "mutual aid."

I well recall being in Sydney, Nova Scotia, during the war years where there are steel plants, and there they were making the broad gauged railway flat cars marked with the insignia of Russia, a gift from Canada in the winning of World War II.

Today our partnership has grown closer and closer. Dew Line—distant early warning—is situated in Alaska, largely in Canada, and slightly in Greenland. It is a joint enterprise. Canada has made its proportionate contribution to it. The next warning line is the Mid-Canada Line, wholly in Canada, also a joint partnership deal in which Canada has paid the proportionate cost. The final line on the Canadian-American border is the Pine Tree Line, again a partnership between us two peoples, because we no longer fear attack from the Atlantic or the Pacific; we fear attack over the Pole.

And we have gone further, if you are familiar with the North Atlantic Air Defense Community, NORAD. Its headquarters are Colorado Springs, and there we have melded the Royal Canadian Air Force and your Air Forces. The senior officer in charge is an American officer; the deputy is a Canadian officer. It is a clear case of a surrender of sovereignty by Canada and a surrender of sovereignty by you to Canada.

I would not have been able to have phrased it that way tonight if I had not had the experience of making remarks of this character in Virginia about six weeks ago. I was greatly impressed at that time by the fact that *we* had surrendered sovereignty. But the American officer is often absent, necessarily absent on urgent duties from Colorado Springs, and in the event of his absence strategic decisions would have to be made by the Canadian in charge and it would affect the 170,000,000 peoples of the United States and our mere 17,000,000. We are a partnership in a sense that has never been realized before in the history of the world.

We have some differences. If you went to Canada today you might find criticism of the United States. They would accept you individually but you might be just a little disturbed at some comments collectively; for example, your wheat disposal situation. We have no subsidies; we have no soil banks. The Canadian farmer is obliged to take what his crop realizes on the world market. And some of the supports, agricultural supports, which I have no doubt are probably fairly popular in Nebraska, are not too helpful to the Canadian economy.

I was in Oregon awhile ago and there is possibility of bitterness developing between our two countries over the Columbia River. The Canadian government probably is entitled to divert the upper waters of the Columbia River into the Fraser which would deprive the downstream owners in Oregon and Washington of valuable supplies of water for the purposes of irrigation and power. That is one of the things that will probably have to be worked out between us if our partnership is to be free from bitterness so that water resources will be available to you and we can jointly protect our rights and our freedoms in a perilous world.

I think that probably we will meet the difficulties that confront us if we just have faith in each other. I don't think we should be like the parson in a drought-stricken area who had a request from his parishioners to have a prayer meeting the following Wednesday night for rain. He said, "All right, Brethren, I'll call the prayer meeting, but I don't think it will do any good as long as the wind's in the northeast."

As a Canadian and probably, say, representing the Commonwealth, I would like to say a little about our problems in the Mid-East. It seems like a long time ago that we had problems in the Mid-East, doesn't it? We were worried as could be about getting Marines into Lebanon, and the British getting paratroopers into Jordan, and then ten days later we were concerned about getting them out, and that problem had hardly been completed until we were confronted with the explosion in Quemoy and Matsu.

But I don't think we should consider the Mid-East problem as over. You have, we Canadians have, a tremendous capital investment there. There is Canadian investment money in the oil companies that are engaged there. They went in legitimately, they went in fairly and they made their deal, and I think we are entitled manfully to protect them as far as we can.

Before I say something more about that oil situation, I would like to digress and talk just a little about our contributions. I do not think the Canadians are fully alive, I certainly wasn't fully alive until the last four or five months when I was looking into some of these things, not for the first time but in continuation of an interest in them, that Canada's contribution in world economic and military aid on a per-capita basis is comparable to the billions that you are pouring out. But I think we have probably been making one mistake. Your contributions are so much absolutely greater than ours that there is a tendency to talk about their being gifts, give-aways, and being a generous nation. I feel that we two prosperous peoples, in the event of a catastrophe here or there, should be ready to make donations, but in this larger field of making contributions, of helping backward peoples, I think we should avoid any talk of being generous. I don't think our money should go in those quarters unless we are making a hard-boiled deal for our own preservation, for the preservation of our freedoms, and we make it clear to the people who are receiving these benefits that that is our aim.

Now reverting to the Mid-East and the oil situation there, there is a further consideration that I think we should be very cognizant of. Western Europe, England, Germany, France, the Nordic Scandinavian countries are all scarce of energy. We don't realize how privileged we are on this continent with the supplies of energy that may come from coal, hydro or oil. They haven't got them in western Europe. The only place they can get it is from the Near East. And we have sound and stout allies certainly in Great Britain, likewise in the Nordic countries, and in West Germany. Over and above our desire to protect investments in the Mid-East we should be very much alive to the need of a policy being pur-

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sued that will ensure those friends of ours, those friends of free Europe, that they will have ample supplies of energy, and the only ones available at a proper cost are those that will come from the Near East.

I think that we folk on this continent must have a sense of togetherness with the people of England, of Great Britain, free Germany, and of the Scandinavian countries.

I would like to illustrate this by a story of the Texan who was over at your meeting at London last summer. Mrs. McLaurin and I were sorry that we could not be with you—many American friends were gracious enough to invite us to be in the party.

This Texan arriving in London wanted to go to Buckingham Palace to a garden party so he went to Moss Brothers and got outfitted in the proper style with striped trousers and morning coat and spats. He was properly garbed by the time he arrived. He was so impressed by this raiment that he decided he would like to buy some to take back to Amarillo, Texas. So he went to the Bond Street tailors and got himself fitted about four or five times. Being of a fine stature of a man he looked pretty well in the outfit.

The London tailor said, "Mr. Jones, we have never sent anything to Texas and this is a complete gift with our compliments. But we have something to add to it."

So they pulled out a big box and handed him a derby hat. He put it on at a little too Texas rakish angle and they told him, "No, just a little over to the other side." Then they gave him an umbrella and said, "Now, Mr. Jones, you wear that over your left arm like this."

So he stood before the mirror and he hadn't been there very long when he started to weep. They said, "Mr. Jones, what have we done to disturb you?"

Mr. Jones said, "You haven't done anything to disturb me, but I'm so damn mad we lost Ind-ya!"

I am suggesting that we Canadians and Americans have to have that togetherness with our friends across the sea, our real stout friends across the sea, to preserve those things in life that are dearest to us.

On this occasion I cannot avoid talking about China. I have naturally left it to the last. The American position a week or ten days ago when Mr. Eisenhower made his public address was that the peripheral island of Formosa joined up with the Philippines and Japan and was really a defense of this country against communism, and that Matsu and Quemoy were strategically part of

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the area that the United States should protect. I have succinctly and probably generally covered the official position of the United States as it stood ten days ago.

Now if there is anything that annoys most people it is an amateur in the field of international affairs. I want to say some things that if you thought they were my thoughts might be provocative. I have made an earnest effort, knowing I was going to be here this evening and making these remarks, to ascertain as best I could the trend of Canadian opinion and that of Great Britain and that of West Germany. The sources of information were from our own Department of External Affairs, the leading newspapers—I am a subscriber of the *Daily London Times*, and I have been reading it up to the last minute of the last one that came in. So I am going to try to tell you what I think the collection of that opinion is. Some of it may be from Europe; some of it may be Canadian.

I would say the rest of the free world has been acting with restraint in the United Nations in the last four or five days when there was a proposal that China be admitted to the United Nations. If I appraise Canadian opinion properly they want Communist China admitted to the United Nations. I think that is the view of Great Britain.

I want to tell you about a singular thing that happened. I am not sure whether it was in good taste or not. Immediately, or about the time of the President's speech, the *Globe and Mail* of Toronto, probably our leading newspaper, printed three articles on Formosa which took direct issue with the American position. Then they did a singular thing. It sounds to me as if it might be provocative but perhaps it was their earnest desire to bring the Canadian view to the attention of the American people. They had the whole three editorials published in the *New York Times* as a paid advertisement.

We Canadians want to trade with China. We have already been doing it; we have sold them quite a bit of wheat. I appreciate that it is illegal for American businessmen to trade with China. In two or three days there is a delegation of Canadian businessmen from Vancouver going to Canton, and the Canadian position is that it is desirable to trade with them and that it is desirable to recognize them. There have been some developments in recent days which look as if Quemoy and Matsu may be out of the picture and we may not have as much trouble with the Chinese situation as originally appeared.

Formosa, as no doubt many of you know, has had a peculiar history. It was part of the Chinese empire with Indonesian back-

ground up to 1895 and then it was turned over to Japan and remained in the hands of Japan until 1945. The population is about 10,000,000, of which I think 1,500,000 would represent Chiang Kai-shek's army and refugees from continental China. These people of Formosa have in no sense of the word for many years been a part of the Chinese empire, and probably it may be possible to neutralize Formosa, neutralize it until the people of Formosa, excluding Chiang's forces, decide what they want to do. And if they desire to join continental China, I would say that the opinion of the sources I have mentioned would be agreeable that they do so.

I think we have to be realistic about the future of China. There are now 600,000,000 people there. Mao is a peasant. He is a grass-roots product of those people. He succeeded a government which according to authentic and official American sources failed because it was corrupt and could not control inflation, and he is making some progress.

China by the year 2,000, instead of having 600,000,000, will have 1,000,000,000 people. The views I would gather from the sources to which I have referred feel that the sooner we have diplomatic relations with them, the better.

Incidentally, your great country is really having diplomatic relations with them in Warsaw right now. The British, who have restored relations with them and have an ambassador to China at Hong Kong, feel that the American position is probably weakened by just a chat in Warsaw rather than being right in there where you can come to grips with the problem.

I would like to emphasize these are not my views but the views that I gathered from the sources to which I made inquiry. The Moscow-Peking axis isn't too happy. Mr. Khrushchev had to go over to Peking the other day before this trouble started in Quemoy. The Chinese are demanding heavy industry, heavy equipment from Moscow when the Russians are trying to turn out commodities to satisfy their own folk. Remember that Russia has a considerable part of Mongolia recovered from Chinese, an area that may be essential to the Chinese nation as they expand. The Chinese are the one folk in the world who might be able in the year 2,000 to take a hydrogen war, lose 800,000,000 people of their population and still have 200,000,000 left to carry on with.

We have got to live with this situation, and to be realistic shouldn't we make a deal with them? Let's understand them; let's infiltrate with them and trade with them in the hope that they will cause Russia more trouble than we can cause them.

Well, I have made that position as one which I think reflects the free world, other than some of the thinking that we have found

in the United States. Some of the communiques—and Canada hasn't been free from it in this recent hectic discussion—have got rather undiplomatic. There have been talks about appeasement and aggression, etc.

It reminds me of the story of the Negro in Georgia who had quite a vocabulary of a flamboyant character which he could interlace with profanity. He turned loose on another ignorant Negro that he didn't like and kept it up until he had lost his breath, and when he was through the other Negro said to him, "All you say I is, *you is*."

I hope I have not been boring you with these remarks which are so vital to the freedom of your country and my country, and I hope I have not misrepresented my country in some views which probably are not officially accepted in the United States, but daylight seems to be dawning in an arrangement that will postpone, at any rate, the horrors of a thermonuclear war.

I have rather reached the stage where I am thinking of the telephone operator in a hotel who got a call about six o'clock in the morning from a man who said, "What time does the cocktail bar open?"

She said, "Ten o'clock."

About half an hour later she got another call, same voice, "When does the cocktail bar open?"

"Ten o'clock."

Half an hour later, somewhat more exhilarated the same voice inquired, "When does the cocktail bar open?"

As you can imagine, she was a little irritated and impatient and said, "This is the third time I have told you that you can get into the cocktail bar at ten o'clock."

And he said, "Hell, I don't want to get *in*. I want to get *out*!"

So in making a speech of this character that is the way I feel.

In conclusion, in telling you how happy Mrs. McLaurin and myself are to be with you, I would like to conclude by reminding myself and reminding you that we are the happiest folk in the world. There is no other continent inhabited with people that understand one another as we do and that enjoy the same comforts of life, but our greatest and dearest possession is freedom. We must never forget that. If necessary, no sacrifice is too great to preserve it.

PRESIDENT MARTIN: Judge McLaurin, we thank you for coming down and spending the evening with us. We want to

assure you that you are always welcome. We consider you one of our friends, and Nebraska should be your second home.

Now comes the climax of the entertainment as far as I am concerned, and that is the opportunity to yield to my successor, Mr. Joseph C. Tye, the gavel of this office.

To you, Mr. Tye, I want to present the gavel to serve for this coming year. I hope that you will be careful how you use it. If you have any campaign promises that you want to carry out or advise this group as to what you expect to do, now is the opportune time.

PRESIDENT-ELECT TYE: Ladies and Gentlemen and my good friend Paul: Until now you have always been a friend. From now on you are an archenemy. This is a shot in the dark, a punch to the short rib. I had no warning of this.

I only wish to say that my sincere desire is to do everything which is humanly possible for me to do to advance the Nebraska State Bar Association. We have a wonderful Association, the finest that I know of in the world, and I shall do everything in my power to carry on the work that my predecessors have done—and I have many fine gentlemen whom I have loved and admired. My life for the next year will be for the benefit, the progress and the advancement of the greatest profession in the world, that of the law which preserves the freedom of the world.

PRESIDENT MARTIN: Just carry on, Joe. That is all we request.

We stand adjourned.

SECTION PROCEEDINGS

FRIDAY, OCTOBER 3, 1958

SECTION ON INSURANCE LAW

Harold W. Kauffman, Esq.  
Chairman

Pax Room—9:30 A. M.  
(Lobby Floor)

“Automobile Liability Insurance” .....Norman E. Risjord, Esq.  
Kansas City, Mo.

Vice President and General Counsel of  
Employers' Reinsurance Corporation

“Frauds and Attempted Frauds Against Insurance  
Companies” .....Victor A. Lutnicki, Esq.  
Lincoln, Mass.

Vice President, John Hancock Mutual  
Life Insurance Company

AUTOMOBILE LIABILITY INSURANCE

Norman E. Risjord, Esq.

Forty years ago it took only 100 horsepower to keep a combat airplane in the air. Today it takes 300 horsepower just to carry a 110 pound female to the supermarket.

A traffic expert recently said that if all the cars in the nation were placed end to end some nitwit would pull out and try to pass 'em.

Many aspects of the efforts of the insurance industry to handle its part of the almost overwhelming problem illustrated by these “statistics” suggest themselves as items of possible interest to the members of this section.

The insurance industry must concern itself with every possible undertaking to promote construction of safe highways and automobiles, and, especially, to, some way, bring about a conversion to safe drivers.

The insurance industry must concern itself with the *public* demand for financial responsibility of drivers and with *private* demands for compulsory insurance and unsatisfied judgment funds.

The insurance industry must concern itself with overly “adequate awards” and jumbo verdicts. (I am told of a recent verdict of \$101,000 in a death case in Nebraska.)

It must concern itself with excessive pressure from trial judges to settle cases which have little or no merit or real value and with the pro-plaintiff attitude of too many doctors, judges and juries.

The industry must concern itself with its own excessive loss ratios, with the many millions of dollars which the industry is losing every year in the automobile liability line, and with the corresponding constant drain on the financial structure of the companies.

The industry must concern itself with the problem of adequate premiums, especially in states with compulsory insurance laws. In Massachusetts, which has suffered under compulsory motor vehicle insurance since 1927, the premiums have almost never been adequate.

Governor Dewey said that, if New York adopted the compulsory insurance he strove for, the political football game over insurance premiums which had been played in Massachusetts for almost thirty years would never be replayed in New York. However, in the first year of compulsory insurance in New York the losses were so bad that the insurance industry, for the first time, is now involved in litigation with the Insurance Department in an effort to obtain a rate increase which to many of us seems too modest. Perhaps in about 1964 the New York Court of Appeals may decide that the companies should have been permitted a rate increase in 1958! To emphasize this problem before leaving it, I understand that under the current grossly inadequate premium rates a policyholder in Kings County (Brooklyn) pays for the required \$10,000/\$20,000/\$10,000 coverage on a private passenger car just under \$400!

The insurance industry must further concern itself with adequate, but not overly adequate and thus costly, *coverage*. While coverage may be the least interesting to you of the various subjects I have mentioned as concerning the insurance industry, at least in my defense I can say it is the one about which I am best informed.

I will therefore leave the other items mentioned to better informed speakers or writers such as the four who were heard by those of you who attended the recent meeting of the American Bar Association in Los Angeles, so ably discussing "Compensation Without Fault." For those of you who were unable to attend that meeting, those able papers will no doubt be reported in the 1958 Proceedings of the Section of Insurance, Negligence and Compensation Law.

Returning then to the Automobile Liability Policy, I will briefly mention the Family Automobile Policy. Then I want to discuss the Nebraska cases we have found decided since the automobile liability policy was first made "standard" in 1936. Finally, I will take up some of the most recent cases in other jurisdictions which involve questions of interest in Nebraska.

### FAMILY AUTOMOBILE POLICY

Shortly after the standard family automobile policy became available for use in September, 1956, I had the honor of discussing it at two meetings in Chicago after which the material discussed became the subject of an article which was printed in *The Insurance Law Journal* for April, 1957. Reprints of that article are available here for such of you as may be interested.

With those reprints in mind, I will forego the temptation to discuss the specific provisions of that 1956 policy.

I do want to repeat one general observation about it. In many ways the family automobile policy represents a new approach to the problem of insuring the typical American family risk. On the other hand, many of its features are merely embellishments of changes introduced in the 1955 standard family provisions which are still in use for truck risks and others not meeting the underwriting eligibility requirements for the family policy.

The 1956 family policy covered all private passenger and "utility" automobiles owned by the named insured during the policy period, without endorsement or notice to the company for newly acquired automobiles. The premium condition requires certain reports and payment of the proper premium but has no effect on coverage. The family policy is designed to cover all such automobiles and, ideally, the company should not sell, and the policyholder should not buy, less.

For the circumstance where the policyholder wants to insure his eligible automobiles in more than one policy, the standard provisions afford the mechanics by means of a standard endorsement which substantially confines the coverage for "owned automobiles" to described and temporary substitute automobiles plus newly acquired automobiles. The latter are subject to a provision for reporting additional automobiles and which applies coverage only if the company insures all previously owned automobiles. This coverage is similar to the 1955 standard provisions and destroys most of the effectiveness of the family automobile policy as regards "owned automobiles." I consider that the policyholder is short-changing himself, and that the producer is rendering him

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a disservice, where there is an effort to ostensibly provide the coverage of the family automobile policy in more than one policy.

As of May 1, 1958, a revised edition of the family policy became available. For the first time in the history of the standard policy program, the new policy in several important respects restricted the coverage that it afforded as compared with its predecessor.

My further remarks about the family policy will be confined to mention of the important differences in the liability coverage of the 1958 family policy as compared with the original 1956 family policy.

The 1956 family automobile policy newly afforded a substantial share of what was formerly known as "broad form Drive Other Cars" coverage to the named insured and spouse. In this connection a serious mistake was made. The old exception for non-owned automobiles furnished for regular use to the named insured was omitted. The coverage afforded was excess over coverage for the named insured under the omnibus clause of the insurance held by the owner of the automobile. The underwriters thought that a salesman named insured, for instance, furnished for his regular use an automobile owned by his employer, would be primarily covered under his employer's policy. They underestimated the number of situations where the employer, being a governmental unit and relying upon "governmental immunity" (which was, however, not available to the salesman) or being a large corporation capable of self insurance, would not carry insurance available to the salesman. The result was that the absence of the "furnished for regular use" restriction caused the companies to afford primary insurance in an unexpectedly large number of cases to salesmen and others for automobiles furnished for their regular use. The May 1, 1958 revision has restored the exception for automobiles "furnished for regular use" to either the named insured or a relative.

Since the coverage for non-owned automobiles was first introduced into the standard automobile policy, there has never been a requirement for permission by the owner for the use of his automobile. For instance, in *Bowman v. Preferred Risk Mutual Insurance Company*, (1957), 348 Mich 531, 83 NW2d 434, the named insured, who undertook to move a strange automobile which was blocking the parking place in front of his house, was held to have coverage for the use of that automobile in moving it, since the Use of Other Automobiles provision of his policy (1947 standard) did not require that he have the permission of

the owner. To remedy this situation, the 1958 revision of the family policy requires, with respect to both the named insured and any relative to whom coverage for non-owned automobiles is afforded, that the actual use of the non-owned automobile be with the permission of the owner of the automobile.

In the 1956 family policy, the coverage for persons and organizations "legally responsible" for the use of automobiles was newly restricted in one important respect. There was no coverage for such person or organization if the automobile was owned by the named insured but hired by such person or organization. This was probably a mistake in the 1956 family policy. The 1958 revision changed that to limit the exclusion to non-owned automobiles so that the person "legally responsible" for the use of an automobile owned by the named insured and hired by such person is covered.

In the 1956 family policy, temporary substitute automobiles were included as "owned automobiles" regardless of the type of automobile or trailer and whether or not owned by the named insured. The provision including as "temporary substitute automobile" one owned by the named insured or his resident spouse was new with the family automobile policy. Its principal importance was that it extended coverage for a truck owned by the named insured while used as a temporary substitute for a private passenger or "utility" automobile owned by the named insured. The 1958 revision, however, confines "temporary substitute automobiles" to those not owned by the named insured.

Once again, despite the underwriting mistakes in the 1956 family policy corrected in the 1958 revision, the standard provisions program, the companies which support it and the rating committees and forms committees which produced it have performed an outstanding service in supplying the great majority of the automobile-insurance-buying public with a streamlined, simplified and adequate automobile policy which comes closer than ever to realizing, for the typical American family, what should be the goal of every policy — all of the insurance the family needs and ought to have which is not (for reasons of convenience or economy) better afforded in other policies. A number of company executives have felt that the coverage granted in the 1956 family policy was too broad for the premium charged. This criticism may be partly met by the restrictions imposed in the 1958 revision. To the extent that the criticism is still valid, the question is one of obtaining an adequate premium, not one of policy coverage.

## NEBRASKA CASES

The next section of these remarks will outline as briefly as possible the factual situation and the result reached in each Nebraska case considering the basic standard automobile liability policy, or similar policies, since the standard policy program was adopted in 1936. Federal cases involving the District of Nebraska are included, since jurisdiction is *always* based on diversity and the federal courts are bound to find or follow the Nebraska law.

A very interesting 1951 case involved seven different policy provisions:

- Sole Ownership
- Defense
- Settlement
- Limits of Liability
- Cooperation
- Action Against Company
- Declarations Condition

Stoker or his wife, or both, purchased a Plymouth with funds drawn from a joint bank account. The car was registered by the wife in Iowa. She used and serviced it almost exclusively. A \$5,000/\$10,000 policy was issued to her in Iowa declaring that she was the sole owner. While Stoker was operating the Plymouth, in August of 1947, an accident injured eight people. Four of the injured sued Stoker. The others made claims but did not bring actions. The insurer retained a law firm to represent Stoker. In January, 1949, the insurer made a reservation of rights agreement with Stoker. In April, it secured a statement from Stoker that he considered himself the owner of the Plymouth and, in May, it secured a statement from the wife that none of her money had been used to buy the Plymouth and that she never considered herself the owner. Another reservation of rights agreement was made with both Stoker and the wife.

In August, 1949, the insurer, represented by the same law firm as had been retained to represent Stoker, brought a declaratory judgment action against the Stokers and all eight of the injured, alleging that Stoker, rather than the wife, was the owner of the Plymouth. Stoker thereupon discharged the law firm retained for him by the insurer, refused to permit that firm to further conduct his defense, and employed his own counsel. Without the consent of the insurer, and without a trial, witnesses sworn or evidence received, Stoker consented to judgments against him for three of the injured and made settlements for \$8,000, \$5,000, and \$3,000, respectively.

On January 19, 1950, the insurer tendered a refund of premiums and amended its declaratory judgment petition to allege breach of the Cooperation Condition. At the trial of the declaratory judgment action, Stoker and the wife each testified that the Plymouth belonged to the wife but admitted signing the statements to the contrary. The jury found that Mrs. Stoker was the owner. The Supreme Court of Nebraska held (1) that the issue of ownership was a question for the jury, (2) that the failure to tender return premium until January 19, 1950, precluded the defense based on the sole ownership declaration, (3) that the effect of the insurer's position on sole ownership in the original petition was to declare the policy void, whereupon, notwithstanding the non-waiver agreements, Stoker was entitled to assume the defense and settlement of the claims against him without breaching the Cooperation Condition, (4) that the insurer was bound by the three judgments against Stoker, (5) that the taxing by the trial court of attorney's fees in the declaratory judgment action was justified neither by the Iowa statute invoked by the trial court nor by the Action Against Company Condition of the policy, and (6) that the trial court was in error in earmarking the \$10,000 it had required the insurer to pay into court for the three judgment creditors, since there might be other creditors having a priority over these three, so that the trial court should distribute the \$10,000 "to the parties it finds \* \* \* entitled thereto."

*Hawkeye Cas. Co. v. Stoker* (1951), 154 Neb 466, 48 NW2d 623.

*Comment.* This was a 1947 standard policy. The Family Automobile Policy contains no sole ownership declaration. It is considered that, while the trial court was in error in "earmarking" the \$10,000 for the three judgment creditors, there is doubt whether the trial court should have ordered the money paid into court. It was for the creditors to establish their own priorities by their own actions (first come, first served, or otherwise). It was not the court's duty or function to allocate the \$10,000.

### *Defense Cooperation*

With a per person policy limit of \$5,000 and an action brought against the insured, the insurer declined an offer to settle for \$4,200, without informing the insured of the offer. The insured failed to attend the trial, the insurer withdrew, and there was a judgment against the insured for \$9,000. The injured then brought action against the insurer for \$5,000 under the policy and \$4,000 for bad faith and negligence in handling the claim.

The injured sought to excuse the insured's failure to attend the trial on the claim that the insured did not receive a certain letter requesting him to attend the trial and stating its date. The jury answered that he *had* received the letter.

The District Court for the District of Nebraska then directed a verdict for the insurer on the \$4,000 claim and the jury found for the insurer on the \$5,000 claim. The Eighth Circuit affirmed, holding (1) that there was a jury question on cooperation, (2) that, since the jury found no cooperation, the insurer was necessarily not guilty of bad faith in neither settling nor defending and (3) that the mere refusal of a settlement offer and failure to advise insured of it would not, *alone*, support a finding of bad faith.

*Kleinschmit v. Farmers Mutual Hail Ins. Ass'n. of Iowa* (1939), 8 Cir, 101 F2d 987.

*Comment.* The court pointed out that the Action Against Company Condition (not standard) put the judgment creditor into the insured's shoes, and if *he* had a right of recovery for excess of policy limits *she* could have enforced her entire judgment by garnishment. The standard Action Against Company Condition presumably would not be thought to authorize recovery by the judgment creditor against the insurer for excess of policy limits (even where the insured could so recover), since current standard language limits the judgment creditor to recovery "to the extent of the insurance afforded by this policy" which presumably means (among other things) subject to policy limits. However, if the insured should recover judgment for the excess without paying it, the *first* judgment creditor might be able to garnishee the insurer.

### *Defense*

A property damage liability policy, by endorsement, excluded liability arising from the operation of a corn sheller mounted on the insured truck. A fire started among dry cornhusks near the truck and spread to buildings nearby. The Supreme Court of Nebraska held that the insurer was not required to defend a suit against the insured alleging negligence in the operation of the motor of the truck used to operate the corn sheller, since an insurer is under no obligation to defend an action for which no coverage is afforded by the policy.

*Gottula v. Standard Reliance Ins. Co.* (1957), 165 Neb 1, 84 NW2d 179.

*Comment.* Not only is the insurer not *obliged* to defend such cases, it should not be *permitted* to do so. Liability insurers

escape the charge of practicing law illegally on the theory that in reality they employ counsel to defend the insured for the benefit of the pecuniary interest of the insurer. Where, as here, there is no interest, there is no justification for defending. If the insurer has the *right* to defend, the right is *exclusive*. Insurance companies should *not* be defending cases for the *fun* of it and to the exclusion of any right of the insured to defend himself or settle, in cases where the insurer is *without* pecuniary interest. The question is *most* interesting where it pertains to defense of litigation against the insured *remaining after* the insurer's policy limit has been exhausted by payment of other claims. The courts have differed on this point but the *correct* rule, as reasoned here, was reached in the early leading case, *Lumbermen's Mutual Casualty Co. v. McCarthy* (1939), 90 NH 320, 8 A2d 750, 126 A.L.R. 894.

#### *Permission*

A truck driver was instructed to use his employer's truck on his employer's business only. Each day he obtained the keys and written orders for the use of the truck. He made a written report of his trips, where he went and the mileage. The first time he had ever used the truck to drive some blocks to a cafe for lunch, an accident occurred on the return trip. He had *not* asked permission and his supervisors did *not* know that he was using the truck. The Supreme Court of Nebraska reversed a judgment against the insurer, holding that the driver was operating the truck without permission.

*Witthauer v. Employers Mutual Casualty Co.* (1948), 149 Neb 728, 32 NW2d 413.

Where, in a federal Nebraska case, the named insured permitted her foster son to drive the automobile and an injury occurred while a third party with permission from the son was driving for purposes personal to the driver, the Eighth Circuit affirmed a judgment for the insurer in the District Court for the District of Nebraska, holding that there was no permission and therefore no coverage for the driver.

*Johnson v. State Farm Mutual Auto Ins. Co.* (1952), 8 Cir, 194 F2d 785.

In another federal Nebraska case, the policyholder and a friend were stationed at Offutt Air Force Base. Occasionally the friend used the policyholder's car with specific permission. Usually the time of return was specified. On a certain Saturday, the friend was off duty at noon. The policyholder was on duty

until 4 p.m., then had four hours of liberty, and was required to be back on duty at 8 p.m. The friend asked and received permission to take the car for the purpose of visiting his girl friend. The policyholder specified that the friend be back by 4 p.m. The friend completed his visit, returned to the base at 6 p.m., did not get in touch with the policyholder, waited until 8 p.m. when he was certain that the policyholder would be back on duty, and then left in the policyholder's car for a round of taverns. While the friend was returning to the base from this excursion, at 2:30 a.m. on Sunday, an accident occurred. In garnishment proceedings by an injured against the insurer after a judgment against the friend, the District Court for the District of Nebraska found that there was no permission. The Eighth Circuit affirmed a judgment for the insurer, (1) holding that the question of permission was one of fact, (2) holding that the evening excursion represented a wholly separate taking and using of the car, and (3) suggesting that testimony of the policyholder that he would have given consent, if requested, would not have filled the contractual void against the insurer, from lack of such permission at the time of the accident.

*Bekaert v. State Farm Mutual Auto. Ins. Co.* (1956), 8 Cir, 230 F2d 127.

#### *Automatic Coverage*

On August 11, 1934, the named insured sold the automobile described in his policy, purchased another one and asked the dealer to obtain insurance on the new car. The dealer called the insurer at the phone number listed in the telephone directory and was assured by the person answering the phone that the insurance applied to the new car. Premium for the new car would have been the same as that which had been paid for the old car. No endorsement describing the new car was ever issued. The Supreme Court of Nebraska held that there was insurance for an accident occurring on September 2, 1934, since the named insured had a right to rely on the ostensible authority of the person answering the phone.

*Ware v. Home Mut. Ins. Ass'n.* (1938), 135 Neb 329, 281 NW 617.

*Comment.* There was no reference in the opinion to any Automatic Coverage provision there may have been in the policy. Under the Family Automobile Policy, the new car would have been covered without the phone call.

In a later case involving an automatic coverage clause which may not have been standard, the policy described a private pas-

senger automobile insured for pleasure and business use. The named insured later acquired a truck which was involved in an accident on the day of the purchase. The Supreme Court of Nebraska held that there was no coverage since the truck could not be classified for pleasure and business use which applies only to private passenger cars.

*Koehn v. Union Fire Ins. Co.* (1950), 152 Neb. 254, 40 N.W.2d 874, after 151 Neb. 859, 39 N.W.2d 808.

*Comment.* If this policy was 1947 standard, the result is questionable, because that policy does not say that trucks can't be insured for pleasure and business, nor that private passenger automobiles can't be insured for commercial use. The court relied strongly on the provision, in the Policy Period—Territory—Purposes of Use Insuring Agreement, that the insurance applies only while the automobile is used for the purposes stated as applicable thereto in the declarations. The comparable Insuring Agreement in the 1955 standard policy makes it clear that the "use" restrictions do not apply to automobiles not described in the policy and for which coverage is claimed under other provisions of the policy.

In another case, the policy insured a Chevrolet automobile. On November 9, 1940, the named insured exchanged the Chevrolet for a Dodge, and from that date had possession of the Dodge. Title to the Dodge was not assigned to the named insured until November 20 and the assignment did not reach him until November 27 or 29. On December 2, 1940, the Dodge was involved in a collision and, on that day or the next, the insurer was advised for the first time that the Dodge had replaced the Chevrolet. The Supreme Court of Nebraska held that the Dodge was not covered by the policy, since the 10-day reporting period commenced to run from the date of delivery, not from the date when title was perfected nor from the date when evidence of title reached the named insured.

*Blixt v. Home Mut. Ins. Co.* (1945), 145 Neb. 717, 18 NW2d 78.

*Comment.* This was a collision policy. Under the 1955 standard policy, insurance under the bodily injury liability, property damage liability and basic medical payments coverages would have been unquestioned, since the 1955 policy requires no notice as to those coverages where the newly acquired automobile replaces a described automobile. Under the 1956 and 1958 standard family automobile policies, insurance under any of the coverages would have been unquestioned.

In a federal Nebraska case, a businessman in Colorado had three trucks insured by the same insurer in three separate policies. The policy covering a Chevrolet truck limited the operations to



the state of Colorado. The policy covering a Dodge truck had no such limitation. The truck owner sold the Chevrolet and bought an International truck. He transferred the Colorado license number from the Chevrolet to the International and asked the insurer to transfer the Chevrolet coverage to the International, which was done.

After obtaining a judgment in Nebraska against the driver of the International arising out of injury from an accident in Nebraska, the injured judgment creditor contended that the automatic coverage clause of the policy on the Dodge covered the International. The Eighth Circuit, reversing a judgment against the insurer in the District Court for the District of Nebraska, held (1) that the clause, pertaining to the situation where the insurer insures all automobiles owned by the named insured, applies only where all are insured under the same policy, (2) that, even if it did apply here, it was limited to the insurance applicable to all previously owned automobiles and the only territory open to all previously owned automobiles was Colorado, and (3) that coverage for the International was limited to the coverage applicable to the replaced Chevrolet, that is, coverage in Colorado.

*Home Mutual Ins. Co. of Iowa v. Rose* (1945), 8 Cir, 150 F2d 201.

*Comment.* Under the policies involved here, the result seems correct, the opinion being considered wrong as to the holding that all the previously owned automobiles must be insured in the same policy and right as to the alternate holding that only Colorado was open to *all* previously owned automobiles. The 1947 and 1955 standard provisions do not limit the insurance for the newly acquired automobile to that applicable to all previously owned automobiles. Under the 1947 standard policy provisions for 30 days' notice, the Dodge policy would have covered the International in Nebraska for 30 days, except that the request for transfer of the Chevrolet coverage to the International would seem to limit the International coverage to that afforded for the Chevrolet, on the theory that the named insured had elected the policy (with commensurate reduced premium) under which the International was to be covered. The opinion did not expressly pass on that point.

#### *Trailer Exclusion*

A non-standard policy excluded coverage "while the automobile described is being used for towing or propelling any trailer or vehicle." The insured truck struck and injured a person while it was towing a hay grinder which had no braking device, no in-

dependent motive power, and the chassis of which was not constructed to carry passengers, goods or merchandise, its function being limited to the conveyance and support of the hay grinder. The Supreme Court of Nebraska, on reargument after reversal of a judgment for the insurer, affirmed, holding that the hay grinder was a trailer or vehicle.

*Moffitt v. State Auto. Ins. Ass'n.* (1941), 140 Neb 578, 300 NW 837, superseding 139 Neb. 512, 297 NW 918.

*Comment.* The court stressed the word "vehicle." It seems doubtful that the court held that the hay grinder was a trailer.

*Employee Exclusion  
Workmen's Compensation Obligations Exclusion  
Cooperation*

I am not the first visiting fireman to come to Omaha, but I hope that I have better luck on my return trip than the two from Columbus I am about to tell you about. The insurer issued its policy to Hardy who operated a filling station at Columbus, Nebraska, under lease from the Continental Oil Company. The Oil Company gave a sales meeting for its dealers and their salesmen at a hotel in Omaha, ostensibly to promote sale of a new lubricant.

Svitak was an employee of Hardy whose hours of employment terminated at 6 p.m. At 4 p.m. on April 5, 1937, Hardy told SvitaK he was through for the day and invited him to go along to Omaha for the meeting. They arrived at the hotel about 6 p.m., had drinks and lunch, and remained until the meeting was over. About 11 p.m., they started for Columbus. If they had driven right home from Omaha they would have arrived about 1 a.m., but they stopped at two night clubs and drank liquor. They were at the second for several hours. They then resumed the trip. SvitaK went to sleep. Hardy stopped once to walk around the car to wake up. About 6:30 a.m., in the eastern outskirts of Columbus, Hardy drove his car on the wrong side of the road and directly into a truck. Hardy and SvitaK were taken to a hospital.

About 11 a.m., two attorneys for the insurer reached the hospital and interviewed Hardy in SvitaK's presence without the doctor's consent. The statements were written down on a portable typewriter. Additional statements were taken on April 24, in which SvitaK said that attendance at the meeting was not required of him, but that Hardy received an invitation and they went, that they each had 1 ½ glasses of beer at the meeting, that SvitaK had a whiskey and soda in one night club and a Scotch and soda in

the other, and that after he went to sleep in the car he woke up in the hospital.

Svitak brought action against Hardy. The insurer drew an answer setting out that the injuries were under the workmen's compensation act and not under the liability policy. Hardy refused to verify the answer. The insurer then refused to defend Hardy. There was a judgment against Hardy.

Svitak then brought this action against the insurer. Hardy testified that it was not a business trip in any sense, that Svitek was not required to go, that Hardy "went down a lot for the trip—to get away from business, to relieve the monotony," and that it was purely a pleasure trip.

The trial court instructed the jury that if Hardy invited Svitek to attend the meeting to enable Svitek to obtain instructions in relation to Hardy's product, the relationship of employer and employee existed, even if Svitek was under no compulsion to attend, but that, if Hardy's purpose was pleasure and not instruction for Svitek, Svitek was not an employee at the time of the accident.

There was a judgment on a verdict against the insurer. The insurer appealed, contending that, after the statement of April 24, Hardy had discovered that the policy did not cover compensation liability and then conspired with Svitek to prove that the relationship was that of host and guest rather than employer and employee.

The Supreme Court of Nebraska affirmed, holding (1) that the insured is under no obligation to verify an answer which he does not believe is true, but he cannot arbitrarily refuse to assist in making any fair and legitimate defense, (2) that a jury question existed as to breach of the policy by refusal to verify, (3) that there was no evidence of a "deliberate, fraudulent plan to beat" the insurer, (4) that any discrepancies between the statements and the testimony on the trial could be accounted for by the circumstances under which the statements were taken, and as to that a jury question existed, and (5) that the question whether Svitek was an employee at the time or a guest was likewise for the jury.

*Svitak v. Sun Ind. Co.* (1939), 136 Neb 303, 285 NW 604.

*Comment.* The opinion does not indicate why the policy would not cover if Svitek was an employee, but presumably the policy contained an Employee Exclusion. The Workmen's Compensation Obligations Exclusion would not have applied since no one was asserting an obligation under the workmen's compensation act.

*Employee Exclusion  
Severability of Interests*

A federal Nebraska case involving a bus transporting members of the Midland College at Fremont choir involved a non-standard cross-employee exception. The main point of the case could not have arisen under a standard cross-employee exception because the injured and the driver were not employees of a common employer, but the case is noted here because it *may* have held that the Employee Exclusion was not available to the insurer because, while the injured was an employee of the college which was a possible omnibus insured, the college was not sued and the injured was therefore not an employee of *the* insured within the meaning of the Employee Exclusion.

*State Farm Mutual Auto. Ins. v. Mackechnie* (1940), 8 Cir, 114 F2d 728.

*Comment.* Possibly this reads too much into the case, but if the case so held it is praiseworthy as being one of the earlier cases to decide in accordance with the underwriting intent that the Employee Exclusion applies against any insured only with regard to injury to the employee of *that* insured. The 1955 and later standard policies make clearer this underwriting intent. The Family Automobile Policy, for instance, states that, except with respect to policy limits, the liability insurance "applies separately to each insured against whom claim is made or suit is brought."

*Limits of Liability*

In an early Nebraska case, the insurer issued its policy to Wilson to cover his Buick automobile for bodily injury liability limits of \$5,000 each person/\$10,000 each accident. Wilson's automobile was involved in an accident in which a husband and wife were injured.

The wife recovered a judgment against Wilson for \$5,000, which the insurer paid. The husband then recovered a judgment against Wilson for \$4,000, divided: \$250 for injuries to him and consequential damages therefrom; \$25 damage to his automobile; \$3,725 for consequential damages resulting from the injuries sustained by the wife. The insurer admitted liability for the \$250 and \$25 items but denied liability for the \$3,725. Wilson then brought this action against the insurer, taking the positions that since more than one person was injured, the \$10,000 limit applied, that the \$5,000 limit applied once to the wife's injuries and again and separately to the husband's consequential damages resulting

from her injuries, and that the insurer was therefore liable for the \$3,725 item as well as the others. The trial court entered judgment for the full \$4,000. The insurer appealed.

The Supreme Court of Nebraska reversed and remanded with directions to enter judgment for \$275, holding (1) that the \$5,000 per person limit applied both (and once) to the injuries to the wife and the consequential damages resulting therefrom and (2) that the fact that the husband was also injured did not prevent the per person limit from applying to all damages resulting from injury to the wife.

*Wilson v. Capital Fire Ins. Co.* (1939), 136 Neb 435, 286 NW 331.

*Comment.* The policy apparently did not mention "care and loss of services" or consequential damages, but the court held that they were covered, with damages for the injury itself, subject to the per person limit as stated. The policy apparently included insurance for property damage liability, although the opinion did not mention it.

### *Cooperation*

In a very early federal Nebraska case, the insurer issued its policy to Smith, covering his automobile. Smith was riding in his automobile while it was being driven by Mrs. Stapp, his "fiance." Her mother, father and son were passengers. The car was forced off the road by a car advancing in loose gravel. Mrs. Stapp's mother was injured.

Shortly after the accident, the parties agreed, at Smith's suggestion, to say that Smith was driving. Smith, Mrs. Stapp, and her mother and father gave statements that Smith was driving. The statements, however, indicated little or no fault on the part of Smith.

The injured mother brought action against Smith in a Nebraska court, alleging much greater speed than the statements had indicated and "gross negligence" (which was required by the Nebraska Guest Statutes). The insurer discovered that Mrs. Stapp—not Smith—had been driving and Smith confessed that Mrs. Stapp had been driving—and carefully—and had been forced off the road. The insurer proceeded under a non-waiver agreement with Smith.

The injured mother then amended her petition to allege that Mrs. Stapp was driving as Smith's agent—and with gross negligence—and recovered judgment against Smith.

The injured mother then brought this action against the insurer in a Nebraska court. The case was removed to the United States District Court for the District of Nebraska. The insurer relied

on breach of the Cooperation Condition. Section 44-322, Compiled Statutes of Nebraska, 1929, provided that breach of a policy condition was not a defense unless it existed at the time of the loss and contributed to it.

The District Court overruled the insurer's motion for a directed verdict and entered a judgment on a verdict against the insurer. The insurer appealed.

The Eighth Circuit reversed and remanded, holding (1) that the insurer's motion for directed verdict should have been granted, (2) that there was conclusive evidence of a fraudulent scheme, and (3) that, while the statute may have precluded the defense of failure to cooperate, it did not preclude the defense of fraud and collusion.

*Ohio Cas. Co. v. Swan* (1937), 8 Cir, 89 F2d 719.

*Comment.* The statute in question here is Section 44-358 of the Revised Statutes of Nebraska, 1943. It is interesting that this statute was held in a later Nebraska case involving notice and proof of loss under a fire policy to apply only to breach of warranty or condition which exists at the time of loss and not to a breach of the terms of a policy which could arise only after the loss has occurred. *Clark v. State Farmers Ins. Co.* (1942), 142 Neb 483, 7 NW2d 71. The opinion in the Nebraska case did not even mention this federal case. It is hard to imagine how *any* breach of a liability policy "Condition" could exist at the time of the "loss," if "loss" means accident!

### *Cooperation Action Against Company*

In another early federal Nebraska case, the insurer issued its policy to Cerra covering his automobile. On August 15, 1935, Bonacci and his wife were riding as guests in the rear seat of Cerra's automobile on the return from a vacation trip to Colorado. Cerra was driving and Mrs. Cerra was beside him in the front seat. The automobile was being driven 60 to 80 miles per hour and ran off the road. Bonacci and his wife were injured. The parties were friends of long standing. The Nebraska guest statute required gross negligence.

Immediately after the accident a deputy sheriff found that the right rear tire had a nail in it and was flat. He reported that fact to Cerra. After a conference with Cerra the insurer's adjuster prepared a proof of loss and a statement, both of which said that the flat tire caused Cerra to lose control of the car and go into the ditch. Cerra at first declined to sign either but after

consulting a friend did sign the proof of loss after eliminating therefrom reference to the tire, leaving simply a statement that the car swerved off the road. Cerra then signed a statement that he did not recall what happened but "I must have dozed for a second or two."

Mr. and Mrs. Bonacci brought separate actions in a Nebraska court against Cerra. In a deposition before trial, Mr. and Mrs. Bonacci each testified that the car weaved and went off the road. Mr. Bonacci's case was tried first. On that trial Cerra testified that he had his hands on the wheel and the car simply got out of control and went into the ditch. Mrs. Cerra's testimony was that there was nothing unusual about Cerra's manner of driving. There was a verdict and judgment for Cerra and the judgment was affirmed, *Bonacci v. Cerra* (1938), 134 Neb. 476, 279 NW 173.

On the trial of Mrs. Bonacci's case, Mr. Bonacci testified that Cerra took his right hand from the steering wheel to "reach something to his wife" and "had his eye off the road and was looking at his wife" and lost control. Cerra testified that he asked his wife for a cigarette, reached with his right hand for it, and as he lit the cigarette he lost control of the car. Cerra also testified that there was no flat tire just before the car left the road. There was a verdict for Cerra, a new trial on order of the trial court, and a verdict and judgment for Mrs. Bonacci for \$8,500 which was reversed as excessive, *Bonacci v. Cerra* (1938), 134 Neb 588, 279 NW 314.

The insurer then brought action in the United States District Court for the District of Nebraska for a declaratory judgment against Mr. and Mrs. Bonacci and Cerra. The attorney for the Bonaccis testified that he was not advised of the "hand off the wheel" story until after the trial of Mr. Bonacci's case. The insurer appealed from an adverse judgment.

The Eighth Circuit reversed with directions to enter judgment for the insurer adjudging no liability under the policy, holding (1) that, as a matter of law, Cerra was guilty of failure to cooperate and fraudulent conspiracy with his friends to enable them to recover against the insurer and (2) that the Bonaccis acquired no greater rights against the insurer than Cerra had.

*State Farm Mut. Auto Ins. v. Bonacci* (1940), 8 Cir, 111 F2d 412.

*Comment.* The opinion implies that the court believed that the accident was caused by the deflated tire but that, after the unsuccessful efforts to recover on that theory in Mr. Bonacci's case, the parties invented the cigarette theory as more indicative

of gross negligence. The cooperation condition was substantially standard except that it required "active" cooperation. The policy also provided that it was void in case of fraud or false swearing by the insured. It is believed that the result was not dependent upon those departures from standard language.

### *Medical Payments*

The only recent Nebraska case we have found involved a substantially 1955 standard automobile policy which afforded insurance for Medical Payments under Division 1 for "the automobile" and under Division 2 for "an automobile." Division 2 excluded "an automobile owned by any insured." On the back of the policy appeared a statement that when "you have Medical Expense Coverage \*\*\* You \*\*\* Are protected \*\*\* while riding in \*\*\* my automobile." The policy described a Ford automobile but not a truck owned by the policyholder. The latter and his wife were injured, the wife fatally, when the truck in which they were riding turned over. The policyholder brought action against the insurer under the Medical Payments coverage. The Supreme Court of Nebraska held that Division 1 pertains only to the automobile described in the policy, that Exclusion (i) applicable to Division 2 excluded any automobile owned by an "insured" and, since the policyholder was an "insured" for the purposes of Division 2, it accordingly excluded the truck owned by the policyholder. The court further held that the language on the back of the policy was an accurate description of coverage under Division 1 and was not misleading since "my automobile" would normally be understood to mean the automobile described in the policy.

*Lonsdale v. Union Ins. Co.* (1958), Neb. , 91 NW2d 245.

### VERY RECENT CASES IN OTHER JURISDICTIONS

The final section of these remarks will outline as briefly as possible the factual situation and the result reached in selected very recent cases in other jurisdictions and of possible interest in Nebraska. It will omit, for instance, a very recent development in a New York case involving a Louisiana and New York conflict of laws question which is probably of only academic interest in Nebraska.

### *Loading and Unloading*

A gasoline truck, which was standing adjacent to a customer's tank while being unloaded, rolled away striking a house. Gasoline poured into the house where it ignited. The accident was held to have arisen out of the unloading of the truck.



*Farmers Union Oil Company of Devils Lake v. Central Surety & Ins. Corp.* (1958), 8 Cir, 256 F2d 603.

### *Intentional Injury*

In a late Connecticut case, the named insured had been drinking, stood in his driveway next to his automobile addressing insulting remarks to three of his neighbors across the street, got into his car, drove it across the street, struck one of the neighbors who was standing on his sidewalk and struck the other two neighbors who were standing on their porch. The Supreme Court of Errors affirmed a judgment for the insurer based on the theory that the injuries and damage were intentional and not "caused by accident."

*Aetna Casualty and Surety Co. v. Murray* (1958), Conn , 143 A2d 646.

*Comment.* The Family policy is not keyed to "caused by accident" but excludes intentional injury, so that the result should be the same.

### *Automatic Coverage*

One policy covered a station wagon and a Chevrolet truck. Another policy (presumably the same insurer) covered a Pontiac truck. All vehicles were owned by Sheffer. Sheffer acquired a Jeep and 22 days later an International truck. Thirteen days still later the International was involved in an accident. An Illinois Appellate Court held (1) that, although not reported to the insurer, the Jeep was covered by the policy, (2) that the insurer therefore insured all automobiles on the date of acquisition of the International, and (3) that the latter was therefore covered as an additional automobile, since the entire period from the acquisition of the Jeep to the accident was within the 60-day reporting period.

*Sheffer v. Suburban Casualty Co.* (1958), Ill App , 151 NE2d 429.

*Comment.* The policy was 1947 standard except that the standard 30 days was changed to 60.

A variation of the *Sheffer* case occurred in Maryland where the policy described one car, the named insured acquired a second which he held for more than 30 days and then traded it for a third, delivery on which was delayed for a week. An accident involving the third car occurred within the 30 day reporting period after its acquisition. No acquisition of the second or third cars was reported to the insurer. The Court held that, since the named insured had sold the second car a week before the third

car was delivered, the insurer insured all automobiles (the first) owned by the named insured at the date of delivery of the third and the latter was covered for 30 days without a report to the insurer of its acquisition.

*Inland Mutual Insurance Co. v. Stallings* (1958), U S D C D Maryland C D, 162 F S 713.

*Comment.* This case is complicated by the fact that the court unnecessarily and perhaps incorrectly held additionally that, since an SR 22 financial responsibility filing had been made, the policy covered *any* automobile owned by the named insured.

### *Use of Other Automobiles*

#### *Other Insurance*

In a case of first impression, the Humble Oil Company qualified as a self-insurer under the Texas Motor Vehicle Safety Responsibility Act and, as such, agreed that it would pay the same judgments and in the same amounts that the insurer would be obligated to pay under an owner's motor vehicle liability policy if issued to the self-insurer. An employee of Humble Oil, whose policy on his own car extended Use of Other Automobiles insurance on the standard excess of other insurance basis, had an accident while driving a Humble Oil car. The Texas Court of Civil Appeals held that the excess of other insurance provision of the employee's policy was ineffective because Humble Oil's status as a self-insurer did not constitute "other insurance" available to the employee.

*Home Indemnity Company v. Humble Oil & Refining Co.* (1958), Tex Civ App, 314 SW2d 861.

*Comment.* Why did Humble Oil's status as a self-insurer not constitute other insurance available to the employee if Humble had assumed the obligations of an owner's policy including its omnibus coverage for the employee?

### *Use of Other Automobiles*

#### *Financial Responsibility Laws*

#### *Other Insurance*

The husband was required to file evidence of financial responsibility and the insurer of his Chevrolet filed an SR 22 form. The wife's Plymouth was insured in another company. While the husband was driving the wife's Plymouth, an accident occurred which involved the question whether the insurer on the husband's car was primary, because of the filing, or excess as provided

in its policy for the Use of Other Automobiles provision. The Court of Appeals of Maryland held that, as between the insurers, the husband's policy was excess as it purported to be.

*Citizens Cas. Co. of N.Y. v. Allied Mutual Ins. Co.* (1958),  
Md , 144 A2d 73.

### *Permission*

A soldier, going overseas, left his eleven-year-old Ford with his brother, also a soldier, "to use to go back and forth to camp" from their home 300 miles away and "use it around camp." The brother permitted a soldier friend to use the car to take home two girls after an evening at a bar. The Courts held that the terms of the loan by the owner were sufficiently broad to cover an accident which occurred while the second permittee was on the trip pertaining to the girls.

*National Grange Mut. Liab. Co. v. Metroka* (1958), 3 Cir, 250 F2d 933.

### *Property in Charge of the Insured Exclusion*

In a very recent Rhode Island case, an employee of a laundry drove the laundry's truck into a service station to have it greased and to eliminate a squeak. While the truck was on a lift, raised in the air, the service station owner sprayed the springs and then, taking hold of the bumper, shook the truck up and down to determine whether the squeak had been eliminated. As he did so the truck slipped, fell, and was damaged. The Supreme Court of Rhode Island held that there was no coverage under the garage policy on the service station since the service station owner was "in charge of" the truck, notwithstanding the presence at all times of the truck driver.

*Aglione v. American Auto. Ins. Co.* (1958), RI , 143 A2d 148.

### *Limits of Liability*

#### *Separate Accidents for Each Property Owner*

A contractor, insured under a comprehensive general liability policy, undertook to extend the platforms of subway stations in New York. He dug a trench parallel and immediately adjacent to the building line for two adjoining but separate buildings. He had to remove the vaults under the sidewalk in front of each building and constructed a temporary cinder block wall to close off the fronts of the buildings between their lower foundation piers. The city experienced a rainfall of record intensity. The sewers overflowed and the trench filled with water. At 5:10 p.m. the

cinder block wall in front of one building collapsed. Water flowed into the sub-basement, damaging the building and property of the owner and tenants. At 6:00 p.m. the wall in front of the other building collapsed with similar results. The contractor settled all claims for \$69,939. The insurance question was whether, with regard to the policy limit of \$50,000 each accident, there was one accident or two. The Appellate Division held (1) that it would be absurd to hold that there is a separate accident for each property owner but (2) that there were two separate collapses and two accidents.

*Arthur A. Johnson Corporation v. Ind. Ins. Co. of N.A.* (1958), App Div 2d , 175 NYS2d 414.

*Comment.* The "absurd" question of separate accidents for each property owner had been raised earlier in *Denham v. LaSalle-Madison Hotel Co.* (1948), 7 Cir, 168 F2d 576, certiorari denied 335 US 871, 93 L Ed 415, 69 S Ct 167 (damage to property of guests in a hotel fire); *Anchor Casualty Co. v. McCaleb* (1949), 5 Cir, 178 F2d 322 (oil and gas distillate, sand, and mud from a wild oil well blown onto the properties of several owners and tenants in the immediate area); *Saint Paul Mercury Ind. Co. v. Rutland* (1955), 5 Cir, 225 F2d 689, after vacated opinion (1954), 5 Cir, (advance sheet only) 217 F2d 585 (automobile struck and derailed a train damaging sixteen cars belonging to fourteen different owners); *Tri-State Roofing Co. v. New Amsterdam Cas. Co.* (1955), U S D C W D Pennsylvania, 139 F S 193 (roofing contractor upset a pot holding hot pitch which burst into flames and spread fire to eleven different properties); and *Truck Ins. Exch. v. Rhode* (1956), 49 Wash 2d 465, 303 P2d 659, 55 A L R2d 1288 (where the "absurd" argument varied by claiming separate per accident bodily injury limits for the occupants of each of three motorcycles which the insured automobile struck as they came toward him in formation about 75 feet apart.

### *Cooperation*

After an action for damages was brought against the insured, the insurer by two letters asked the insured to appear for a discovery deposition requested by the injured, by two letters advised the insured of the date of trial and requested appearance and cooperation, and sent telegrams to him three days before the trial. The insured received all communications, failed to respond to any of them, and failed to appear at the trial. A motion by the insurer's counsel for a continuance was overruled.

They participated in the trial which resulted in judgments against the insured. In later actions against the insurer, the judg-

ment creditors claimed that, by participating in the trial without notice to "all interested parties" of reservation of rights, the insurer waived the defense of failure to cooperate. The Court held for the insurer on the grounds (1) that the insured had breached the Cooperation Condition and (2) that the insurer, being required to defend, did not waive its policy defense in so doing.

*Beam v. State Farm Mutual Auto Ins. Co.* (1958), U S D C W D Kentucky L D, 163 F S 514.

*Comment.* As authority for the insurer's obligation to defend after breach the court cited its earlier *Strode v. Commercial Cas. Ins. Co.* (1952), U S D C W D Kentucky, 102 F S 250, affirmed *Commercial Casualty Ins. Co. v. Strode* (1953), 6 Cir, 202 F2d 599. Disagreeing that the insurer is bound to defend after breach, certainly, if bound, it should not be thought to have waived its rights by doing what it was required to do. The opinion in *Beam* implied that no notice of reservation of rights was sent to the insured and did not reach the question whether notice to him without notice to the injured would have sufficed. As to that, see *General Acc. Fire & Life Assur. Corp. v. Mitchell* (1953), 128 Colo 11, 259 P2d 862; *Laroche v. Farm Bureau Mut. Auto. Ins. Co.* (1939), 335 Pa 478, 7 A2d 361; *Speier v. Ayling* (1946), 158 Pa Super 404, 45 A2d 385 *State Farm Mut. Auto Ins. Co. v. Coughran* (1938) 303 US 485, 82 L Ed 970, 58 S Ct 670, reversing 9 Cir, 92 F2d 239; *Fisher v. Fireman's Fund Ind. Co.* (1957), 10 Cir, 244 F2d 194; and *Hinton v. Carmody* (1936), 186 Wash. 242, 60 P2d 1108, superseding opinion in 57 P2d 1240. Each of the six cases held that the reservation of rights was effective without notice to the claimants.

Again, where an insured, after repeated letters from the insurer's counsel and calls at the insured's home in his absence after prior appointments, failed to communicate with counsel for the insurer, the court held (1) that the questions of failure to cooperate and prejudice were jury questions, (2) that the injured were not barred by a previous declaratory judgment of no coverage for failure to cooperate in an action between the insurer and the insured to which the injured were not parties and (3) that failure of the insured to forward suit papers was not a defense where the insurer received copies of them from the attorneys for the injured.

*Pharr v. Canal Ins. Co.* (1958), SC , 104 SE2d 394.

*Comment.* It is submitted that the insurer should not be required to show prejudice, but that, even if it is, failure to cooperate and prejudice appear/as a matter of law in this case.

*Other Insurance*

One policy was issued with a standard pro rata Other Insurance clause and no omnibus clause. Another was issued with an excess Other Insurance clause. The court held (1) that, "*disregarding the words used*" (emphasis supplied), the clauses meant the same, (2) that each purported to be excess, (3) that they were mutually repugnant, (4) that the New Mexico Financial Responsibility Law required an omnibus clause and (5) that the first \$10,000 of coverage required by the Financial Responsibility Law should be pro rated, not in accordance with the policy limits, but in accordance with the premiums paid.

*Insurance Company of Texas v. Employers Liab. Assur. Corp.* (1958), U S D C S D California C D, 163 F S 143.

*Comment.* The court implied that breach of the Cooperation Condition was not a defense. Perhaps the most diplomatic comment which can be made about this case is that it reinforces a growing prejudice against diversity jurisdiction. The prejudice, however, is tempered slightly by the next case to be mentioned.

In a federal case in Florida, two policies, both purporting to be excess, were held to pro rate, presumably according to policy limits.

*Continental Casualty Co. v. St. Paul Mercury Fire and Marine Ins. Co.* (1958), U S D C S D Florida M D, 163 F S 325.

*Medical Payments**Duplicating Recovery under Bodily Injury Liability Coverage*

Where an injured daughter and her father recovered judgments for her injuries and the father released the named insured, his driver son, and the insurer, upon the insurer's payment of \$6,500 divided \$6,000 and \$500 (the Medical Payments limit), the release was held to absolve the insurer from liability under the Medical Payments coverage, although the insurer conceded and the court therefore assumed that the father of the injured was entitled to a double recovery under the two coverages.

*Barbour v. State Farm Mutual Auto. Ins. Co.* (1958), Mun Ct. App D C, 141 A2d 924.

The concession is correct and in line with *Severson v. Milwaukee Auto. Ins. Co.* (1953), 265 Wis 488, 61 NW2d 872, 42 A L R2d 976; *Gordon v. London & Lancashire Ind. Co.* (1955), 180 Pa Super 45, 117 A2d 778; and *Distefano v. Delta Fire & Cas. Co.* (1957), La App, 98 So2d 310. *Hawayek v. Simmons* (1956) La App, 91 So2d 49, contra.

*Notice of Accident*

The insured struck a boy on a bicycle. The injury appeared trivial. The insured notified his broker who notified an intermediate broker. The latter mistakenly sent the accident report back to the insured. Forty-four days after the accident, the intermediate broker received doctor bills and called the insurer. The insurer disclaimed liability 118 days after receipt of notice of the accident. The court held that, by its delay in disclaimer, the insured waived, and was estopped to assert, any disclaimer of liability for the delayed notice of accident.

*General Acc. Fire and Life Assur. Corp v. Johnson* (1958), 177 NYS 2d 90.

*Notice of Claim or Suit**Who Is the Insured?*

A very recent Indiana case held that one operating an automobile with the permission of the named insured was an "assured" under the policy and was therefore required, as a condition of coverage, to forward to the insurer suit papers served on him, and had no coverage where he breached the policy by failing to do so with the result that the insurer's first notice of the suit was received after judgment against the omnibus insured and six years after suit was brought.

*Lomont v. State Farm Mutual Auto. Ins. Co.* (1958), Ind App, 151 NE2d 701.

*Comment.* This case brings back memories of a New York case in which one insurer argued that the omnibus insured under the policy of another insurer was not subject to the Notice of Claim or Suit requirement. The New York court said that the argument was "specious." Worse than that, it was absurd and would have been most harmful to the insurance industry if accepted. The New York case was *Century Indemnity Company v. Hartford Acc. & Ind. Co.* (1951), 130 NYS2d 844.

*Cancellation by the Insurer*

There is a decided tendency these days for the courts to interfere with the standard cancellation provision which effects cancellation by the mailing of the notice regardless of receipt. A recent case in the District of Columbia, in the face of elaborate evidence of the mailing of the notice by the insurer, held that evidence of nonreceipt is evidence of nonmailing, permitting a trial court to find nonmailing and therefore noncancellation. The Municipal Court of Appeals stated that the question whether

mailing without receipt would cancel the policy "must await the case in which both mailing and nonreceipt are conclusively established."

*Allied American Mutual Fire Insurance Co. v. Paige* (1958), Mun Ct App D C, 143 A2d 508.

*Comment.* The case seems unrealistic. When will the case ever arise when both mailing and nonreceipt are *conclusively* established, if nonreceipt rebuts the *prima facie* case of mailing as it did here?

#### *Without Return of Premium*

A federal district court in Florida recently re-affirmed the almost unanimous rule that cancellation by the insurer is not contingent upon the return or tender of the unearned premium.

*Johnson v. New Amsterdam Casualty Co.* (1958), U S D C N D Florida T D, 162 F S 582.

#### *Cancellation by the Named Insured*

The named insured sent to his broker for cancellation a policy issued in New Jersey. The broker marked the policy "Cancel 10/14/55" and on that day mailed it to the insurer with a letter stating that the named insured had requested cancellation. The named insured's vehicle was involved in a collision before the insurer received the policy and letter. The Court of Appeals of New York held (1) that there was no coverage because the cancellation takes place when the named insured by his agent, the broker, mails the notice, (2) that, while the letter did not state the effective date of cancellation as required by the policy, the notation on the enclosed policy did and (3) that cancellation effective the same date as the mailing satisfied the "thereafter" requirement of the policy.

*Nobile v. Travelers Ind. Co. of Hartford, Conn.* (1958), 4 NY2d 536, 152 NE2d 33, 176 NYS2d 585, reversing 3 App Div2d 993, 163 NYS2d 407.

#### *Uninsured Motorists*

This coverage was added to the Family Automobile policy in its 1958 revision.

Another recent New York case considered an earlier Uninsured Motorists coverage which paid only if the accident was caused solely by the negligence of the owner or operator of the uninsured vehicle and provided for appraisal in case of disagreement.



The insurer failed to respond to a request that it select an appraiser, but moved for summary judgment in a suit by the named insured and another occupant of his car (which had been struck by an uninsured automobile) on the ground that the sole remedy was to compel appraisal. The court held (1) that the appraisal provision was not an agreement for arbitration and (2) that, if the insurer's delay of 24 days in appointing an appraiser was a failure to comply within a reasonable time (which could be determined only upon a trial), the insured was absolved from compliance with the appraisal condition and could proceed with his action on the policy.

*Karasch v. Empire Mut. Ins. Co.* (1958), 175 NYS2d 690.

*Comment.* The standard coverage in the 1958 Family Policy has no requirement that the accident be caused solely by the uninsured automobile and contemplates arbitration rather than appraisal.

### BROOKLYN, LOS ANGELES AND SAN FRANCISCO

This title appears to be, but isn't, a list of pennant winners in the National League for 1956, 1959 and 1960. I am merely returning, at last, to my earlier observations about high verdicts and high premiums (especially in Brooklyn). I would repeat the promise made by my friend, Gordon Snow of Los Angeles, General Counsel of Pacific Indemnity Company, to one of the early N.A.C.C.A. conventions in San Francisco, six or seven years ago. Gordon told N.A.C.C.A. that, if the operations of N.A.C.C.A. continue to be successful (and, I might add at this later date, if the private enterprise insurance industry can continue in business under the pressure of that success), it won't be long before it will cost more to *insure* an automobile than to *buy* one.

### FRAUDS AND ATTEMPTED FRAUDS AGAINST INSURANCE COMPANIES

Victor A. Lutnicki, Esq.

One of the distinctions which the John Hancock Mutual Life Insurance Company can justly claim is the fact that it is the underwriter of the Nebraska Bar Association Group Life Insurance Plan. Having for a number of years enjoyed both a personal and professional acquaintance with a number of the members of your esteemed Bar, it was almost symbolic to me when on leaving our Company's Law Department as General Solicitor and looking up my duties as the head of our Company's group insurance

operations, the first case presented to me for consideration included the specifications that your very capable committee placed in the hands of the several carriers who were competing for the opportunity to serve you. If ever a case stood to benefit by the personal interest of its underwriter, it is certainly the Nebraska Bar Association Group Plan. The bidding on and underwriting of your needs helped me step over from the active practice of law to the fast-moving, rapidly expanding field of group insurance.

Let me also compliment you not only on your choice of carrier, as I most naturally must do, but also on the manner in which your committee handled the investigation and determination of your needs. Your committee chairman, Mr. Kauffman, his fellow committeemen and the insurance advisor he turned to in Mr. Black organized the presentation of your case to the competitive market in a manner that was certain to bring you the best buy for a dollar spent. I only wish that all so-called sophisticated buyers in this market were as well guided in the technical complexities of getting an insurance need on the block for competition. Those people served you well and saved you a great deal both dollar-wise and benefit-wise.

Considering the host of outstanding barristers that you had to call upon, I must say that your chairman's choice of me as a speaker caused me a bit of wonder. Then when our distinguished Omaha General Agent, George Bodenmiller, passed on to me the information that your chairman indicated a preference for a piece on "Frauds and Attempted Frauds against Insurance Companies," I entertained, shall I say, a passing concern as to your expectations. So often speakers at Bar meetings, with proficiencies in certain techniques, put on a bit of a do-it-yourself show, with slides, diagrams and even canned instructions to the jury. My friends, please note at the outset that with the nice \$10,000 of life insurance coverage we provide you, any such "special instructions" should be more appropriately given your widows.

And now, turning a little more closely to my assigned topic, if public attention means anything, "Frauds and Attempted Frauds against Insurance Companies" is a timely, interesting subject.

A husband murdered for his insurance money, jewels reportedly stolen to collect their financial value under an insurance policy, etc., have been familiar plots for the movie industry. Hardly a television program week transpires without a few stories with fraud against insurance companies as an aspect of the drama. In one week Alfred Hitchcock's program, Kraft Theatre, Dragnet and even the late movie—a hoary opus called "Double Jeopardy"—contained references to this hazardous field of endeavor. News-

papers and magazines have regularly given generous space to accounts of this type of fraud. To say the least this is a "hot" subject. Even if I cannot congratulate the chairman on his choice of speaker, I can congratulate him on his choice of topic.

Frankly, for me to address such distinguished members of the legal profession as are represented in your influential Association is both an honor and an opportunity. I suppose no greater honor can come to a defendant's counsel than to have even one plaintiff's attorney listen to him for thirty minutes without an *objection!* Also for an insurance representative to face such a talented group made up, I am sure, of a number of good plaintiff attorneys requires some degree of courage, if not nerve.

Much good can come out of meetings like this when counsels for both the claimants and defense sides of the Bar get together. Of course I can say that with equanimity and even a smile. For twenty years I have been a defense counsel—but for a life insurance company. A \$10,000 policy is at most a \$20,000 claim, if double indemnity is involved. When my brothers at the Bar in behalf of the casualty companies say, "Man, you don't know what pain and suffering really means"—they are, I know, in earnest. I keep telling them, however, that by getting to know the other fellow better and seeing his side, understanding and trust can be built. We are all seeking the truth and have the interest of our profession and the community at heart.

"Frauds and Attempted Frauds against Insurance Companies" are not just the concerns of those companies. Obviously an insurance company has an obligation to its policyholders and stockholders to resist false claims. To do otherwise would raise the price of insurance and lower the return to its investors and would even jeopardize the company's very survival.

To the oft-repeated question, "What are you worried about—it isn't your money," the reply must come, "That's just it, *it is not our money.*" Beyond the wealth that is created by the companies in which they invest, insurance companies do not create wealth; they just pool together other people's money and redistribute this money according to need.

So often the Home Office will be urged to overlook a fraud and pay a nice amount representing say 20 per cent of the face of the policy just for public relations. That never struck me as good public relations. On life insurance claims either the claimant is entitled to the full payment or to none. Paying a small part as good will to me is like the fellow who paid his doctor \$1,500

to cure his halitosis, just to find that people didn't like him anyway.

The benefits of insurance are part of our way of life. In a real sense insurance policies provide our citizens with freedom from want and freedom from fear. However, rising insurance costs due to failure to detect and defeat fraudulent claims can price certain kinds of insurance out of the market. I'm not going to mention the serious problem of automobile insurance in several states today. Fortunately for the public's interest insurance companies do not stand alone in fighting fraud. Medical societies and bar associations like yours with their ethical practices committees, alert to the good of both their profession and the community, are powerful allies along with many other civic and business groups. In an address on the subject of "Investigation of Fraudulent Claims" before the Federation of Insurance Counsel, Mr. F. Britton McConnell, Insurance Commissioner of California, warned of the increased cost of insurance if fraudulent claims are not discovered and defeated. He stated that the Department of Insurance itself should initiate prosecutions of such frauds, and pointed out that "there are many organizations in every community ready, willing and able to assist the Department of Insurance and the insurer in the matter \* \* \*. All of these good forces in every community must be rallied to assist in the maintaining of insurance as an efficient, solvent, private enterprise service to our economy and society."

Surprising as it may seem, the area of most concern to insurance companies, especially those in the casualty field, is not the big and definitely fraudulent claim with which the public is familiar, due to publicity given these unusual cases. This type of claim is infrequent and relatively easy to detect and defeat. Rather it is the exaggerated claim—the smaller, more routine and much more frequent claim—that presents the basic problem. Subtle as this type of fraud may be, it is fraud just the same, and its impact on costs is appreciable. A few dollars' loss on each claim in a multiplicity of claims means a sizeable loss to a company. However, I am sure you are not interested in my reciting the boring details of such routine cases in order to show where a doctor's fee was excessive or where a hospital overcharged for its services or a garage mechanic padded a repair bill, etc. Despite their critical importance in the aggregate, individually these cases are not interesting.

We have an organization working on that and in our company several capable committees. However, committees, as you know, are rather like the sex life of an elephant. They take place at a

very high level, they are accompanied by much noise and trumpeting, but nothing happens for a year and a half.

The cases which I have selected to discuss with you come from our files and from the files of a representative group of insurance companies. They appealed to me because of their human interest. No attempt has been made for complete recitation of all details or legal points involved. The essential facts are there and all the cases are authentic.

Insurance has been known on occasion to put a strain on marital relations. Consider the case of the wife whose husband passed away naturally in his sleep. It occurred to her that accidental death would have doubled the value of her beloved mate. Believe it or not, she pushed the poor old boy out the window. However, she broke down under questioning and confessed and had to assuage her grief with only the face amount of the policy.

I should title the next case, "Love Is a Curious Thing." Although the company was not successful in proving fraud, they are convinced this is one of the *rare* ones that get by.

Lily, a middle-aged factory worker, had been separated from her husband for six months because of his amorous adventures with other women. She still loved him, however. Suddenly, one night he appeared at the apartment she shared with two co-workers. After he left she seemed excited and disturbed, told her girl friends that her husband had informed her that he had gotten a girl in trouble and that this girl was demanding \$3,000 or else. Lily said she still loved him and was determined to get him the money. Her roommates told her she was balmy. Two days later she left a note at the office of an insurance company for an agent to call, and he did. She wanted \$10,000 worth of insurance with her husband as beneficiary. The company agreed to only \$5,000. When the policy was ready she was notified and she told the agent she would have the money the next day. The following morning, Friday, Lily went to a loan office, borrowed \$110 which she said she needed for household bills, walked a few doors down to the insurance office where she generously added fifty cents of her own money, paid the initial premium of \$110.50, and got the policy. That same Friday night she told her two girl friends, "Joe won't have to worry about the \$3,000 for that girl."

The following Sunday she claimed she was ill and did not go to Mass with her roommates as she usually did. When the girls left the apartment—it was a warm September day—the doors and windows were opened. When they returned, the door and windows were shut, they smelled gas and broke open the door.

Lily was lying in bed dead. On the gas stove was a pan half filled with water with two hard boiled eggs in it. The gas jet was on and the flame was out. Death, according to the medical examiner, was due to asphyxiation with illuminating gas. The husband, gay blade to say the least, put in his claim as beneficiary and when the investigator called on him he was found at the apartment of the redhead that he had allegedly gotten into trouble. In view of their investigation and the fact that the policy was only a week old the company refused payment on the basis of suicide. Oh, I can just imagine what Alfred Hitchcock would do with that one. Do you know what we did? We paid! The case went to court, the jury found for the plaintiff—the husband—on the basis of accidental death and Joe reaped the benefit of his wife's love to the tune of \$5,000.

I know you've heard this one but believe me, friends, it is not just a good subject for a cartoon. Here is an authentic case, names and all, involving an old, old bromide.

Mrs. Panas was on the witness stand in a workmen's compensation hearing in which she was claiming an injury on her job. After explaining that among other things she was now subject to dizzy spells and had a "burning inflammation" in her back, she added that she could hardly move her right arm anymore. "How high can you lift it now?" asked the commissioner. Mrs. Panas, slowly and with seeming difficulty and pain, raised her arm about to the level of her shoulder. "How high could you lift it before the accident?" "All of the way up," she replied, as she raised her right arm with ease over her head.

After listening to the claimant detail all his physical complaints, one cynical company representative was heard to remark, "It would be easier for the good Lord to start all over again and make a new man than to try and cure this one." However, he had forgotten the miracle of the full settlement. Once the papers were signed, lo—a full recovery took place. Miracles like this can occur in this day and age.

In fact, at the recent Los Angeles ABA meeting a very fine paper on "Whiplash Injury" was presented by a leading physician who defined the occurrence as "a sprain in the neck from which complete recovery cannot be expected until all litigation has been finally settled."

Familiar to insurance investigators is the deliberate disappearance case. You know we depend a good deal on our investigators. Because of the lure of the job created by TV and paperback novels, we have a number of applicants for these positions. Quite an

effective screening process has been developed, one part of which is a vocabulary test.

The following case, which was widely publicized in the press, illustrates not only the deliberate disappearance but also the feigning of accidental death. A young father, George Rome, was insured with two companies for about \$150,000. His wife was the beneficiary. He was reported by two male fishing companions as missing and probably drowned. Their story was that while fishing together in the harbor their boat had overturned. The two of them made it to the nearest shore, but Rome, who was supposed to be a good swimmer, somehow had not made it. They had not seen him go down—it was fairly dark and they were busy saving themselves.

Although no claim had been presented as yet, the insurance companies cooperated immediately with the police who were being urged into the investigation by several loan companies to which Rome owed money. It was soon uncovered that there was another girl in Rome's life, an attractive blonde model who had quit her work and left town during the week of Rome's disappearance. Susy was traced to a New York model agency when her former employer received a reference form on her. The New York agency disclosed that she had left her job there, but later they received an inquiry on Susy from a Texas department store where she had applied for work. She was traced to Texas; and when questioned admitted that Rome was alive, that he was in the same town and that he was to meet her that night at her apartment. That evening, when Rome arrived at the apartment, instead of the arms of his beloved, he found the strong arms of the law awaiting him! Confronted with the evidence, Rome and his two male accomplices admitted their parts in the conspiracy and explained that the boat had been overturned to feign the drowning. Rome had swum to the opposite shore and had gone to his sweetheart's apartment to change his clothes. Later both of them took off for New York City. His wife apparently had had no knowledge of the conspiracy. His disappearance would have eventually given his wife and family a substantial fund of \$150,000 to cushion the loss of a husband and father, and he would have been able to live happily ever after with his dizzy blonde. However, his attempt at fraud failed and he and his accomplices were tried and convicted.

Most deliberate disappearance cases are not inspired by attempts at fraud against insurance companies, but usually are the result of a desire to escape from one's problems—be they marital, financial or social. Some fellows, for example, just can't take

the burden of looking at the same face each day across the breakfast table for too long a period of time! The interest of insurance companies in these cases lies, of course, in the presumption of death that attaches to seven years of unexplained absence.

Many of the attempts at fraud against insurance companies involve considerable enterprise. Consider the automobile accident racket which was recently broken up in one of our larger cities. This group would solicit the cooperation of others in various parts of the state by offering them \$100 or more to admit to an accident and to sign a notification form of the alleged accident to their insurer. Regularly several passengers would be in the other car, and claims would be advanced—certified by a physician for physical injuries. This ring was finally broken up when one of the individuals solicited to make out a false accident report, reported instead to the police.

Mr. Brown, an automobile dealer, reported the theft of one of his new automobiles. It appeared to be a legitimate claim, so after 30 days the company settled for the value of the car. Later they received an anonymous letter suggesting they check with another auto dealer. This dealer said he had bought the auto in question from Brown and sold it to a Bill Mason. He produced the sales records to prove the transaction. Bill Mason was contacted and his automobile turned out to be the same make and model that was supposed to have been stolen. When confronted with these facts, after some evasion, Brown claimed it was an error and wrote out a check to the insurance company.

Dan Hollis, an employee of Page Manufacturing Company, had a knee which appeared deformed. He had applied for disability benefits under group insurance and had received \$30 per week for 18 weeks when his fraud was discovered. His trick knee had fooled both the doctor and the company investigator because it was eventually learned that he had been working full time on the third shift with another company while he was collecting disability benefits from the Page Company. The insurer sued, claiming Hollis had obtained \$540 by fraud. Hollis was ordered to make restitution.

Just how far will the lure of an insurance payoff take a person? A father and his son picked up a derelict in "skid row"—fed him, cleaned him up, took him for a ride in the son's auto, hit him over the head, put the son's ring and watch on him, crashed the auto off the highway and set the car and the victim on fire. He was burned beyond recognition. Identification was made by the father of the insured on the basis of the ring and the watch.



The father as beneficiary was paid both regular and accidental death benefits. An anonymous phone call to the insurance company revealed that the son was alive, and after investigation the father and son were criminally prosecuted and eventually electrocuted.

Of course nobody learns these tricks more thoroughly than the claim adjusters. In fact, an adjuster for a large casualty insurance company succeeded in collecting about \$300,000 by faking accidents and attesting data and doctors' and lawyers' bills before he was discovered.

Insurance companies, to prevent fraud, set up controls but these controls rarely, if ever, are air-tight. This one was brought to me by our western claims manager just a few weeks ago while I was attending the ABA meeting in Los Angeles. In a group case before a disability claim is paid, a triple signature check had been set up to prevent frauds. The company must receive a claim form signed by the employee and a medical certificate signed by the doctor. The draft of the check must be signed by one or two of the authorized company officials, and of course the check itself when cashed must be endorsed. Three people had to authenticate each claim with their signatures. As nice as this sounded I guess it should have occurred to us that it would be just as easy for a crook to forge three signatures as one. That is just what happened. An infirmity employee of this policyholder had for some time been buttressing his income with fraudulent disability checks. He had been in the habit of helping disabled employees who came to the infirmity by cashing their checks for them at a nearby drugstore in order to purchase medicine for them. Having access to the various forms needed, he began to make false claims forging employees' and doctors' signatures and made out drafts by forging the signature of a proper company official. In order to cash the draft, he would forge the employee's name, purchase a small amount of medicine and get the rest in cash. The racket was discovered when the company investigated to determine why so many people were ill!

Any good plaintiff attorney will tell you that his responsibility before undertaking a case is to investigate thoroughly to ascertain the honesty of the claim. Such investigations by attorneys and doctors are in their own personal interest. They will not be embarrassed and will not have wasted their time on a fraudulent case. Most importantly, they are in the interest of their professions, both of which have a high reputation for ethics, and are in the interest of the community, which must be protected against fraud.

A case which points up this need occurred in an eastern city. Frank Marshall sued the Graham Theatre for an injury to his arm suffered, he claimed, by his slipping on the floor of the men's lounge on Thursday evening, October 23. No one had seen him fall and he admitted that he had not reported the fall that evening to the management, because he dismissed its significance. The next day he said his arm pained him excessively and he went to a doctor who testified that he had taken an X-ray picture of Marshall's arm on Friday, October 24. The X-ray picture showed a fracture and the X-ray was introduced as evidence. To prove his attendance at the theatre, Marshall produced a theatre stub. Fortunately it occurred to the defendant's attorney to have the number on the stub checked. This showed, according to a tabulation kept by the theatre, that the ticket could only have been purchased on Friday, the day after the alleged accident. Marshall then admitted that he had injured his arm at home on Thursday, gone to the doctor the following day, and also had gone to the theatre to get the ticket. His original story to his attorney and doctor had persuaded them that he had a legitimate case only to finally have it turn out as an attempt at fraud.

Occasionally the lure in an insurance fraud is other than money. A seaman claimed he was struck by a valve which blew out while he was preparing a high pressure line on a vessel. Taken to the hospital it was found that he had a punctured femoral artery. The case was accepted by the insurance company and a settlement was made which provided for medical care. When later he attempted to reopen the case to get more medical care, the company investigated further and found out that he had a record of injuring himself. Further investigation disclosed that he was a narcotic. He had been admitted to several hospitals because of self-inflicted injuries just to get the drugs. It was too late to prevent his original fraud with this company, but the information regarding him was circulated to the various marine hospitals.

The last two cases illustrate that fraud and attempts at fraud against insurance companies can be perpetrated from within.

Sal Weinstein was the principal stockholder, treasurer and manager of a small wholesale corporation which as a result of membership in a National Wholesalers Association had group insurance coverage for his employees. On January 1, 1956, his wife, Mrs. Mabel Weinstein, was recorded as an employee of the firm and made application for insurance. Automatically after three months of employment, employees are eligible for coverage if they have worked at least 30 hours per week. She received a

certificate for \$5,000 of insurance dated April 4, 1956 with her son as beneficiary. She entered the hospital on April 5 on account of cancer and died on July 5, 1956. Investigation disclosed that for a period of four years previous to January 1, 1956, Mrs. Weinstein had been under almost continuous medical treatment for cancer and that when she made application for the insurance she actually was in an advanced state of cancer. Also that she never worked for the company, according to the testimony of employees, and that she was in Florida for the months of February and March. Mr. Weinstein claimed that she went to Florida to look into possible business sites. Upon the refusal of the insurer to pay the death benefit, Mr. Weinstein brought suit. The court ruled against him and in favor of the insurer on the grounds that Mrs. Weinstein had not been eligible for insurance under the terms of the policy since she had not fulfilled the requirement of three months of continuous active service of 30 hours per week.

My final case I'd like to title "The Dead Man Applied for Insurance." A routine application for insurance under a pension trust program of a large corporation was being processed at the home office of an insurance company. A file clerk searched the name of the proposed insured through the indices in routine fashion. The alert clerk was startled to find that the applicant's name, age, occupation, parentage and other data coincided with those of an individual on whom the company had paid a death claim two years ago! Investigation revealed that this individual was definitely alive and was legitimately applying for an insurance policy. Contact with him brought out that the policy, on which the death claim had been paid, had been surrendered by him for its cash value three years before through a district office of the company. One of the company's own agents had been for some time defrauding the company by running his own insurance company. Whenever someone who was leaving the area and needed money, wanted to surrender his policy, the agent paid him out of his own funds for the policy. For a while afterwards he continued premium payments on the policy, thus keeping it in force. After a reasonable period of time, seemingly legitimate claim proofs of death were duly filed through the district office at the company's home office. The address of the beneficiary was always listed as one of two post office box numbers which the agent had previously obtained for himself in the names of fictitious persons. In this way he could get the check unknown to everyone concerned. He would forge the endorsement on the back, endorse it and deposit it in an account under a fictitious name. Eventually the money was transferred to his own account. This procedure was repeated ap-

proximately fifteen times and about \$40,000 was stolen before the alert file clerk discovered "The Dead Man Applying for Insurance." The agent was prosecuted, convicted and jailed.

The type of cases which I have described to you today fortunately occur only occasionally. If fraud were practiced widely, insurance companies as well as other businesses could not exist. Actually the cases of fraud are few. Insurance depends on the honesty and good faith of people. The vast majority of claims are honest and legitimate. In one year's time at the John Hancock Mutual Life Insurance Company only 7/10 of one per cent of the claims were resisted. The total amount in 1957 of claims paid was 265 million and total amount denied \$1,400,000. The job of our Claim Department is to pay claims promptly, fully, and with complete regard for the human relationship involved. The job of our Bureau of Investigation is to uncover the reasons for payment. We strive to be fair and to live up completely to our contractual obligations.

The Company's philosophy in this matter is that "there is a moral as well as a legal duty to pay just claims promptly."

Our obligation to our own John Hancock people, our policyholders, to the insurance industry and to the community at large is to resist with all the skill and experience at our disposal any claims that we believe are fraudulent. When we refuse to pay a claim, it is only because we are confident, based on facts uncovered by investigation, a particular claim is not a just one.

You know, we are lucky to live in a country where able and experienced counsel are available for each side in litigation. Where there is equal strength, the truth must prevail. That the great majority of cases are eventually settled to the satisfaction of the company is not by any means an indication of great ability or experience on the part of our counsel, but is simply the result of sound practice.

Sound practice means that we will only refuse to pay those claims which, after a thorough investigation, we are convinced are unjust.

Ethical practices of lawyers and doctors and the honesty of the general public help us maintain our vigilance against fraudulent claims. Most lawyers investigate the legality of their clients' claims and the fairness of the amounts requested in damages. Most nurses, doctors and hospitals are fair in their evaluation and treatment of fees. Those who are not cause the problem and reflect on others.

A study of business organization would soon show that the long-term survival and success of a business or profession depends on its moral and ethical practice.

Even the survival of nations and civilization depends upon the character of their people. As Charles A. Lindbergh expressed it, "The character of man still forms the essential core of a lasting civilization \* \* \* short-term survival may depend on the knowledge of nuclear physics of supersonic aircraft, but long-term survival depends alone on the character of man. When a business, or a profession, or a nation fails to live up to moral principles—growth and progress are impeded."

The lawyers who have made a significant impact on their profession and whom you and I respect and admire are not those who have manipulated the law for personal gain. Rather they were men of moral principle who cared for their profession and cared about people.

Thus when we address ourselves to the subject of "Fraud and Attempted Fraud against Insurance Companies," we are dealing with more than the prevention and detection of fraud in order to save money. There is a great issue—a moral one—involved in this matter of fraud; an issue which has implications for the survival of our economy and the American way of life.

The extent to which the law does actually become "the true embodiment of everything that is excellent" is the extent to which our country and our civilization are insured and protected against forces that would destroy them.

**SECTION ON PRACTICE AND PROCEDURE**

**Robert B. Hamer, Esq., Chairman**

Panel discussion of recommendations of the Subcommittee of the Judicial Council concerning modifications relative to settlement of bills of exceptions, and modifications of other existing procedural statutes relating to appellate practice.

"Trials and Tribulations"—Emile Zola Berman, Esq., New York, N. Y.

**CHAIRMAN HAMER:** The first part of the program will be devoted to a panel discussion of recommendations of the Subcommittee of the Judicial Council concerning modifications relative to settlement of bills of exceptions, and modifications of other existing procedural statutes relating to appellate practice.

The panel members who will participate are, proceeding from my immediate right: David Dow, who is on the faculty of the Law School of the University of Nebraska; Les Stiner from Hastings; and Edwin Cassem, whom I think you all know and who has been here before. Yesterday he gave the address of welcome as the President of the Omaha Bar Association.

I might say to you that these panel members are not necessarily in agreement on all phases of this. Some of these things are, so I am told at least, of a somewhat controversial nature. The primary purpose of this discussion is to acquaint the members with the problems and the recommendations that are being made and the views that are being taken of people who have given these matters some study. The decision, of course, is in the first instance up to the Judicial Council in connection with recommendations to be made and, of course, ultimately up to the Legislature in connection with its 1959 session.

With that I am going to turn over the program at this stage to Dave Dow who has gotten this part of it together and who will lead the panel discussion. Mr. Dow.

**DAVID DOW:** Thank you very much, Mr. Hamer. Without any further introduction I am going to start by introducing Mr. Les Stiner of Hastings who will discuss some of the procedural suggestions which have been made with respect to bills of exceptions. Les.

**L. R. STINER:** Gentlemen, as your chairman has indicated, the committee was appointed about two years ago by the Judicial Council, charged with the responsibility of studying the present procedure in reference to bills of exceptions and possibly recom-

mending to the Council changes which might simplify and improve the present situation. Squire Cassem, George Healey, Dave Dow and Rush Clarke have served on the committee. The committee met a good number of times and the present status of the matter is that various drafts have been prepared but the Judicial Council has not yet taken any final action on the matter, so that nothing definitely has been done. For that reason these remarks will have to be confined to the general ideas involved rather than any specific provisions of any new statutes or rules.

The reason for this study of possible changes in the law may be summarized as follows: Under the present laws, as you all know, the burden is upon the appellant to obtain and file with the Supreme Court a bill of exceptions. If the lawyer for the appellant slips up in some way and fails to furnish a valid bill of exceptions under the law and under the rules of the court, then the court is not permitted to review any question of fact involved in the case. The present rules and the present statutes are somewhat complicated. As you all know, they have intricate provisions as to just when certain things shall be done, just when the bill shall be filed, and consequently experienced lawyers have told me that when they have had a case and go to the Supreme Court they have found it necessary to sit down for a day to try to figure out just exactly what they have to do, and when, in order to be sure that they have a good bill of exceptions in the high court.

In recent years with disturbing frequency there have been slip-ups, and litigants have found themselves in the position of not having the right to have their case reviewed in the Supreme Court, at least so far as fact questions are concerned, because of some failure to comply with the intricate rules.

Another thing that has brought about criticism of the present system is the fact that there have been court reporters—I don't say all of them—but there have been court reporters who have been dilatory about this matter of furnishing a bill of exceptions after it has been ordered and this has caused no end of trouble.

Until the recent amendment in regard to appeals involving multiple parties, that situation caused a lot of trouble because under the present rules whereby the appellant has to deliver the bill to the attorneys for the appellees, there might be several lawyers involved; they might all live in the same community or they might be scattered all over the state, and it has been very confusing and in some ways almost impossible to comply with these provisions.

Then this business under the present statute of allowing an arbitrary length of time within which the reporter shall furnish the bill of exceptions, and then if he doesn't get it done the appellant goes to the district court and gets extensions of time, up to eighty days, has not been satisfactory because in many districts the district judges have allowed these extensions almost automatically, and sometimes they haven't. So it was felt that this system could be improved.

If changes are to be made in the rules one question which presents itself is whether or not this shall be done by means of amendments to the statutes or whether the whole thing might best be regulated by rule of the Supreme Court. In other words, it has been proposed that all of these statutes relating to bills of exceptions be repealed and that the Legislature pass an appropriate statute which would give to the Supreme Court the power to make rules in reference to the preparation and filing of the bill of exceptions.

As your chairman indicated, there has not been entire unanimity as to just what should be done, but I think the things I am going to talk about are pretty well agreed upon as being desirable changes.

In the first place, the committee feels, and I believe the Judicial Council agrees, that the burden of getting the bill of exceptions, so far as getting it prepared, getting it filed in district court, getting it filed in the Supreme Court, the burden there should not be upon parties or the lawyers, but it should be on the public officials. The reason for that is that if there is some slip-up, some delay in filing the bill, some failure to abide by all the rules, then it is extremely unlikely that the Supreme Court would impute that failure to the parties but rather would take steps to permit the bill of exceptions to be filed in Supreme Court so that a litigant would not lose his rights of review.

In accordance with that theory it is proposed that in order to get your bill of exceptions, if you are an appellant, the first thing you would do would simply be to file a precipe with the clerk of the district court within the same time you file your notice of appeal.

In the precipe, if you don't otherwise indicate, it would be taken to mean that you were asking for transcript of all the records in proceeding. You could, however, with the consent of the adverse parties, ask for less than the whole record, but under the proposal now under consideration you could get less than the



whole record only with the consent and stipulation of the adverse party.

The next step in the proceeding would be that the clerk of the district court would furnish a copy of this precipe to the reporter. It would then be the duty of the reporter, within some arbitrary period such as eighty days, to prepare the bill of exceptions and file it with the clerk of the district court. After it is filed with the clerk of the district court it would be the duty of the clerk to notify all the parties concerned that the bill had been prepared and filed. It would stay on file then with the clerk of the district court available to the lawyers in connection with preparing briefs until some time shortly before the case is heard in the Supreme Court.

Of course there is this problem sometimes of mistakes in the bill, omissions, misspelling, various things that can occur. Amendments to the bill would be handled either by agreement of the parties, which would be permitted, or if they couldn't agree then by submitting the matter to the judge who tried the case and on such notice as he might prescribe he would make an order resolving any differences about what the bill shall contain.

Incidentally, it might be that the time for filing appellant's brief in the Supreme Court might run from the time the bill of exceptions is filed in the district court rather than, as it is now, having that time run from the time the notice of appeal is filed. This present system is totally unrealistic, I think, where you have your brief day fixed in reference to the time of filing your notice of appeal and when brief day comes around you may or may not have your bill of exceptions ready, so that would take care of that.

You will observe that under this rather simplified procedure which really is about the same as getting a transcript of your plea from the clerk of the district court, you simply ask for it and then it becomes the duty of the clerk to furnish it. You will observe that if this went into effect there would be no passing of the bill of exceptions back and forth among the lawyers. There would be no necessity for getting an order of the district court settling the bill except in those cases where there was disagreement as to what the bill should contain, in which case the judge would be empowered to resolve those differences.

This procedure would take care of the multiple party situation very nicely and it would take care of this matter of having a definite brief day fixed on a realistic basis.

Now, of course there is another problem. Suppose the reporter fails to furnish the bill within the prescribed eighty-day period? The proposal is that in that case the appellant, or any other party, could ask for an extension of that time by the Supreme Court, and the Supreme Court would be given the power to grant extensions of time on such terms and conditions as might be appropriate. That last qualification would be important because that implies that the Supreme Court, as a condition of granting the extension, might impose some penalty on a reporter who under the circumstances was dilatory and who had no excuse for not getting the bill out sooner. So it would give the Supreme Court some power there to control this situation we have in some areas in regard to court reporters.

There would also be an appropriate provision which would cover the situation where the judge who tried the case becomes disabled or is out of the state, or something of that kind. About the only innovation we propose there would be that if you have a judge who is imported from some other district and you did have some question about amendments to the bill, those matters could be submitted at chambers anyplace in the state.

Then the other provision which would be necessary would be to try to adapt this procedure to cases where you have a review from some inferior court; that is, inferior to the district court or from a board or tribunal. It is pretty hard to make the procedure exactly the same in those cases because many times you don't have a clerk with whom to file a precipe and you don't have anyone who could carry out the duties that would be involved in a case in district court. We have in mind there that anyone who wanted to appeal or to prosecute an error proceeding from such an inferior court would have the burden of furnishing the bill. He could hire the reporter and if any question arose as to the accuracy of the bill, that could be settled by the court or tribunal from which the appeal or error proceeding was taken.

MR. DOW: I suggest that you might have some questions with respect to the things that have been and will be said here but perhaps it would be best if we held the questions off until after all the three of us have had our say because some of the things which I am going to say and some of the things which Mr. Cassem is going to say may either prompt additional questions or perhaps even answer some of the ones that you have.

While we were working on the proposals with respect to the bills of exceptions, it became clear to us, or at least to some of

us, that there were certain general rules of practice which cut across not only bills of exceptions but other areas of the law and that it might be wise, although it was not technically within our area of jurisdiction, to suggest a modification of the statutory picture in general which impinged upon the area of bills of exceptions. It is these things about which I propose to talk very shortly.

In the first place, I call your attention to the fact that we have been talking about bills of exceptions in civil cases. There is a provision in the statute specifically dealing with bills of exceptions in criminal cases, and particularly with respect to bills of exceptions in cases involving indigent defendants. This section has been a part of Nebraska law for some time and it is required now by the equal protection clause of the Constitution under the decision handed down two years ago by the Supreme Court of the United States in *Griffin v. State of Illinois*. This subject is being dealt with separately and it is not involved in the discussion which we have here today.

Next we have suggested certain modifications in those statutes which deal with reporters, as Les mentioned. Many of the difficulties which lawyers have found themselves in may perhaps be traced either to the reporters or to the statutes which are set up to control reporters.

The first modification which was suggested to the Judicial Council is that the reporter be required to file a bill of exceptions. The statute as it now stands merely provides that the reporter shall furnish, when requested, a transcript of the proceedings, and many reporters have taken the position that a transcript of the proceedings does not include the form of a bill of exceptions required by the Supreme Court, and therefore the fees which they are permitted to charge do not necessarily apply. It is true that the Supreme Court has ruled that they were limited in the fees which they could charge to those set forth in the statute, but it seemed desirable that the statute be amended under any circumstance to require that they provide a bill of exceptions in accordance with whatever rules were laid down by the Supreme Court.

We also provide in favor of the reporters that they shall be entitled either to be paid or to have satisfactory provisions for payment before they file the bill of exceptions.

It is also apparent to all of us, I think, that the fees which are now set out in the statute for the preparation of bills of exceptions, to wit, fifteen cents for one hundred words, are not

adequate under modern conditions to properly pay for the work which the reporters do. We felt that this was something which should be amended. We did not feel that it was a matter about which we could suggest a specific sum. Therefore the proposal as it is submitted to the Judicial Council is that the statute raise the fees, but to what figure we do not say. It was at one time suggested that this also be done by rules of the Supreme Court, but I believe that this is not favorable to the Supreme Court; that is, that they should not be responsible for setting the fees when the total take of the reporter is a combination of salary and fees, the salary being set, of course, by the Legislature.

The next modification which we suggested in the statute with respect to reporters is that the reporter shall be required to report arguments of counsel, including the opening and closing arguments, when requested by either counsel in the action. At present the statute merely says that it may be done if the judge thinks it is desirable, under the rule of *Sandomersky v. Fiximer*, which permits counsel to wait until the close of the argument to raise issue with respect to proper argument. It seemed better that the whole argument be taken down and that provision be made in the statute for this if counsel wishes to do so.

I might suggest one further difference of opinion among the people who have been working on the drafting of the bill of exceptions and one to which Mr. Cassem will, I think, address himself particularly: some thought that it would be desirable to provide that the reporter file two copies of the bill of exceptions with the clerk of the district court. This would then permit each counsel in the normal lawsuit to have a copy of the bill to prepare his brief. This is undecided as yet.

Then there was much discussion on the question of whether or not sound recording devices, such as the one we are using here, should be used in the reporting of lawsuits or hearings before tribunals or other bodies. The solution which a majority of the committee reached on this particular issue was that the statute should be amended to permit the sound recording of hearings, within the discretion of the trial judge. At present the statute requires that the reporting or recording be done "stenographically." Whether or not this permits the recording by a sound recording device we are not quite sure, but the states that have decided the question have said "no." It seemed to us reasonable, certainly, that such should be permitted rather than prohibited.

In the same vein it seemed reasonable to us to say that in the taking of depositions a sound recording device could be used

by whoever was reporting the taking of the deposition. I call your attention to the fact that the statute now provides that a deposition may be taken stenographically "or in any other way," provided it is so stipulated by counsel. This merely permits the taking of the deposition without such a stipulation. On the other hand, I refer you to the very excellent article which I just had the pleasure of reading yesterday by Norris Leamer in the *NAPA Journal* on the subject of taking depositions with a sound recording device. It is obvious that you will need some kind of a stipulation to handle the returning of the tapes or disks which you use to the district court if it is not transcribed.

The next subject deals with the question of the time within which things have to be done in civil actions. This is now covered by two sections of the statute, to wit, Sections 25-2221 and 24-316. It seemed to us that these sections taken together were ambiguous and left out things which probably should be in the statute. The ambiguities deal with the termination of the end of the period. You may recall it says that you exclude the first day or the day upon which the starting event happens and you include the last day unless it is Sunday—period. The difficulty comes up if the last day is a holiday. Other statutes provide that if the last day for doing an act falls on a holiday it shall not be counted. This is not so with respect to the taking of action in a civil proceeding. If it falls on a holiday you are required to have done the act, filed the paper, or whatever it may be on the day before. At least the decisions of the Supreme Court in years past have so indicated.

This is not, as I say, in accord with other statutes concerning such problems in other areas in Nebraska, such as the negotiable instruments law and certain provisions of the workmen's compensation law, and it is not in accord with what is generally done throughout the country elsewhere. Furthermore, it is customary for people to think that if a holiday falls on a Sunday then Monday is a holiday and you don't have to do anything until Tuesday. This provision, similarly, is in the other statutes but is not in this particular Statute 2221 which deals with when an act must be done in a civil proceeding. For that purpose and with the thought, to borrow a phrase of the Supreme Court, that this seems to be a trap for the unwary, we have proposed modification of Section 2221.

This is tied in with another problem which, I believe, has been talked about a good deal by lawyers across the state, and that is whether or not courts should be closed on Saturday as well as on Sunday. If the courts are closed on Saturday it seems

reasonable to say that you do not have to file a paper on Saturday in a clerk's office which is not open. In any event, the suggestion which we made was that the statute provide that the end of the period shall be extended if the day falls on Sunday, on specifically enumerated holidays, and just picking days out of a hat, we used those days which are now designated by the Governor as being holidays in the State House, and if a holiday falls on a Sunday the paper does not have to be filed or the act done until the end of the next business day. This is a modification I might add, to take into consideration the Nebraska problems of the federal rule which deals with this same problem—Federal Rules 5 and 6 deal with service and time, and they are hand in glove.

The federal rule has one other provision in it which we specifically left out and I merely call it to your attention because I nor we quite knew what the answer was. You may recall that the Federal Rule 5 provides that if the period of time within which an act must be done is less than seven days, then intermediate Sundays and holidays will not be counted in the seven-day period. We left this out because the only act we could think of which had to be done within seven days, and that was not otherwise covered similarly by statute, is the filing of the affidavit and the sending of the copy of a notice under the new statute which requires mailing of notices that are published to those people whose addresses you know, and so forth, and those things have to be done within five days. That is the only statute that we knew of that was pertinent to this problem in Nebraska.

The next and last area which I will mention briefly deals with the service of papers in a civil action. It seemed to us that two things were rather ambiguous about these provisions of the statute or at least merited serious consideration of change. In the first place, there are several statutes in Nebraska which provide that papers must be served upon a party, as opposed to an attorney. It has been held that this is mandatory. The service on the attorney is not enough, and I refer specifically here to revival proceedings. Therefore it seemed reasonable to make a statute which says that it shall be permissible at any time to serve a paper upon an attorney who has appeared of record in the proceeding. Furthermore it seemed to us that it would not be unwise to permit the service of papers by mail. This is the normal procedure in inferior courts. This is the normal procedure in the federal procedure, and after all the mail is a somewhat more sure device than it was when these statutes were first proposed back in the nineteenth century.

At present we have two statutes, and I dare say there are many attorneys who don't know it—Sections 911 and 912 of Chapter 25. What they provide is that the service of motion papers shall be served upon the attorney in the same manner that a summons is to be served. In other words, you can get the sheriff, you can service it personally, or presumably at his residence. What happens if it is not a motion paper that you are serving, I don't know. The subject was approached by the Supreme Court two years ago in the Weismer case and they did not decide the issue as to how service must be made.

We propose that service be permitted by either certified or registered mail, similar to the federal rules on the subject, and that contrary to the federal rules the service be complete upon receipt of the mail. Proof, however, of service may be made by the certificate of the attorney who caused the service thus to be made. It would then be supported by a presumption of delivery. We left out the federal provision which says that if service is made by mail three days shall be added to the time within which the act shall be done.

These, then, are the peripheral subjects which were discussed and suggestions made by this subcommittee appointed by the Judicial Council.

It is now my pleasure to introduce Mr. Ed Cassem who is a member of that subcommittee and who did not agree with all of the provisions which we proposed. We believe it was highly desirable that his point of view be put directly before you for question, discussion, if not decision.

EDWIN CASSEM: Mr. Hamer, gentlemen: This chap, Dave Dow, was a very disquieting factor in the deliberations of our committee. I should tell you that deliberations of this committee—that's a good word, you know, deliberations—began last year when from time to time we went to Lincoln, and to get the proper atmosphere we sat in the conference room of the Supreme Court. I don't know what that has done to our deliberations. There might be a variety of opinion on what effect might come out of sitting in that room. Anyhow, speaking of the disquieting factor represented by Dave Dow, we would sit there and with respect to a given provision we would argue back and forth and resurrect cases and personal experiences and the customs and practices of the trial courts in our respective districts and so forth. Then here would come Dave up with a statute that none of us had ever heard of, a Nebraska statute. He had the disquieting way of reading the statutes, and he has been doing it right along. A very

nice thing that we had him, although it is not good to find out that there are so many statutes that you haven't read, after you have been in practice twenty-five or thirty years.

Just speaking of one minor point mentioned by Dave with respect to this extension of time when the courts are not open. My feeling has been that we might just say that in substance whenever the last day falls upon a day when the clerk's office isn't open, or the office in which an appropriate official act must be completed or performed is not open, then the time is extended to the next day on which the office is open.

First, getting to the question of whether this procedural change should be made by statute or by rule of the Supreme Court, I think it should be made by statute. I don't think it is fundamentally sound that a rule or a regulation should be interpreted by the same men who make it. There is just a human tendency to say, "Listen, can't this guy read? We made this rule." The administration of it is likely to be less detached, let us say, than if it is the stumbling product of that notoriously stumbling body, the Nebraska Legislature. Nevertheless, let me say that however we get the job done if we get it done, why, let's get it done. It doesn't make too much difference.

One other minor point; we felt that where possible we should chop off our time or put it in terms of months instead of days. In other words, if a statute says that you have a month from a certain date to file something, then if your starting point was September 16 you know that your terminal point is October 16, and you don't fall into that trap which occasionally happens of counting that calendar and missing it by one day. It is easy to do and it never makes more than a day or two difference. I think that we should use that method of reference.

There are a couple of other things that in a sense are minor. Let me say this, that our subcommittee came up with a detailed, verbose, voluminous draft of a revision of appellate procedure, and Judge Carter took it and boiled it down into an admirable, concise, simple product which I am heartily in favor of, and I think that we should proceed with all possible expedition to finalize that—to use one of those fancy advertising men's words—finalize that and get it enacted by the Legislature. I don't want anything that I present to you here this morning to distract attention from the fundamental project of getting this job done which Judge Carter has admirably visualized, namely taking this nightmareish, trap-laden situation off the chest of the trial lawyer. It never should have been there, and it ought to be taken off.



Now I want to discuss a couple of points which, to the extent necessary, should be separated from our proposal so as not to imperil the possibility of getting it enacted. The first one is this subject of an extra carbon or a carbon copy or two copies of the bill of exceptions. We proposed in our draft that the reporter, or his stenographer—most of them at least in this area in our end of the state now have their bills of exceptions typed by typists whom they hire for that purpose—make a carbon copy at the same time and file it with the original. Obviously the appellant would have the original and there would be a carbon for the appellee and you would have finished with that harassing process of passing back and forth that bill of exceptions and trying to decide whether your opponent was going to be using it at the only particular time when you could advantageously prepare your brief. It seems so simple to me, and to my astonishment when the matter came up for discussion in the Judicial Council up popped some opposition, and that opposition was based upon what the opponent said was adding to the cost. Now we get into a question of semantics there. What is the cost? And whose cost are you talking about? This particular individual went on to say that if you wanted a carbon copy of it you could sure purchase it from the reporter. Well, the fact is, gentlemen, that the cost of a carbon copy is about a cent and one-half a page. The price that the reporter would get from you if you exercised what this gentleman said was your prerogative to order one from the reporter would be at least twenty-five cents a page. It seems to me that we should fix the reporter's compensation at an adequate point and then the expense to him of furnishing a carbon copy of the bill of exceptions would be about \$4.50 for a 300-page bill of exceptions.

I think it represents a tremendous convenience, a tremendous means of expediting these things. As you well know, a trial lawyer who has any work to do at all doesn't find that he has continuously at hand the available time in which to write briefs. You know that you sandwich these things into available periods, and if at that available period you can't get the bill of exceptions, then you are going to be under pressure at some later time when you *can* get the bill of exceptions in order to write your brief. To me it seems important that that very simple thing be done to expedite appellate procedure to relieve trial lawyers of some of the crushing burden that they now have.

Furthermore, as you well know, the getting of the bill of exceptions down to the Supreme Court just before argument is another thing. You get all ready to go down there and you open

your filing cabinet and pull out the file, and the bill of exceptions is not there and you don't happen to think about it. Then you get down there and where is it? Well, I have known times when that question was pretty hard to answer. The other guy thought you had it, and you thought he had it. We would eliminate all that by this simple provision which I think should be in there.

Now we get to the matter of sound recording. We have encountered a lot of opposition on that and the subject is "out," so to speak, as of the present moment. It just seems to me that in this day of advanced mechanical recording, together with the fact that we as trial lawyers are continually hazarding our litigation due to the fact that the shorthand notes of that reporter may forever evaporate if tomorrow morning he has a heart attack and dies, and there is going to be in many instances no remedy except a new trial, a retrial of the case. Now isn't that silly! Why shouldn't it be required that in every court room there be a modern sound recording device that will prevent that thing from happening?

All right, now let's go a little bit further. I don't know how it is elsewhere in the state but it has been my observation that in the Omaha area court reporters are greatly overburdened. We have some very good ones and they are diligent and assiduous men who do everything within their power, but the fact is that the court reporting profession is not reproducing itself. You know, at least the Omaha lawyers know, that it is routine that if you take a deposition you are going to have quite a bit of trouble getting it very soon, and on almost every appeal it is a struggle to get the bill of exceptions.

For the last four years I have been putting sustained pressure upon our court reporters in Omaha to get into first-class sound recording. The better ones among them admit that it makes sense and that it should be done, but over all none of the reporters will do it to any extent because of a feeling among the reporting profession generally that it will put them out of business or that it will hurt business. Well now, I am not going into the arguments that explode that fallacy completely, but there is nothing to it at all.

But the point is that without some sort of ability on the part of the profession to force the introduction of these devices, we aren't getting it introduced. We do happen to have in this area one first-class sound recording setup of a court reporter, and that is down at the federal court. It is the only first-class type of machinery there is for the business. It should be in every

court room in the State of Nebraska, and if it isn't there, it should be the option of the lawyers to put it there, to bring their own, or to bring the county bar association's machine and put it there for their protection. I don't think it should depend entirely upon the discretion of the trial court, either. And why? Because there are places in the State of Nebraska where, if the court reporter said to his judge, "Judge, I don't like that damn thing," the court's discretion would be exercised in the direction of excluding it.

There seems to be something fundamentally horrifying to some lawyers and judges about this suggestion, that it is so advanced, that it has no safeguards, that it is opening the door to every kind of abuse. A proper perspective in this matter requires some consideration of the historical nature of the bill of exceptions.

As you well know, in the Anglo-Saxon courts and Anglo-Saxon jurisprudence originally there were no court reporters. The bill of exceptions was made in this way: The punitive appellant went to the judge and said, "Judge, I would like to tell the Court of Appeals that you refused to admit certain evidence, that you ruled against it, excluded it."

"All right, I'll so certify."

So the lawyer writes it down and the judge certifies it, and he keeps on going until he has—what?—a bill of exceptions.

Stenographic reporting, first-class stenographic reporting, is a very modern thing, something like electric lights. It is only in relatively recent times that we have had a verbatim stenographic report provided by an impartial court reporter rather than by the appellant's attorney.

Now let me tell you this, and there might be one or two here who are not aware of this: Do you know what the federal rules provide on that, the federal rules which we are accustomed to regarding as the latest, most modern expression of procedure? The federal rules provide that an appellant may produce a bill of exceptions from any source "including his own recollections."

All right, then, what is so drastic, what is so hazardous, what is so foolhardy about providing that in a pinch a lawyer can produce a bill of exceptions from a properly regulated sound recording machine?

All I want to say is that I think this is a great enterprise and I do think that the kernel of it, the germ of it should be presented and passed, and that no chances should be taken on it, but I wanted to present these other points to you because it seems

to me there has been some lagging in the thinking of the Bar and Bench on this subject.

CHAIRMAN HAMER: Gentlemen, I want first to thank Dave Dow, Les Stiner and Ed Cassem for their presentation. We don't have a great deal of time for questions at this time.

I would, however, suggest that John Samson and Lowell Davis pass out the ballots in connection with the voting for members of the Executive Committee.

If, while these ballots are being passed out, any of you have any questions you would like to present to the panel in connection with the matters discussed, we will have about five minutes for that purpose, and I trust that you won't be too much inconvenienced by the fact that these ballots are being passed out.

There aren't any questions forthcoming, apparently, so I take it, gentlemen, that your presentation has been very enlightening.

Perhaps Judge Carter and others on the Judicial Council would appreciate just a show of hands on this one proposition: Of those who are present in this room I suggest we might have a show of hands on, No. 1: Do you favor *any* modification in the existing practice with respect to obtaining and securing the settlement and filing of a bill of exceptions? Those who do not favor any change put up your hands. [No hands raised] I thought surely there would be some old-times here who would put up their hand simply because they haven't fallen into the trap.

Now those of you who do favor the modification as has been presented, raise your hands. I think it is very evident that the majority of you do.

Is there anyone who has not received a ballot? I am going to ask the members of the Section, after you have had the opportunity of marking your ballots, to please deposit those.

We are going to take a recess for about eight or nine minutes. I know a good many of you have been in the room since ninety-three or shortly before, so we will take a recess for about eight or nine minutes, not more than that. I ask that you be back in the room and in your chairs so our guest speaker can commence promptly at eleven o'clock. We are now in recess.

— Recess —

CHAIRMAN HAMER: In connection with the balloting I am going to make this very brief announcement: In view of the number of people who have voted, and the ballots are here, I will take the responsibility of preserving them at the time we

recess this noon, but will ask the present members of the Executive Committee of this Section to meet me here about a quarter of two and then we will have them counted so that the vote can be accurately tabulated and proper announcement made.

The Section will please come to order. This, ladies and gentlemen of the Association, is a part of the program that I have been looking forward to for a long time. As a matter of fact, I was looking forward to it even before our speaker knew that he was to be invited, because when I found out that I had some responsibility in connection with making the arrangements for this program, I thought of him because I knew that if he did accept, he would deliver a very fine address and one that would be greatly appreciated.

There is really no mystery about this because it has been printed in the program as to the name of our speaker and his subject. I want to say to you, though, that he is essentially a lawyer's lawyer. He is one of few whose practice consists almost entirely of trial work. He is associated with A. Harold Frost, and that firm's practice consists almost entirely of the trial of cases. Like most of us he is neither a plaintiff's or a defendant's lawyer but he is on both sides of these matters.

In case you don't know it, he is the defender of the Parris Island Marine sergeant, and his work in that defense was great. I mention that because I have insisted that he tell you something about that case because I know that it will be most interesting to all.

Aside from that; he has been on the faculty of the Law School of New York University and Columbia Law School teaching trial practice. He has long been a participant and contributor in the Practicing Law Institute. He is the author of *Foundations for Evidence*. He has been a lecturer in the Law Science Institute at the University of Texas. He is a member of the Association of the Bar of the City of New York. He is a former president of the Metropolitan Trial Lawyer's Association. Of course he is a member of the New York Bar and the American Bar Association, and he is active in the Insurance Section of that Association. He is a member of the International Association of Insurance Counsel. He is presently a vice-president of the Federation of Insurance Counsels. He is a Diplomat in the International Academy of Trial Lawyers and a Fellow of the American College of Trial Lawyers.

Visiting with him last evening he told me that his wife is about the only one who calls him Emile. His mother, who probably had some responsibility in the name, refers to him as Zola,

and his friends refer to him as "Zook." I think that by the time you have heard him, all of you and all of us here will be calling him "Zook."

It is a distinct pleasure to me and an honor to present to you one of America's truly great trial lawyers—"Zook" Berman.

### TRIALS AND TRIBULATIONS

Emile Zola Berman, Esq.

Mr. Hamer, Officers of the Association, Your Honors All, my Brethren of the Bar and your Ladies: I am honored to be here and flattered by the introduction.

It is quite true that the subject I have been asked to discuss with you is not one of my own choosing. It seems to me that there is not too much of teaching value in a recital of this type, and moreover I would think that by now it is "old hat." Maybe there are some principles that this case, as with many, many others, represents.

It was Webster who said that justice is the most important interest of men on earth, but the difficulty with the proposition is that lofty abstractions about individual liberty and justice do not enforce themselves. These things must be reformed in men's hearts every day, and they are reformed by the law because every jury trial, in my view, in this whole land is a small daily miracle of democracy in action. With that goes the basic tenet that the right to a trial, and a *public* trial in a court of justice, is deep in our tradition, whether life, liberty or property be at stake.

Against the background of these fundamental views that I hold, I would remind you that about two and one-half years ago in the middle of April, you, as was I, must have been shocked to read across the headlines of your land in banner letters that in a military establishment to which all of us turn over our boys at one time or another, a *drunk* led a death march; and to find on reading that shocking news that six young boys had lost their lives who had been entrusted by their parents to the United States Marine Corps.

A few days later you may have observed in your papers that the commandant of the United States Marine Corps, a four-star general, had appeared before a Congressional committee to explain the curious events which had occurred at the recruit training depot at Parris Island. During the next few days after that they were continuously being fed by violent, I use that word advisedly, violent handouts from the public relations office of

the Marine Corps headquarters. A court of inquiry met and determined after a hearing that murder, or at the very least manslaughter in the first degree, had been committed by a Marine staff sergeant, Matthew McKeon, who was then under the influence of intoxicants to an unknown extent. I am quoting their language.

This kind of thing in a country which has always been reluctant, except in times of actual defense, to turn their own young ones over to the military forces obviously created chaos, and the Marine Corps headquarters caught in some attitude of that chaos, in my view and as I shall attempt to point out to you, because it contained part of the warp and woof of this case, they, in turn, became hysterical.

Four distinguished judges of our Supreme Court in New York sat around to reflect upon these events and formed a self-constituted committee consisting of those four justices and eight of the litigating partners of the largest law firms in New York City with the thought that the volume and the vigor of the publicity, the antics of the top-level brass of the Marine Corps, the complete exclusion from the court of inquiry's finding of any responsibility on the part of anyone other than a sergeant, might all give rise, at least sufficiently to the extent of making an investigation, as to whether or not in our day and generation a sergeant could be picked as a scapegoat for the activities of a military establishment. And it was in that framework of curiosity and with that same deep sense of justice to which I referred before, that the committee decided that certainly an investigation of this type and a trial of such a case could not properly be made, if the issues would subsequently determine that the Corps itself bore responsibility, could not properly be made by a Marine Corps officer. It was suggested that I undertake that investigation and if the investigation proved out what was even then suspected, to defend Matthew McKeon.

Well, now, military establishments and court-martials are not forms of my choice, I can assure you of that, but nevertheless the issues were important and the fundamental issue was whether or not one man's rights could be tampered with or jeopardized, and if they could, would it not be a fact that all men's rights would be in jeopardy? With that in mind we undertook to find out what had happened at Ribbon Creek and who was the man who had caused it.

We started with the man. Here was a man who every headline put out by the Marine Corps public relations office had suggested was a *drunk* who led a death march. We found that

this man whom they spoke of so vehemently had a remarkable and an impeccable career in the armed services, having enlisted first in the Navy at the age of seventeen and having served with valor for over three years on one of our great aircraft carriers, which was constantly in combat in the South Pacific. Upon his discharge, honorable, from that service he enlisted in the Marine Corps, and in the Korean War he had controlled and commanded in combat machine gun platoons consisting of 32-gun positions under heavy fire. We found out that this was a boy who had been born in New England and had, indeed, a New England conscience; that he was devoutly religious; that he came of a good family; that his two brothers had enlisted as Marines during World War II and that his sister was an Army nurse; that his loyalty and devotion to the Corps almost approached a religious fervor; that he rarely, if ever, drank hard liquor; that he was a man of family and that his family lived with him right off the base, two small children, a perfectly ladylike wife, and a third child in the process. None of these things sat well with the notion that here was a man who was being portrayed to the American public of utter bestiality, corrupt and venal, without the slightest sense of responsibility, and a drunk on duty to the point of causing murder. So much, then, for the man.

The next thing we had to find out was: What about this business of taking recruits into the boondocks and marshes and tidal creeks that abound at Parris Island? Was this an extraordinary occasion? Was it an unusual event? Was it a matter of punishment, or was this a custom and practice which had a legitimate training value?

When I went down to Parris Island for the first time to spot my own men around to do this leg work, I knew that there were 226 other drill instructors at that base, equally devoted and dedicated to the Marine Corps, and I assumed that I would have no problem of finding out what the fact was with regard to this practice. I will tell you later that for weeks not a single drill instructor would talk to us, my office, or to the two officers, outstanding officers that the Secretary of the Navy had designated to assist me, one a lieutenant-colonel in the Marine Corps and the other a major.

Nevertheless, we were able to find out—remember that Matthew McKeon himself had done boot training at Parris Island, and many others had done boot training in Parris Island who were no longer there—we were able to find out that there was a practice, a recognized practicing training for the purposes, not of punishment but to instill and teach discipline, interdependence



and an esprit de corps to take platoons over the years, regularly, into the waters and the boondocks of Parris Island. So this odd thing was now being hooted and hollered about as being against all regulations and against all humanity. It turned out in our view, at least so our investigation taught us, to be a recognized training exercise.

Next we had to find out about the events. Before I could get to the events I had to do the same kind of preparation about the Marine Corps that we would about any other case. This was not my branch of the service and I had to learn about them. I lay claim now to having read more about the Marine Corps than the commandant ever did. I found that out. The fact of the matter is I read everything from history to fiction that I could get my hands on about the Marine Corps and its valiant history, its origins and its mission. Then I had to learn about the mission of the recruit training depots at Parris Island and San Diego. I read every regulation I could get my hands on. I only point this out because it doesn't really make very much difference what kind of a case you get into, you can't try it off the cuff if you are a trial lawyer. I think it was someone else who said that if you are a trial lawyer you can expect to be a drudge, because unless you are a drudge first you will never be a trial lawyer.

That was some of the work that I had to do, and I found out, for example, that the whole mission of a recruit training base was to teach discipline—that is to say, an instantaneous response to command; to teach interdependence—that is to say, the feeling that every guy alongside of you, behind you and ahead of you can depend on you, and you on them; and to teach and inculcate in a Marine that this is the greatest service that has ever come down the pike and that Marines are *unusual* fellows; and to teach loyalty both to the Corps and to the country. That is the whole business of bringing them to Parris Island.

Now who do they get down there? I had to find out that. How do they handle them? They take them down an assembly line and each platoon is made up simply by counting them off by numbers. In Platoon 71, for instance, that we are talking about, of the seventy-five men in that platoon, the poles varied from two or three boys who had had two or three years of college to kids of the same age who never had worn shoes and couldn't speak English, and in one instance could not respond when asked to say what his left hand was, or his left foot. The levels and quotients of intelligence varied almost the same way. Background, culture, training, all varied, and yet the mission of the depot and

the mission of the drill instructor was to take this conglomerate group of kids and within ten short weeks make of them one group with one loyalty, so that you could depend one upon the other—in short, what the Marines call *Marines*.

We had to find out who does this. And who does this? We found out that the office of personnel at Parris Island, and it is similarly true, or was, at San Diego, bore no part of the responsibility for the actual training of recruits. Their work was almost in its entirety administrative. They never inspected and they certainly never supervised what was being done. This was not merely a matter of casual neglect of duty, but it stemmed from the proposition that in combat the Marine is led by his sergeant. They fight in small units, and it is the drill instructor or the sergeant in the field who is responsible, really, for the effectiveness of the work of a Corps in battle. So the same thing prevailed at Parris Island. It was to the drill instructor that the job went of training these fundamental criteria that I mentioned to you.

That brought up a pretty question. Who, may I ask, teaches the drill instructor? This is quite a job of teaching. A trained teacher would have a helluva time taking that kind of a conglomerate grouping in one group and train them; that is to say, a trained teacher who has himself been trained in applied psychology and in teaching methods. But who teaches the drill instructors to teach? No one. He goes to a five-week school where he is again graded on his weapon's perfection, on his bearing, on his emotional content. They send him to a psychological observation unit to get a personality checkup. They tell him, "Now, remember, there will be no maltreatment"

When a fellow says, "Well, just what is the line about maltreatment?"—and this is their training schedule, I'm quoting it:

"Whatever you think of doing to a recruit do to yourself first. If it hurts you, it's maltreatment." That's some definition to give to a fellow!

In any event, the fact of the matter is that they rely on the training and the experience of the drill instructor to be able to produce these results.

To those of you who don't know it, remember that a recruit is never without a drill instructor twenty-four hours a day. On the very week which terminated at Ribbon Creek, McKeon had been on duty with his platoon for 140 hours out of 164 hours totally in a week. You sleep with them, you eat with them, you're with them at all times.

Those are some of the things we found out that had to do with this case. Now what about the events? We found out that after half of this training program of ten weeks had gone by, McKeon and his senior drill instructor, a fellow by the name of Sergeant Hough, and another lad by the name of Sergeant King, three drill instructors to the platoon, had a laggard, backward platoon. It was a platoon that goofed off. They had no loyalty, they had no respect for the Corps, they had no feeling of pride in the Corps, they had not learned obedience to command and they knew nothing about discipline. This is not the first platoon that has been backward, but for such kind of things a curious native psychology, not taught, comes in, and that psychology was, "We've got to shake these kids up and give them a feeling that they have done more than the ordinary platoon; that they have gone through something additional to what the ordinary platoon has gone through; and that from this will come a sense of loyalty and interdependence and a feeling of the group that will make a Marine of them." And traditionally in such a circumstance, it is to the boondocks, to the boondocks!

So McKeon in his own way, attempting to do that which the Corps expected him to do, which he himself wanted to do, as he said once on the stand, "If those kids had gone into combat trained by me that way, I, knowing that many of them would have to be sent home in a casket because of their lack of discipline, I would never, never have been able to hold my head up as a Marine at all." Well, that was his psychology. It was something of that spirit that prompted him to take these boys into the boondocks.

Now what about these boondocks? I tell you this because some real hot stuff came up about that boondocks business. This is what appears to be a meandering creek behind the rifle range. The rifle range is a large one. These kids had been on the rifle range. They were then bivouacked in the rifle range area. Everybody had seen that creek. Everybody had seen the tall swamp grass from which boondocks take their name, and there was nothing mysterious about it. There was nothing particularly unknown about the area, and the march from the quarters to Ribbon Creek was less than a mile. I tell you that because one of the regulations that he was charged with violating was that on troop maneuvers he failed to take due care; he didn't establish a command post. Anybody that has had some connection with the service—now mind you, they are going on a march of less than a mile—he didn't establish a command post, didn't set up first

aid medical facilities. I asked a witness who testified, "Are you talking about field maneuvers or are you talking about a march behind the rifle butts? Which is it?"

He said, "I make no distinction." From the witness stand he makes no distinction! Well, that is something I won't go into. We come down to the problem of "drunk."

It is a fact that a fellow came by that morning who was a rifle instructor, a tech sergeant who outranked McKeon, and he had had a hard night. He allowed as how he would like to have a drink.

McKeon said, "We have no drinks here and we don't drink here."

He said he happened to have him a little vodka down in his quarters and would he drive him over there. So he drove him over there and he got the bottle, but McKeon had to be at the place where that platoon was. And so in the course of two hours these two fellows each had two drinks of vodka. This was, I would say, at the latest 11:30. The Ribbon Creek march took place at 8:30.

And now we come to a test that you will have to deal with from time to time, the Bogen's test. The Bogen's test on the form gave a reading of 1.5, which is equivocal. It is on the borderline of intoxication, and yet the doctor who examined him, it turned out, said that clinically this man was absolutely sober and coordinated.

So I began to find out I had to learn about the Bogen's test, its criteria, and how you can get a wrong result. It is not a very happy thought but I sat in the morgue in New York City for three different nights. We have our greatest pathologists there and I had them run Bogen's tests for me with the same quantity of liquor in the same period but making the test within a half hour after the injection of the liquor. And you couldn't get a reading like that with the quantity that I am speaking of. You certainly couldn't get it eight and one-half hours later. Then I said, "How do you get a wrong result?"

He said. "Let me show you. A Bogen's test is one where you extract blood, and the blood is then analyzed in a certain process chemically for alcohol, and the level of that alcohol determines whether or not intoxication exists. In the extraction of the blood if you do what is generally done and are not familiar with the criteria of the Bogen's test you will get generally an alcohol sponge and smear the area from which you are going to insert the needle. Well, you just do that and you'll get a result on the Bogen's test."

And that was what happened. I'm going on but it was from that one finding that this whole business of "drunk" came in.

Another thing we found out to a last man from every recruit was that McKeon led that entire march all the way, that is to say led it across the rifle range, he was the first man in the water, and as it turned out he was the last man out. I emphasize that business of leading because that had something to do with it.

In any event we started to put our case together. We took aerial photos of Ribbon Creek and the whole area so that in a good blowup, talking about demonstrative evidence, we could show to the court the area and have the witnesses of this very platoon trace the line of their march to the best of their ability.

We found out in talking to some of these fellows that they were talking about suddenly going off a shelf. The water went over their heads. We tried to find out who knew anything about Ribbon Creek, and we found out nobody knew anything about Ribbon Creek. They had never done a hydrographic study on Ribbon Creek in the history of the Marine training program. We applied to the Secretary of the Navy and they gave us five men who were hydrographic experts to go down there and spend ten days, and they charted that place up and down and down and up, depths, tidal water, speed, drew appropriate maps, and we flew them all up and had the fellows there to testify. There is no shelf. There just isn't any shelf. So we knew that when they said they suddenly went over their head, it was not because they stepped off a shelf or into a hole but because something else had happened to them which had nothing to do with the speed or the depth of Ribbon Creek. And we soon found out that that something else that happened was panic, panic which does not yield to reason, is not subject to explanation. It cannot be equated on any logical basis, and its consequences can never be predicted.

In addition to that we went to the visual aids department and had a mock-up made of this whole area, a physical exhibit, a thing that was about twenty by ten feet. I tell you all this not as a matter of personal pride but simply indicating to you some kind of an approach to the preparation of this case that we took that I assure you the government and its representatives neither took nor, so far as I could ever find out, knew even how to approach it, were not accustomed to trial depending on their facts, the necessity to establish the facts, and to do it as persuasively as possible.

I said something about interviewing witnesses. We interviewed every surviving recruit and we found to a man or with

the exception of one man, that of the 69 survivors, 68 of those kids swore for McKeon as being a man of kindliness, not a man of bestiality. He took an interest in their personal problems, that in the case of a nonwriter he helped him write letters home, that he did all kinds of little things that ordinarily are not done by drill sergeants. And perhaps this may have been his own greatest weakness, for that matter. It may explain more than anything else why it was difficult for him to secure this instantaneous obedience that the other instructors were able to get a little quicker.

I told you we couldn't see a drill instructor, and as the case was closely approaching trial I found out why. The fact of the matter is there was an aura of fear on Parris Island, fear that if a man spoke up that such things were, in fact, the practice, there would be reprisals against them. I went to the commandant of that depot, a major general, and I told him that it was a source of great regret to me to have to find that there were a whole host of people who were afraid to tell the truth. I said, "Will you publish an order that no man will be subject to reprisal who tells the truth?" It seemed to me to be very innocuous. But the major general would not do so.

I said, "I can only deduct from your refusal to do so that the feeling that I am meeting with here runs a lot deeper than I anticipated." Well, he allowed I could deduct anything I wanted.

I did write to the Secretary of the Navy in the same vein, and the Secretary of the Navy wrote back that he saw no need to publish an order or to have the commanding general publish an order since, he said, and I think I am quoting, "No Marine in this command will ever be punished by *any* officer at any time for telling the truth." And it was incredible for him to dignify such a suggestion that anyone would do it. At the time I thought that this was the height of naiveté. In any event I took that letter and I blew that up from about here down to there (about eight feet) and I took that part about where nobody was going to be punished if they told the truth, signed by the Secretary of the Navy—this is pretty big brass we are talking about now—and I plastered that around the N.C.O. Club, all over my quarters and wherever else we would put them up with the reasonable assurance that they wouldn't be torn down. And for the first time we started to get some drill instructors coming in. Even then it took courage. I want you to believe me it took great courage. These were career Marines living there with their families. I can't tell you what it means to resist what one considers may be the command influence. We were getting a little desperate.

I had to avail myself of the great hospitality of the television companies and I went on the air and asked former drill instructors or former boots at Parris Island who had ever had such experiences to please communicate with me, to offer me their cooperation. Then I went to see the officer corps at Parris Island from second lieutenants up, and we got nothing, absolutely nothing. They would not discuss the situation with us at all.

Now we come to Marine Corps headquarters and some of the problems that we became involved in. I've mentioned to you about these public relations releases, but the thing that General Pate had said in these very early days and that the papers had played up almost as big as "drunk leads death march" was a solemn promise that he would see that the miscreant for this was punished to the fullest extent of the law. They had gotten all through trying him. The notion that there is a presumption of innocence never existed. And the Congressional committee were satisfied that General Pate would take care of the situation and I must confess that a Congressional inquiry was avoided. And I think it is a good thing, too, actually.

Now we come to the court of inquiry with their charges. Without the slightest real basic evidence, they came out with charges of murder and manslaughter while under the influence of an intoxicant to an unknown degree. I have never been able to figure that out except I know that the newspaper man getting that is entitled therefrom to say that a drunk leads a death march. So that brings us to the issue. The commanding general of this base who ordinarily would be the convening authority of a court bucked along the finding of the board of inquiry with a fifteen-typewritten-page editorial to the commandant of the Corps. The commandant of the Corps, who felt that the Corps was now getting pretty sticky in the whole business, and especially that things were moving in various directions, bucked it along to the Secretary of the Navy. This was one of the rare times in history where a departmental head of a defense unit, such as the Secretary of the Navy, has ever been the convening officer of a general court-martial.

What about the issues? The way the issues finally came down was:

No. 1. There is a depot regulation that it is a violation of that regulation to have or to use alcoholic beverages in enlisted men's quarters. You will notice that the prohibition is not against having it or using it; it's *where* you do it—in enlisted men's quarters.

No. 2. That by oppression and maltreatment McKeon caused the death by drowning of the six named recruits.

No. 3. That by culpable negligence he caused the death of these six recruits.

The fourth charge was that he drank in the presence of a recruit, which is a different thing from the other matter.

Fundamentally I was concerned with those two major propositions of murder or manslaughter through oppression, maltreatment or culpable negligence, and you will observe as I repeat what these charges are that they never *charged* him with being intoxicated in the charges for the trial—not a word about it. So before the trial of any jury or before the court was sworn I argued preliminarily for days and with an array of memoranda that the charges ought to be settled. The major charges are of such a nature that the introduction of these minor charges of violation of that kind of regulations are only included to prejudice the accused on the major case. And I thought we had some pretty good law on it, too, but in any event the law officer denied the motion. That's not news to some of you, is it? You have had that happen yourselves.

We went from that proposition to the *voir dire*. Now just look where you are in this kind of a forum. The case you are trying, you are trying to a jury of military experts. Where ordinarily you are trying to inform and advise a jury through the evidence, the appropriate law to come to them from the judge, here these are the guys who are the pros in the league. That, it seemed to me, presented some very unique problems in handling myself as well as the *voir dire*.

I had three problems involved. First of all, assuming that the court would admit it, on which I had not gotten any ruling, would these officers accept the evidence of Parris Island practice and custom in training methods on the question of the validity of the accused's actions? What I wanted to do was to get an individual agreement with each one of those jurors that it would not be on the basis of their own military expertise that they would decide this case, and that they would listen to evidence on that problem. We had an awful hassle about my right to ask this question but I finally was permitted it.

Now the next thing is, here are these officers in the Marine Corps, dedicated, devoted and fine men, but who is *their* commanding officer? This is the guy who has been up to Congress and talked about punishing this fellow to the extent that the law would allow, to the fullest extent that the law would allow. Well, there was no sense in blinking your eyes about that and so I asked them whether they were familiar with the



commandant's statements to the Congressional committee. Well, in the case of some of them they hadn't heard it, and if they hadn't heard it I wasn't about to repeat it. Some had. I asked, "Well, would that influence them?" I told them point blank, "We are convening here under the United States code of military justice and you are here to implement that code of justice. And I am asking you, and it is a matter on which I have put the utmost reliance, whether or not whatever the commandant may have said or whatever the newspapers have said and are saying, do I have your assurance that this case will be disposed of only by the evidence you hear in this court room?" And again I would settle for nothing less than an individually expressed assurance from each one of these seven gentlemen.

Third, we come to all that I learned about the Bogen's test. Seated on this court was a Navy doctor, a lieutenant. Everything I learned would go out the window if he didn't know as much or if he had some preconceived views about the Bogen's test, obviously. So I asked him whether he had had experience with it. He said he never had any experience with it. Being in the Navy, obviously he had heard of it and he had seen Bogen's readings. I said, "Do you know anything about the criteria of the making of the test in order to insure its validity and reputation?"

"No."

"Would you take that if it becomes an issue in this court room?"

He would.

"Well, do you recognize, Lieutenant, that the validity of the test depends on the accuracy of the criteria employed?"

He does. O. K. That in the main was about where I fostered my voir dire.

I had one very serious problem and I gambled with it. We had an officer on that court who had been a battalion commander at Parris Island for two years and had been transferred two months before Ribbon Creek. I knew that the government was going to call the battalion commanders of this Third Battalion to which this platoon was attached. And I knew that he was going to give me some answers to questions of practice that would not assist me, and in my view either indicated his complete unfamiliarity with training practices, or something more grave than that.

Now what do you do with this guy who is on the jury here who has been in the same position? I told him about all this

on the voir dire and I asked him, "What would you do if you were me?" We had never met before. "I don't want a court that will decide this case on the basis of some extraneous factors not within the evidence. Now here you come along and you know about Parris Island. What you know I'm not here to ask you but you know, obviously, having been here for two years. Are you prepared to testify?" He's going to think it over. He recognized it was a tough decision to make. He came back the next day and said he could. I said, "I have no challenges. I take the court as constituted."

It turned out—I never heard this except very recently—that he was the toughest guy in that jury room against the government, on the theory that he was a stickler for the legal doctrine called "beyond a reasonable doubt" and they couldn't budge him for a long time. Well, that is something having to do with the voir dire.

Let me just say that my strategy was to run parallel to the prosecution. It seemed to me that in terms of timing I could not afford to bring out the strength of my case by having to wait for the defense, that I had to proceed with the first witnesses that they offered to try to develop what my position was. I told you what the issues were as the government framed them. The way we framed the issues were as follows: that this was an accident produced in the course of a training practice well recognized at Parris Island and that we did not think in view of the history of the Corps that its practices required an apologist, but if they did it should not be left for a sergeant in a general court-martial to do the apologizing.

So you see we were pretty much on diametrical poles, and I wanted to get that theme developed as fast as I could. In this court in which we were I didn't know too much about it except I knew it said that if anything wasn't specifically said in the code or in the manual about rules of evidence, then you go by the rules of procedure in the United States District Courts, and I knew something about those rules. As I undertook to cross-examine I started with: What did they know about recruits being taken into the boondocks? Well, the whole defense, the whole bench jumped up with objections. It wasn't adverted to in the direct, it's not proper cross-examination, I can't attempt to prove my case through their witnesses, which by the way was a rule I had never heard of before.

I'll close it up by saying that I finally decided that since up to this point not one single second lieutenant, even, would talk for the honor of the Corps, this Corps that prides itself so greatly

that we never leave our dead or our injured, that maybe I ought to have a talk with the man who ought to talk. And I went to see General Fuller and General Pate — Pate was the commandant, Fuller is the living legend of the Marine Corps — and I told them how I felt about it. I told them where I felt the Marine Corps stood and that in my view loyalty not only runs from down up, but it ought to run from up down, and if you are right when you think the Corps is on trial, then it is about time you stood up and talked for it, and they did. I abandoned all my other witnesses. I figured if I can't win with Pate and Fuller, there's no sense in calling the sergeant.

You know the end result. We won on every main issue. The sentences that were imposed by the court on the issues on which we were convicted, and incidentally it is the only forum in the world, so far as I've ever been able to find out, where simple negligence, which was the finding, can be equated with any kind of criminality. But they do it there. They call that negligent homicide. And I have had serious doubt about the constitutionality of that kind of business. It seems to me to make it a crime it requires Congress to do it, not custom in the military. But in any event I didn't have to get to that point, thank goodness. I went to the Secretary of the Navy on the sentence. I wanted this boy to stay in that Marine Corps, and he wanted to stay in the Marine Corps. I was satisfied that certainly his conduct didn't deserve that he get a medal pinned on him, that he undoubtedly was careless to some extent, but perhaps just because these boys were not disciplined enough he ought not to have taken them there, but whatever it was it was a matter of judgment and of simple negligence. And I said I wanted him to stay: "If you think the ends of the service will be best served by reducing him to the rank of private, reduce him to what you want him." The Secretary, I think, put the case where it belonged, and as far as I'm concerned the case was best described in the last editorial that the *New York Times* wrote about it which I'll quote to you and then close.

"Much more was at stake," said the editorial in the *Times* of Sunday, October 7, 1956, "than the conduct of one staff sergeant. A whole system of training and discipline was on trial. Obviously something was wrong with it as well as with the sergeant or the tragedy would not have happened" — I do not subscribe to that comment, by the way — "but it also would have been tragic if one man were made the scapegoat for errors in practice and judgment that were beyond his knowledge or control. The record of our court-martial, by and large, is a good one indeed. And there

has been study and earnest effort to make their procedure even more fully representative of what we believe and ought to be fundamental human rights within our society. The disposition of this controversial case upholds those rights. The case itself has thrown a fresh spotlight on all the things that are involved in military training and discipline. The Marine Corps itself will gain in the long run for this scrutiny."

I certainly thank you for inviting me. I would like to end by telling you something of my own philosophy briefly, in this regard. It seems to me that human rights, justice and the vindication of the democratic process must be fought for with energy in every court house in every town, hamlet, city as well as in Washington, and as well as in our military establishments. In my view, to do otherwise is to lose the right of freedom by default.

CHAIRMAN HAMER: Thank you very much, Mr. Berman. I know I express the view of those present in this room when I say that we all very, very much appreciate your being here and this splendid address. As a little more tangible token of appreciation, I am going to call on Squire Cassem.

MR. CASSEM: The official capacity which I momentarily hold calls for various errands, some of them onerous, but this one like some others is very rewarding. It concerns our guest speaker. This guy is no stuffed shirt. There is no pomposity in his character. He is a warm, genuine, hard-fighting trial lawyer. When you meet a battle-scarred veteran of a thousand hard-fought issues, you know that somewhere down in him there is some kind of metal with a pretty good temper in it, and so you watch and wait. If you are intrigued with the analysis of human character you watch and wait for a glimpse of that metal, a glimpse of the basic psychology that motivates him. Well, I hung around and circulated in his environment for a couple of hours last evening, eavesdropping, and on two separate occasions I heard him refer to two different lawyers whom he highly respects and admires and he ended up in each instance by classifying that gentleman as a "fighting man." It came to me ultimately that the ultimate accolade that this gentleman can place on a lawyer is that he is a "fighting man."

Now I come to the business that brought me here. Mr. Berman, on behalf of the Omaha Bar Association I want to read this scroll which the Association is about to present. "Know all men by these presents, Emile Zola Berman, Esquire, is hereby constituted and enrolled as an honorary life member in the Omaha Bar Association."

May I say to you, sir, that it is a great personal privilege to me to pin the banner of our Association on a "fighting man."

MR. BERMAN: Thank you.

I want you to know that I shall certainly treasure this because I recognize the high honor that is implicit in it.

I just gave you my own notion of what a lawyer is in his role and what the role of the law is. I take it from a book which is a fine best-seller and I recommend it to your attention: *The Anatomy of a Murder*. A lawyer having finished a long and a hard murder trial turns to his associate and says—and by the way, ladies, this is a quote, not Berman talking but a Supreme Court judge by the name of Vogel up in Michigan—he said, "We'll continue on as we have, occasionally representing bastards and angels alike, as between whom, always remember, Our Lady Justice has never distinguished."

SECTION ON TAXATION

Keith Miller, Esq.

Chairman

"Review of Important Sections of New 1958 Tax Law"

(Small Business Tax Revision Act of 1958 and  
Technical Amendments Act of 1958)

Panel Discussion

Keith Miller—Moderator

MEMBERS OF THE PANEL

Laurens Williams, Esq.

Harry B. Cohen, Esq.

John C. Mason, Esq.

CHAIRMAN MILLER: First I want to recognize that in our presence we have some non-members of the Association. I think there are some Internal Revenue agents and personnel in the audience, and I know some of the staff of the Regional Council of the Internal Revenue Service are here. We want to welcome all of you and hope the meeting is enlightening to you.

As you all know, the Section on Taxation had its fifteenth annual Institute last December. That Institute and this program are the two primary functions which were planned and prepared by the Executive Committee of the Section. In that connection I wish at this time to give credit to all the other members of the Executive Committee who are Dan Stubbs, Hale McCown, Tom Davies, Jack North, and John Mason. They have all worked hard. Four of them of course will continue; Tom Davies and I go off the Section.

We believe that we have a panel this afternoon which is one of the best we have ever assembled for any of these tax meetings. We are very pleased to have the four speakers who are with us.

First of all I will introduce our two local boys whom you have seen on these panels before, and we are happy to have both of them back. I will ask Harry Cohen to stand up briefly. As you know, he is a member of the law firm in Omaha of Monsky, Grodinsky, Good & Cohen.

We have from Lincoln a gentleman who has participated in several of these clinics and institutes and has done a fine job. He will be next year's Chairman of the Section on Taxation—John Mason.

I want to tell you a little bit about what we are trying to accomplish today. All of you know, I am sure, that a new tax

law was passed by the Congress in 1958. Many of you perhaps do not know that this new statute which was passed started out to be simply a bill which would correct some technical errors and omissions in the 1954 Internal Revenue Code. Somewhere along the line it got to the point where there were many substantive changes in the law and new ideas incorporated in this statute. Many of them are very important to all of us. They require immediate thought on behalf of our clients.

It was therefore thought that at this panel we had to present some of the more important substantive changes in this new law. This afternoon in discussing the new 1958 tax law we can't even come close to covering all the sections. However, we are going to try to cover some of the more important changes which will affect us and our clients immediately, and even then we can't cover them in detail; we can only call them to your attention.

This law started out, as you all know, from a Mills Committee in Congress of which we have all heard. We have heard talk the past few years about the Mills bill and whether or not it would be passed. Although the Mills bill is part of the new law, the first part of the law is called a Technical Amendments Act and also incorporated into the new law as Part 2 is what is called the Small Business Tax Revision Act. These are all one statute, and I this afternoon will refer to section numbers from that new statute, but those section numbers that I refer to are only for identification and of course each one of these sections, or almost each one in the new bill is incorporated somewhere in the Internal Revenue Code, either in the form of a new section or as an amendment to an old section.

To get the ball rolling this afternoon we are going to hear a little bit about how this law developed and why it was thought necessary to begin with, and the progress of it in Congress. To tell us a little about that we are very pleased and proud to welcome back to Omaha the man who, along with a few others, was the one who really developed this Section on Taxation, who has appeared before us at many, in fact almost all, of the annual institutes, and who is now recognized throughout the United States as the man who can probably explain most clearly these complicated tax laws to us.

You all know of course that I am talking about Laurens Williams. After Laurens left Omaha in 1954 you also know that he was the legislative counsel of the Treasury Department for two years, where he was in charge of seeing that the new regulations came out in some kind of decent shape, but he had

many other jobs and of course worked very closely with the committees of the House and the Senate which deal with tax laws.

Since he left the Treasury Department in 1956 he has still been close to that work as a member of an advisory group to the Mills Subcommittee. So I am going to welcome Laurens back and ask him to take over and give us a little bit of the background and history of this.

LAURENS WILLIAMS: Mr. Chairman, Ladies and Gentlemen: It is a real privilege for me to get back home. I say that deliberately because this is and I think always will be home to me.

I deny some of the things that Keith said in introducing me. I don't claim to have any more expertness than anybody else who has had a little experience and worked hard in this field.

This Revenue Revision Act of 1958 is a rather typical case history of how legislation develops sometimes in the tax field, and incidentally is a graphic illustration of how the temper of the times sometimes makes a tremendous difference in what Congress decides to do or not to do in respect to amendments of the Internal Revenue Code.

This Act actually had its origin in late October and early November of 1954, almost four years ago, at which time the Internal Revenue Code of 1954, having just been enacted and having just become effective, everyone recognized that notwithstanding the two years of hard work that had gone into the development of that law, that complete recodification of all our Internal Revenue laws, inevitably there had nevertheless crept into it some errors. Some of them were clerical errors. Others were situations which, through want of foresight on the part of draftsmen, unsuspected and unintended results would follow from the literal language of the taxing statute.

Everyone recognized that and so, thinking that this would be a polishing operation, a matter of cleaning up the inadvertent, unintended goofs in the 1954 Code, the Treasury staff and the Internal Revenue Service staff started an over-all review of the entire Code for the purpose of trying to spot every unintended result and inadvertent error in it.

The result was that by December of 1954 the Treasury had developed a list of approximately 150 items which somebody or other suggested was an error in the Code. That list was very carefully analyzed and considered by the people in the Treasury responsible for legislative recommendations to the Congress.



In April—I guess I can't say this off the record but this is not public information so far, as far as I am aware, but there is no secret about it and there is no reason why it shouldn't be told—in April of 1955 the Treasury submitted to the Chairman of the Ways and Means Committee a list as I recall of approximately 75 to 80 items which they thought ought to be amended, ought to lead to change. Some of those were mere corrections of misspelling. For example, in one place the words "devises" appeared where it obviously was intended that the word should be "devisees," a typographical error where the printer dropped out one "e" in the word. Some of those had to do with punctuation. On the other hand, some of them went to points where, under the literal terms of the statute, a taxpayer would get a double benefit from a deduction or would be denied the benefit of a particular provision because of the interplay of different sections of the Code that clearly was never intended.

Now the matter of atmosphere and climate: At that time in 1955 and for the balance of the session that year, and as a matter of fact in 1956, the climate just was not right for that type of legislation to the Congress. You will recall that the Democrats and Republicans had engaged in a knockdown dragout fight in February and March of 1955 over a proposed \$20.00 a head tax deduction for taxpayers, individuals; and at the same time the repeal of the celebrated methods of computing depreciation, the dividends received credit, and some of the other things in the '54 Code. Although the Administration won that fight, they lost it in the House, they held the line in the Senate by only a margin of four Democratic votes that joined the solid Republican ranks. That seemed to leave both parties exhausted and neither one cared to engage in another tug of war over a tax bill.

The result was that through '55 and '56 these proposals for technical corrections, for polishing of the '54 Code, received no important consideration from the committees themselves, although the profession staffs continued to work on them.

Toward the end of the 1956 session of the Congress you will recall that at that time there was a great deal of hue and cry across the land about the complexities, the terrible complexities of our taxing statutes. A presidential election was coming along. There was a candidate for the presidency who had been a former Commissioner of Internal Revenue who was talking about abolishing the income tax. This was a time then when the taxing committees of the Congress were required by these same things

to take a look at some of the complexities, things such as were in some measure embodied in some of these Treasury proposals.

The result was that the Committee on Ways and Means created a new subcommittee called the Subcommittee on Internal Revenue. This subcommittee, then chairmanned by Mr. Wilbur Mills, who now has become Chairman of the Committee on Ways and Means and who at that time was second in seniority in the Democratic side on the House Ways and Means Committee, was granted authority that in all respects was as broad as the authority and jurisdiction of the Ways and Means Committee itself except that it excluded excises, narcotics, social security and certain special types of taxes. But in the income, estate, and gift tax field this subcommittee had no broad jurisdiction.

That subcommittee started out on what I think was a very sound approach to the whole problem of tax revision. Even though they ultimately decided to get along without their own separate staff and relied on the staff of the Joint Committee on Internal Revenue, the Ways and Means, and the Treasury, that committee decided its first undertaking would be technical corrections of the nature that first were embodied in the first Mills bill.

However, carved out of that for separate consideration were three very vital important areas of taxation. First, the taxation of corporations, corporate distribution, corporate reorganizations, etc., all of Subchapter C. Second, the taxation of partners and partnerships, Subchapter K. And third, Subchapter J, dealing with the taxation of income of estates, trusts and beneficiaries, all highly complex chapters. Those were carved out for special consideration.

Advisory groups comprised of professional people, accountants and lawyers, largely lawyers, all lawyers in the case of Subchapter J, were created to consider, on a technical level largely, but a policy level also somewhat, those three areas of the Code and make recommendations to the Committee on Ways and Means with respect to those three subchapters.

Those groups now have largely completed their work. One had its last meeting last weekend, the next one meets a week from Monday, and that will be substantially the end of the work of those advisory groups which have made comprehensive reports that the committee undoubtedly will consider *next* year, and which may lead to important legislation in those areas next year.

Now to go back to the Mills bill. Starting then in the autumn of 1956 the professional staffs up the Hill and in Treasury and Internal Revenue commenced intensively to work and draft what has now become this current taxing act. That work continued through the winter of 1956 and 1957, the spring of '57. Then finally in June of 1957 there was introduced 8381, the original of this current bill we are talking about, by Mr. Mills. That was considered at length by the House Ways and Means Committee and was reported out to the House in July of 1957, but toward the end of the session so that the Finance Committee on the Senate side didn't have time to consider it before adjournment.

Starting in January two things happened. The Finance Committee began consideration, although the active consideration came later, of this bill that had come over from the House called the Mills Bill, the technical corrections bill.

In the meantime there were those who thought we had a recession in this country, and about this time a presidential committee recommended certain changes in the tax law for the benefit of small business, although nobody was quite sure at that time what small business is — how do you define it?

Time went on. The recession continued or not, depending, I guess, on your partisan politics, but at any rate nobody thought we were having perfect times in this country. There was still talk about the need to help small business in particular. So the Finance Committee began consideration in the spring of the Technical Corrections Act.

In the meantime in the House there was introduced, and this was getting late in the session, as I recall in July, the Small Business Bill—introduced, reported out, passed and sent over to the Senate. When it got over there it was tied into and put together with this Technical Corrections Act that had come over the year before, and those two bills, merged into one, have now been enacted.

In the form in which it was finally enacted I think it is safe to say that all the really important things in it were not in the original bill, not within the contemplation of the scope of the original bill; it is an entirely different act.

Many of these very important changes, what I am going to talk about later, for example, came in on the Senate side. The House didn't even give it full consideration. It was just the temper of the times that made possible this great change in the nature of the bill and the introduction of some things we are

going to talk about this afternoon which I think you will agree are pretty vital and important and rather startling, almost shocking, changes in some respect in our taxing statute.

That is briefly it. There are all kinds of details. By the way, Keith, I have here some forms I want to have distributed that we will talk about when I get to my part of this.

CHAIRMAN MILLER: The most important changes, as Laurens has told us, are designed to aid small business. Of course small business is not particularly well defined, but at any rate Section 64 of the Act now incorporates into the Internal Revenue Code an entirely new Subchapter S, and I am going to ask Laurens Williams to tell us all about Subchapter S, which is the thing you see in broad print as saying that corporations may now be taxed as partnerships. I think this is probably the one most important section which will affect all of us and I am going to give Laurens the mike and see if we can learn something.

## SUBCHAPTER S

### Laurens Williams

We ought to start with a comment on something Keith said. It is commonly said that this new Subchapter S which has been added to the Internal Revenue Code permits certain small business corporations to be taxed like partnerships. However, technically that is not so. There are various differences. Let's get accurate right at the beginning:

First, this Subchapter hasn't anything to do with *small* corporations, as such, even though the Act itself says it does. It applies to *closely held* corporations, without regard to size.

Secondly, it isn't accurate to say that under it corporations may be taxed like partnerships.

Let's go back to a bit of elementary background before considering what has happened under the new law. As you know, traditionally, ever since we have had an income tax, in fact, going back beyond 1913 and the first individual income tax, there was an income tax on corporations, and ever since there has been an income tax on corporations as such. Corporations have been taxed as distinct, separate, legal entities. Corporations—all corporations—traditionally have had to pay their own income taxes on their own income. They had their own income, they had their own deductions, and as a result had their own separate independent taxable income on which they have paid an income tax.

That corporate tax currently is 30 per cent on the first \$25,000 of taxable income and 52 per cent on the excess over \$25,000 each year. During wartimes traditionally we have had an excess profits tax which added 30 per cent to the already otherwise 52 per cent tax on corporate excess profits income.

Now the basic pattern of corporate taxation is that dividends paid by the corporation to its stockholders are separately, independently taxable to the shareholders as ordinary income with no credit for any tax paid on that income by the corporation itself. Nor does the corporation get a deduction for the dividends it pays to its shareholders. The result is double tax on corporate income. Here is the way it works: A corporation makes \$1.00. If it is in the 52 per cent bracket then it pays 52 cents tax and has 48 cents left. When that 48 cents is paid out to the stockholders, they receive it as ordinary income, and except for the dividend received credit which changes these mathematics slightly, but only slightly, the stockholder having received 48 cents out of that corporate dollar pays another tax on it, so if he is in the 50 per cent bracket he only gets to keep 24 cents out of the \$1.00 profit that his corporation made—a double tax on the same income.

Now that is the traditional plan. That has in effect meant that many "small" businessmen, and I use the term loosely, couldn't afford to be in corporate form and therefore couldn't afford to have the protection of limited liability, the ready transferability of interest in the corporation, and all the other ordinary so-called common law advantages of the corporate form of doing business.

On the other hand, this means that other stockholders who have very large individual incomes so that they are in high individual tax brackets in excess of the tax bracket of the corporation itself, can hardly afford to be in partnership because there is a tax saving to them by being in corporate form. There is, at least, a cash conservation. Ultimately, when the accumulated earnings and profits of the corporation are paid out, they would have to pay individual tax on it. But until they have to pay it out, as long as they can keep from paying dividends, they are better off dollar-wise in corporate form.

This taxing pattern has placed an artificial premium on the form of doing business and has resulted in many people having to do business in a form of organization that just is not naturally best suited to them and their particular organization.

Everyone has been aware of this for decades, and in 1954—now we get back to the 1954 Code again—in '54 on the House side when the H.R. 8300 came out of the House and went over to the Senate it had in it a provision somewhat like, but technically different from, the present Subchapter S. It would have permitted certain corporations to elect to be taxed as partnerships. But when H.R. 8300 got over to the Senate side there were so many monstrous, terrific, technical problems involved that nobody could see just what it meant in its application to a particular taxpayer in a given situation. So the Senate knocked it out. Then they did something that everyone has wondered about since, because nobody is sure what it means. In lieu of the House provision they went "vice versa." They put in a provision, Subchapter R of the 1954 Code, which gives certain partnerships the right to be taxed as corporations, just the opposite of what the House was trying to do. It is in the law today, and has been there since 1954.

That provision, Subchapter R, permitting certain partnerships to be taxed as corporations is so full of unknowns, and nobody knows what would happen if certain situations developed, that it has been very little used. I don't know the present situation, but a few years ago, when I was still in the Treasury, we had identified only five partnerships in America that had undertaken to exercise that election. In October of 1958 the Treasury Department has still not promulgated even proposed regulations on Subchapter R, so you see how far away we are from the solution of some of the technical problems under that Subchapter.

That was the situation, so Treasury said to Ways and Means, a year ago when the Act we are talking about now was over there: "Subchapter R permitting partnerships to elect to be taxed as corporations is utterly impractical. Practically nobody is using it. Nobody knows the answer to some of the technical problems. Repeal it!" The House agreed. So the House version of the present bill would have repealed Subchapter R.

When the Bill got over to the Senate, the Senate said, "No. We like this provision, Subchapter R"—which the boys call the Christine Jorgensen Subchapter. "We like it. We think that it is sound in principle not to place such a terrific tax premium on the form of doing business, not to have this vast difference between the three-man partnership and the three-man corporation each engaged in the grocery business cater-cornered across the main intersection of the same town, and so we won't repeal Subchapter R. Struggle with it, Treasury, and work out some

kind of regulations and rules. And now we pass the versa of the vice."

So, into the tax law came Subchapter S which, while it doesn't permit corporations to be taxed as partnerships, yet produces somewhat equivalent results, which says that corporations which qualify and which elect this treatment no longer pay any income tax whatsoever, which eliminates completely the corporate tax so that there will be thenceforth for electing corporations only one single tax instead of the double bite of the income dollar of corporations. That corporate income, instead of being taxed to the corporation, henceforth for electing corporations will be taxed to the shareholders.

Now what corporations can elect and receive this excellent benefit? They are called, in the Act, "small business corporations" and they are defined as such. But as I mentioned, even though the language is in terms of small business, the definitional provisions of Subchapter S are utterly different, entirely separate and distinct, from the definition of a small business for all the other things that we are going to talk about later that are new and that constitute special provisions for "small business"; and it is an entirely different definition from the small business definition dealing with companies that can get loans and other types of government aid under other programs, etc. Subchapter S contains within itself the special definition of the kind of corporations that can get this special tax treatment.

Now, briefly, as I said, the definition is of a closely held corporation. It doesn't make any difference whether it is large or small; it is the stockholders that count.

To be eligible for this treatment the corporation, first of all, must be a domestic corporation. It has to be a United States corporation; it can't be a foreign corporation.

Secondly, and this is the major thing, it must not have more than ten—it must have less than eleven—in other words, it must have ten or less—stockholders—not over ten stockholders.

Third, and this is very vital and it may shock you a little but it is purposeful: all of the stockholders must either be individuals or estates. A trust cannot be a stockholder; a partnership cannot be a stockholder; a corporation cannot be a stockholder. To qualify, every stockholder either must be an individual or must be an estate.

Fourth, the corporation must have only one class of stock; in other words, if you have common stock and preferred stock, you're out. You must have only one class of stock.

Then, finally, the corporation must make the proper election.

So you see the size of the corporation is not a test. The number of stockholders and the character of the stockholders are determinative.

Now, suppose a corporation does elect to receive this special treatment. What is the taxing pattern? It is not that of a partnership. I think the Senate Finance Committee report expresses it more succinctly than I could do it, and I am going to read several things because this is new and I want to be as accurate as possible.

"Where the tax treatment provided by this subchapter is elected, the shareholders include in their own income for tax purposes the current taxable income of the corporation, both the portion which is distributed and that which is not. Neither type of income in this case"—that is, neither that which is distributed nor that which is not distributed—"is eligible for the dividends received credit, since it has been subject to no tax at the corporate level. Generally this income is treated as ordinary income to the shareholder without the retention of any special characteristics it might have had in the hands of the corporation."

There is the major difference between a partnership and a corporation. Under Subchapter K the partnership in effect is a conduit. The conduit theory is applied. Income retains its character in the hands of the individual partner. In other words, both income and loss have the same character in the hands of the partner that it had in the hands of the partnership. That is *not* true in this corporate situation, with one exception. This corporate rule has been adopted so that the provision can operate in as simple a manner as possible.

Now this is the exception: "Long term capital gains, however, are an exception to this general rule. In the case of these long term capital gains the character carries over to the shareholder."

So with the exception of capital gains, the character of the income in the hands of the stockholder, that is, as it is reported by and taxable to the stockholder, whether or not paid down to them, is that of ordinary income. You don't have anything like a conduit theory. You don't have any special treatment of special types of income once it is down to the stockholder level.

How do you determine how much corporate income is taxable to the shareholders? Well, the first step is to compute the corporate income exactly as you compute it today, subject to all the special rules dealing with the includability of corporate income and the deductions allowable to corporations. All those rules apply pre-



cisely and completely as they ordinarily do. After you have determined the taxable income of the corporation in the traditional manner, you then make certain adjustments. You add to this otherwise taxable income figure any amounts that have been taken as deductions in arriving at that figure for partially tax exempt income—situations where the corporation had some partially tax exempt income and in arriving at the corporation's taxable income you had excluded the tax exempt portion; the intercorporate dividend credit of 85 per cent when the corporation receives a dividend on stock it owns in another corporation. It has a credit of 85 per cent of the amount received and only reports and pays back on 15 per cent of the dividend. So you add back the 15 per cent that was otherwise deductible.

Net operating losses—and this is very important if you have an existing net operating loss carried over today because it is going to make a difference in whether you want to elect this year or not. Net carry back and carry forward operating losses are not taken into account. If they have been used in arriving at the corporate taxable income you add them back so that the current year's income drops right down and is taxable to the stockholder during that current year.

Then there are adjustments for three special classes of dividends received and dividends paid, situations very rarely encountered, so I will just call it to your attention.

Now the sum of these things is taxable to the stockholder. That sum is taxable to the stockholder in two ways. First of all, any amount paid out in money—not distributions in kind—a money distribution by a corporation by way of a dividend during the year out of current earnings is one part of what is taxed. Of course when you make a corporate distribution like a dividend, it always is deemed to be out of current earnings, if there are earnings enough to cover it. Therefore any distribution of money that has been made to the stockholders must be taken into their tax returns and reported in the year they receive it.

In addition, the undistributed taxable income, the difference between the corporation's taxable income otherwise figured and the amount that has been paid out in dividends, is reportable by the stockholders of record on the last day of the corporation's taxable year, so that the combination of these two means, as of the end of the corporate year, the stockholders are taxable on the total corporate income of that year, and the corporation pays no tax on it.

Now what happens to the stockholder when he has dividend distributions, or maybe has none, and at any rate there is some

undistributed income left in the corporation? He has already paid tax on it because he is going to have to pay his tax on his share of the corporate income whether it is paid out to him or not. Now, what happens to the money left in the corporation that hasn't been paid out to him but on which he has paid tax? When it is paid out to him in later years, how do you determine whether a dividend in later years is out of current earnings, whether out of past undistributed taxable income on which you have paid tax, or out of earnings and profits accumulated before you elected this special type of treatment which when paid out to you are taxable as ordinary dividends?

Again the Senate Committee report: "Where a shareholder has been taxed on corporate earnings which were not at that time distributed and then the corporation in a subsequent year distributes these earnings to such stockholders, no further tax is required from the shareholder at that time since these earnings have already been taxed to him in a prior year. Once all such earnings have been distributed, if further distributions are made and the corporation has earnings and profits before it elected this special tax treatment then such distributions are to be taxed to the shareholder in the same manner as ordinary dividends from the corporation." That, of course, is a pretty logical taxing pattern.

What I have just said is true only while an election to receive this special tax treatment is in effect. The reverse is true once you revoke or lose your right to be taxed this special way. When that happens, undistributed taxable earnings accumulated during the time you have been getting this special kind of tax treatment are locked in, and they are the very last distributions to come out. Thus, future distributions after you lose your right to this type of treatment are always deemed to be ordinary dividends out of either current earnings or pre-election year earnings that have been accumulated. So, not until you have paid tax individually on dividends as dividend income on all earnings and profits other than the undistributed earnings you have already paid tax on, do you get tax-free distributions from your corporation. That is one of the reasons (only one, as you will see later) why it may be terribly important once you go in to not have to come out. We will come to those points.

I have talked about taxation of corporation income to the stockholder. How about corporate losses? Suppose instead of making money the corporation loses money. What happens under this taxing act? Well, again, the Senate Finance Committee report: "Under this provision the net operating losses of the corporation currently are also passed through to the stockholder. Thus at

the corporate level where this special treatment is elected there is no carry-back or carry-over of operating losses to or from the year with respect to which this special treatment has been elected. At the individual level, stockholder level, these distributed so-to-speak corporate losses are to be treated in the same manner as any loss which the individual might have from a proprietorship. That is, they first offset the individual income of the individual in that year whether or not derived from any other business, and then any excess of these losses may be carried back and offset against the individual's income in prior years, and if any losses still remain unused they may be carried forward and offset against his income in subsequent years."

So, your operating losses—not capital losses, that is another story—your operating losses pass through to the stockholder year by year as incurred by the corporation.

Now suppose there is a sale of stock, a transfer of stock by a shareholder, after we have been having this special type of tax treatment for this corporation for several years. During this time the corporation has either had income or loss, profit or loss. Your stockholder has either had the benefit of deductible losses individually or he has paid tax on corporate income, some of which may have been distributed to him, some of which may not have been distributed to him. Now he sells his stock. How does he determine his adjusted basis for measuring his gain or loss on sale of that stock?

Again, the Finance Committee report: "Where this special treatment, this special tax treatment, has been elected, the basis of a shareholder's stock is increased for any of the corporate earnings taxed to him and which are not then distributed." He gets an increase in his basis for any earnings he pays taxes on that haven't been paid down to him. "Although this basis is subsequently reduced if these tax-paid corporate earnings are later distributed to him. The basis of the stock of the shareholder is also reduced for any corporate losses which are passed through to him. The losses that he may take, however, are limited to the basis he has for his stock, so that you can never reduce your basis below zero."

I won't go into this zero basis business, which has not become a common provision in the Code for technical reasons. So that, generally speaking, you adjust basis as you have corporate income on which you pay taxes; as you get distributions you reduce basis. As you pay tax on earnings you increase basis. As you take deductions of loss you reduce basis. That is generally the way it works.

How do you determine how much of a corporation's total taxable income for a particular tax year is to be taxed to a particular stockholder? If I am one of several stockholders, how do I determine what proportion of the corporate income or corporate loss I pick up on my individual tax return? Each shareholder is taxable, as I said, on two things that go to make up this total amount: one, the money distributions; two, the difference between those, if any, and the total amount of the earnings for the year.

First, then, each stockholder picks up the amount of money paid out to him during the year as dividends, and he picks those up in his tax return for the year in which he receives those distributions of money. Now then he also picks up on his tax return the amount that he would have received if the corporation, on the last day of its taxable year, had paid out all the rest of its undistributed earnings for that year. In other words, if at the end of the year the corporation had paid out in money an amount equal to the difference between any dividend it has already paid out that year in its total income for that year, that is the amount that the stockholder has to pick up; and each stockholder picks up the amount that he would have received if it had all been paid out.

In other words, you test the amount of this hypothetical income that you report on your individual return by your proportionate stockholding on the last day of the corporate year. Thus if I owned 90 per cent of the stock on December 29 and I sell it to you that day so that the last two days of the corporate year you own all that stock, you pay tax on all the undistributed corporate income; I don't pay on any of the undistributed income. You test it on the last day of the taxable year as to your share of the undistributed corporate income.

That is not true of capital losses. I'll come to that in a minute. The foregoing means, you see, that you can lawfully shift income by transfer of corporate stock during the corporate tax year. This is a lawful way to shift income by gift or by sale, for that matter, and there are some very interesting practical problems, I think, if you and I at arms length are bargaining for sale or purchase of some corporate stock and we have elected this treatment. It is going to make quite a difference in what I pay or what I'll take what the tax consequences are going to be in shifting the income of the corporation from the beginning of the corporate year up to the date we are making the deal because I am taking it out of my tax return, if I am selling stock, and putting it in yours. So maybe you can say I am converting ordinary income into capital gains. But Uncle Sam is still going to get his ordinary income

tax from you, the purchaser, and therefore you aren't going to pay me too much for it.

Now with reference to this capital gains pass-through that I mentioned. As I said, here you do apply a character rule. Capital gain in the corporation does pass through to the stockholder as capital gain. Now, how do you determine how much of a corporation's capital gains for the year are taxable to each individual stockholder? This is unlike the way you determine how much each stockholder has to report of the *ordinary* income of the corporation. This is a little different. Each shareholder may report as long-term capital gain his pro-rata share of the corporation's excess of net long-term capital gains over short-term losses, not to exceed the total taxable income of the corporation. I won't go into the reason for the limitation. It will be obvious, if you think it through.

Let me illustrate: Suppose the corporation has paid cash dividends during the year, and the shareholders are on a different accounting period than that of the corporation. Suppose the corporation reports on a January 31 fiscal year but the stockholder is on a calendar year, which is a usual thing. The corporation is often on a fiscal year and the individual stockholders on a calendar year. The stockholder is in a position of having to report his cash dividends in his tax year, the calendar year of 1958, let's say, in which he receives it.

Now suppose next January 31 (1959) the corporation reports some capital gains that have come down to this stockholder as capital gains, but all of this happens after his tax year is closed. What happens? Do you have to look at '58 at all? The fact is that he got a cash dividend in 1958—does the 1959 capital gain situation affect him in any way in 1958? The answer is "yes," which creates a monstrous problem where a shareholder has an overlapping fiscal year situation, because in respect of these capital gains, you have to allocate the capital gains between your money dividend and the undistributed taxable income which constructively comes down to the shareholder as his portion of the unrealized total at the end of the corporation's tax year. I won't attempt to spell out how to do that. I would say to wait for regulations and the final forms. They will tell us exactly how we are going to do it. Obviously, you get some very bizarre results where there is that situation.

And there are some very bizarre results where there is a change of stockholders during the year. For example, net operating losses pass through to the stockholders. But they do not pass through to the stockholder as the income does, because net oper-

ating losses pass through the stockholder *on a daily basis*, not on an annual basis. You don't take one look at the end of the year, on the last day of the taxable year and say, "My share of the operating loss is so much," and drop it down to the then stockholders. No. You look at the losses at the end of the year and say, for example: "Our net operating loss is \$365.00. That is, we have a \$365.00 net operating loss for the year. This means that on the average every day of the year we lost \$1.00. Now every day of the year we drop down \$1.00 loss to our stockholders on that day." That is the way you do it. This produces some most bizarre results because maybe when I sell my stock to you on April 1 the corporation's business is booming, and then later in the year things turn and it loses a potful of money the next nine or ten months so that at the end of the year it has a net operating loss. Surprise! The fellow who sold out April 1st has a piece of that loss! And it works the other way. Suppose the corporation has a bad net operating loss in the middle of the year when I sell my stock to you. I, the seller, think I am going to have a nice net operating loss to deduct from my tax return. But if you turn the operation into a profit the net operating loss is gone. It is only the net operating loss at the end of the year, for the whole year, which is allocated down to the shareholders.

How do you make the election to be taxed under Subchapter S? I think, in the interest of time, I must move along and come quickly to how you make the election if you want this treatment, and what are the effects of it. Well, the general rule is that the time when the election must be made is during one of two months—the last month of the year preceding that in which you want this treatment or the first month of the tax year in which you want this treatment. During those two months is when, as a general rule, you will have to make the election.

Secondly, how do you do it? You do it on this form that I have passed around—sorry I could get only 150 copies. They were just printed the first of this week so they are new forms. I won't discuss it. The forms are very simple and self-explanatory. The main point is that every stockholder has to sign and give his consent—that is the main thing about the form.

There is a special rule concerning the election in this first transition year. For 1958, if you are on a calendar year or a fiscal year commencing in '58 and ending after the effective date of the Act, September 2, 1958, you have to elect either by December 1, 1958, or if you happen to have a fiscal year ending, for example, on November 30—watch that one—October 31, or if you did have one September 30th, you must have made the

election before the close of that fiscal year ending before December 1. So it is December 1, 1958 currently or the last day of your fiscal year if it is prior to December 1.

How do you do it? You make this election on this form. I call your attention to the fact that the Treasury has already issued a Treasury decision which can be found in the Federal Register for September 26 which spells out the basic ground rules that are applicable to the election.

Once you have elected, when does your election end? Are you locked in forever? May you be kicked out against your will? Can you get out if you don't like it? How and when do you get out from under it, if you want out, and what throws you out whether you want out or not? This is very important because very obviously the results can be rather catastrophic in given situations if you are in and don't want out or if you are in and want out and couldn't get out.

First of all, you can have a voluntary revocation of your election in any year after the first year, assuming that all the shareholders on date of the revocation consent to the revocation—that is, they sign up—and assuming that you file your revocation within the first month of the corporation's taxable year for which you want it effective. If you don't file it until after the first month of the corporation's taxable year then it is effective for the year following that in which you file. That is the way you can get out voluntarily.

What happens when a new shareholder comes in? Here are five fellows who own the stock of the corporation and they make the election. One of them dies and the stock goes to his executor. What happens? Or one of them sells to a sixth man. What happens? Such transfers result in an automatic termination of the election unless the new shareholder files a written consent to the election—and mark this—*within thirty days* from the date he became a shareholder. So the corporation can be automatically out unless within thirty days the new shareholder consents.

Third, there also is an automatic termination any time the corporation ceases to meet any of the other five qualifications for electing this type of treatment. That is, any time any stock passes into the hands of a corporation or a partnership or a trust or a nonresident alien, any time it has more than ten stockholders, if any of those things occur, automatic termination occurs. You also lose the election if 80 per cent or more of the corporation's gross receipts in any particular year come from foreign sources. That wouldn't be of much interest to us here in Nebraska. You

lose Subchapter S's treatment any time 80 per cent or more of the corporation's *gross receipts* come from rents, dividends, interest, annuities, royalties or gains from sale or exchange of securities, the type of thing that normally is the personal holding company income, but it is not exactly like a personal holding company situation because here you test it by 80 per cent of gross receipts; thus if you have a corporation in a real estate business electing this treatment and find that 80 per cent of your gross receipts are from rents, you've had it. So watch that particular provision.

Once you lose your right to election, once it is terminated on you or once you revoke, you cannot for five full tax years thereafter re-elect back in. You can't go in and out. You can go in and come out in any subsequent year, but once you are out, you must wait five years until you can get back in.

There are all kinds of problems in this Subchapter but in the interest of time, since most of them are technical, I am not going to discuss them. However, I want to suggest the importance of regulations in this area. There are a lot of open questions to which nobody knows the answers, which I think regulations will spell out. There are situations where the bill itself gives legislative authority, so to speak, substantive, regulative authority to the Treasury, so they are going to be important. I make this suggestion to you. I believe that the regulations are likely to be tight. There may be strict construction of this statute for awhile until they see how it works. But I think it presents a wonderful opportunity for tax planning. There are some important things to think about. I am going to mention a few of them.

First of all there is a direct dollar tax saving in many situations. Where corporations are in a position of having to pay dividends, it is very rare to have one tax bite bigger than two tax bites. So if you are paying much in the way of dividends normally you can save money by this elective treatment.

Second: Where the over-all income of a shareholder is not very large—unless you are getting up into the 50, 60, 70 or 80 per cent tax bracket—normally the long-range dollar economy will be found in this elective treatment.

Next: The fact we have had two taxes on corporate income heretofore prevented you from using the corporate form of doing business with all its advantages of limited liability, transferability of interest, etc. Now that is gone. Here is a way to eliminate the corporate tax and use the corporate form for its common law advantages.



Next: Subchapter S corporations definitely *do* qualify for all the fringe benefits that are denied to partners in partnerships and proprietorships. For example, sick pay. The law excludes from income certain sick pay benefits—deductible by the corporation but not taxable to the employee, including the officer, who is ill. Reimbursement of medical and hospital expenses are deductible by the corporation but not taxable income to the recipient under a proper plan. The cost of accident and health insurance and the cost of group life insurance are deductible by the corporation, not taxable income to the employee, officer or shareholder. And finally, very important profit-sharing and pension trust fund benefits are available in this type of corporation. Here you can have these fringe benefits; the corporation takes the deduction in computing its taxable income which drops down to the stockholder and nobody pays taxes on these deductible amounts. This is a very important matter.

Next: In the area of personal service corporations which currently are taxed as personal holding companies, which sometimes keeps people from going into corporate form. The monstrous personal holding company surtax can be eliminated in this situation by use of Subchapter S.

Next, this Subchapter offers a perfectly valid and proper way to split income within the family group which is much simpler and surer than a family partnership. In that connection, as I have already mentioned, here is a way lawfully to shift income even after it has been earned—about the only place in the tax law I know of where you can shift income after it has been earned from A to B, from father to son, from father to daughter, etc., through the gift of the stock that carries with it the taxability on already-realized income.

Now, moving into an area of “gimmicks,” where you maneuver for tax benefit, the use of a fiscal year for new corporations in particular and for old corporations which under the rules can change their accounting period to a fiscal year, of course you can produce very staggering tax savings. They are one-shot deals, usually, but they can be very, very large and very important, where you shift for example to a January 31 fiscal year so that the corporation reports as of January 31 or 1959 including its income for February, March and all the other months of 1958 up to and including December, and January—one month—of 1959, and the stockholder then picks those up in his 1959 return. Let's assume we did that in 1959. Now the stockholder would have to report this income in his tax return for 1959 and he wouldn't finish paying his last installment until April of 1960, so you have

gone clear around the clock, and have deferred by a year the time for paying the tax on that income. Moreover, through the use of fiscal year at the beginning of business you can split the first year's income into two tax bites as far as the stockholder is concerned.

I won't pause on the next point except to call your attention to it. Some "collapsible corporations" that are in a spot could take advantage of Subchapter S and thus prevent the conversion of capital gains into ordinary income that does happen in case of collapsible corporations.

Next: There is a wonderful opportunity here, which I think is perfectly obvious, in given situations for huge one-shot benefits. Suppose you have a corporation with a lot of real estate or other assets which have appreciated very, very importantly in value. You have a ranch that has a cost of \$100,000 and today it is worth half a million. You want to liquidate that ranch. The ranch is held in a corporation which is in some other business too. By electing this type of treatment you can go ahead and realize this enormous capital gain in one tax year and pass it directly through to the stockholders, not only theoretically but actually pay the money down to them, and they pay only one capital gains tax—the corporation pays none.

New enterprises which ordinarily lose money for the first six months or a year or two or three years of operation might look at this as a way of starting because you can drop the losses down to the stockholders to offset other income, passing the losses through, and then when you get to the point where you are making a profit and it doesn't pay you to do it any more, you can terminate your election.

This Subchapter has a lot of problems in it. But we are all going to have to work with it, because your clients are going to ask you about it. We are getting a lot of inquiries about this. There is obviously a lot of taxpayer interest in it and I expect you are going to have to answer a lot of questions between now and the end of the year. Remember, if a corporation is going to elect *this* year and they are on a calendar year, December 1 is the deadline.

CHAIRMAN MILLER: Thank you, Laurens.

In the interest of time we are going to try to hold all the questions from the floor until we cover some of these other more important sections. I know many of you have questions. I have some myself, but if you will hold them we will move right along now.

Harry Cohen, I am going to ask you to tell us a little bit about the part of the new statute which technically is called the Small Business Tax Revision Act of 1958 and which does not include Section 64 which Laurens just talked about. Harry, will you tell us what Section 202 of that Small Business Revision Tax Act is about?

### **SMALL BUSINESS TAX REVISION ACT**

**Harry B. Cohen**

Section 202 of the Small Business Tax Revision Act creates a new kind of stock called Section 1244 stock. You have heard of Section 306 stock created by the 1954 Code. Section 1244 stock is stock of a small business corporation. I will define that a little later. The maximum amount of loss that can be taken in any taxable year is limited to \$25,000 for an individual for a separate return and \$50,000 for a joint return of husband and wife. The loss can be taken only by the original purchaser—it cannot be taken by subsequent purchasers from the original purchaser—or through a partnership. It is not available to a corporation; it is not available to a trust.

Here again, as in the case of Section 64, in order to be able to take a loss for the five-year period ending prior to the year that the loss occurs, or if existence of the corporation is less than five years prior to the year the loss occurs, or if the corporation has existed less than a year, you cannot take the loss if for each of these periods the total is more than 50 per cent of the aggregate gross receipts from sources other than interest, rents, royalties, annuities, dividends and sales or exchanges of stock or securities. A corporation must derive more than 50 per cent of its aggregate gross receipts from sources other than those particular income brackets or tax classifications of interest, rents, etc., to permit loss deduction.

Section 1244 stock is defined to be common stock issued by a domestic corporation regardless of whether or not such stock is voting or non-voting stock. Preferred stock and stock of foreign corporations does not qualify. Furthermore, to qualify the plan or offering must be adopted in writing after June 30, 1958, and the stock must be issued within two years from the date of the adoption of the plan.

At the time of the adoption of the plan the corporation must be a small business corporation.

Further, at the time of adoption of the plan no portion of a prior offering of stock must be in existence; otherwise the stock

would not qualify under the plan as Section 1244 stock. What must be done if you have an offering outstanding at the time? You must withdraw that offer.

The stock must be issued for money or other profit. Stock issued for other stock or securities or services does not qualify.

Stock dividends on Section 1244 stock continue as Section 1244 stock.

Also in some cases stock received in a recapitalization, or where you have a mere change of identity of a corporation, if you are changing Section 1244 stock for this new issue it still retains the classification as Section 1244 stock.

If a subsequent offering is made after you have got your plan, and before you issue all your stock under the first plan, if you make a subsequent offering then any stock under the plan issued after you have a subsequent offering does not qualify for Section 1244 stock.

If you make your stock offering under the adopted plan through underwriters, be sure that the underwriters are the agents of the corporation and not the agents of the stockholders who are acquiring the stock because you lose your identity.

Section 1244 stock losses can be taken into consideration in determining the net operating loss for carry-back and carry-forward purposes. You get an ordinary loss deduction in Section 1244 stock.

To qualify, as I said at the outset, the stock must be the stock of a small business corporation. In the law a small business corporation is defined as one which has adopted a plan for the offering of common stock in exchange for money or property or both, and if at the time of adoption of the plan the value of your equity capital—the equity capital is all the assets of the corporation, plus the money that you are to receive for this new stock which you are issuing under this new plan—does not exceed in the aggregate \$1,000,000; furthermore the amount of stock that you are going to issue under the plan does not exceed in the aggregate \$500,000.

I could best illustrate that by an example. If your equity capital at the time of adoption of the plan for issuance of 1244 stock is, let's say, \$600,000, then under the plan you cannot issue more than \$400,000 worth of stock. If your equity capital is \$300,000 you can issue up to a maximum of \$500,000 in stock because the equity capital plus the money you receive from the stock will only equal \$800,000, and that is less than the aggregate total of \$1,000,000.

**Non-qualifying stock losses:** For example if you have stock that doesn't qualify as Section 1244 stock, you can still take ordinary capital asset losses on it; also all gains on Section 1244 stock you can keep as capital asset gains.

Now there are some rules as to this: For example, if you turn in property for the 1244 stock—let's say you turn in an asset that has a basis of \$1,000 and has a market value of \$500 at the time you turn in the asset for this 1244 stock—if you have a loss, the limit of your loss would be the \$500 on that basis. Let's say your asset is an automobile. You turn it in for stock that has a basis cost to you of \$1,000; the market value is \$500 and you get 1244 stock for \$1,000. If that stock is completely lost, the whole value is wiped out. All you get for the 1244 stock, ordinary loss deduction, is \$500; and on the other \$500 you take ordinary capital asset loss deduction.

I have hurried through this because our time is getting short, but I want to emphasize how much bookkeeping you are going to have to do to keep track of all this as an individual. You are going to have to keep track of your stock issues, whether they are Section 1244 stock or not. You have to take care of all of your sales. You are going to have to identify your sales by stock issue. You are going to have to keep track of your stock issues that you receive in the form of stock dividends. You can readily see that there are a number of things. And the stockholder must be in a position to prove that when a loss does occur, in order to take an ordinary loss deduction the corporation qualifies as a small business corporation with respect to the amount of capital at the time of the issue, with respect to adoption of the plan; and you have to prove the date of issuance. You have to go back for a period of five years and prove that the corporation did not receive in excess of 50 per cent from annuities, dividends and so on. So there is a host of records that will have to be kept by the individual stockholder in order to get this Section 1244 stock loss.

**CHAIRMAN MILLER:** Another section of this Small Business Tax Revision Act gives us a new treatment with regard to payment of federal estate taxes in certain cases. I am going to ask John Mason to give us a little explanation of that.

## **FEDERAL ESTATE TAXES**

**John C. Mason**

Thank you, Keith. You know the delightful thing about this estate planning business is that you just get everybody all fixed up and Congress changes the law and it gives you an excuse,

which the Bar Association defines as a duty, to contact your client again and revise his will, so you can talk to him and make a small amendment to his will and charge him another five dollars, and you also satisfy your constant curiosity as to whether in the meantime he may have gone to some one of your competitors.

Many of us who were fortunate enough to attend the fine Estate Planning Institute they held out in Boulder, Colorado, in June learned a little bit about how the other half lives in this field. They were telling the story about the big law office in Denver that had a lot of experts in all fields.

One day a tall good-looking Texan walked in with his big white hat, obviously loaded with money, and announced to the receptionist that he was from Texas and he would like to get some estate planning done. He had heard they had an expert in that field.

Well, the bells rang in all the back offices and the partners all came out and shook hands with him and turned him over to the estate planning partner who took him back into his office, and they sat down. He called in a young law clerk to take the notes, and incidentally to advise the partner what the law was in case that question came up, and began to ask him some questions.

He asked his name and asked what his wife's name was. He said he didn't have a wife. They couldn't use any marital deductions. So he asked him, "How many thousand head of cattle do you have? Maybe we can work out something on breeding stock, or something like that."

He didn't have any cattle. The lawyer tried again and said, "How big is your ranch down there?"

Well, the Texan said, it wasn't exactly very big. It was only a quarter of a section. The lawyer was getting a little discouraged at this point when he suddenly realized he had forgotten a very important question: "How many oil wells do you have?"

The Texan said he didn't have any oil wells. So the partner mentally checked this one off and was preparing to turn him over to the associate to finish it out. Finally he said, "Well, can you give me the legal description of this property that you own?"

The Texan scratched his head and said, "Well, I don't rightly know the legal description. Folks down there just call it Downtown Dallas."

We are not all fortunate enough to have that kind of client. This particular section which I am going to discuss I think has an applicability to the kind of clients that we do have, so I hope you will be interested and get some benefit from hearing about it.

Section 206 of the new act adds a new section to the Internal Revenue Code called Section 6166. The purpose of this section is to allow installment payments of that part of the estate taxes of a decedent which is attributable to his interest in a closely held business. Again there is no test of size of the business; it is merely that it be closely held. The purpose of the section over-all is to allow you to defer payment in not more than ten equal annual installments of that portion of the decedent's estate taxes which is attributable to his interests in a closely held business.

The reason that this amendment has come about, I believe, is that in the hearings which were held by the Senate Finance Committee and the House Ways and Means Committee there was a considerable amount of testimony to the effect that many small businessmen were liquidating their businesses or merging their businesses with large national corporations in order to avoid a problem which they feared of liquidating their business at the time of their death, and that there was a great liquidity problem in many instances because a small business cannot be sold as readily or as profitably as shares of stock in a large national corporation.

The law up to this point has allowed a method of deferring estate taxes in hardship cases and only with the consent of the Secretary or his delegate. It was not the sort of thing up to now that you could plan on or advise your client with any certainty that his estate would be able to take advantage of. So this new provision does give you an additional estate planning tool, a method of planning for the payment of estate taxes which may in some cases allow your client and his family to continue to own his business rather than to sell it out during his lifetime. I think all of us would be interested in anything that would help in that respect.

Now the interest in a closely held business is defined by the statute as being either an interest as a proprietor in a trade or business carried on as a proprietorship, and it is not limited to a sole proprietorship, I believe; or, secondly, the interest as a partner in a partnership which is carrying on a trade or business. However, if it is a partnership the decedent must have owned 20 per cent or more of the total capital interest of the partnership; that is, 20 per cent or more must be included in his gross estate; or the partner must have had ten or less partners. If there are ten or less partners, it qualifies; or if he owns 20 per cent or more of the value of the partnership. Third, definition of an interest in a closely held business is stock in a corporation which is carrying on a trade or business with the same general provisions as to

partnerships, that the decedent's gross estate must have included 20 per cent or more in value of the voting stock of the corporation, or the corporation must have had ten or less shareholders.

Interest in two or more closely held businesses will qualify as an interest in a single closely held business if the decedent's interest in each of these two businesses exceeded 50 per cent of the total value of each of the businesses.

There is a further requirement that the interest in the closely held business must be a certain proportion of the estate in order to qualify for the installment payment. The interest must exceed either 35 per cent of the gross estate, or 50 per cent of the taxable estate, the same rules or qualifications which are applicable in Section 303 on redemption of stock to pay estate taxes—35 per cent of the gross estate or 50 per cent of the taxable estate.

The executor may elect to take advantage of the installment payments at any time not later than the time for filing the estate tax return or any extensions thereof. Only that part of the estate taxes which is attributable to the interest in the closely held business may be deferred; not all of the estate taxes. The amount which may be deferred is the same proportion of the total estate tax as the value of the interest in a closely held business bears to the value of the gross estate. If the election is made, as I believe I mentioned, you can elect to pay in up to ten annual installments. You don't need to use the full ten years if you don't want to. The first installment would be due on the date for filing of the estate tax return, and the subsequent installments will be due on the anniversary of that date each year thereafter until it is paid. Interest on the unpaid balance of the estate taxes is due each time an installment payment is made.

There are certain situations where the privilege, having been elected, may be withdrawn if certain things happen. In other words, the estate tax balance due may be declared due and owing in full if certain things happen. If the aggregate withdrawals of money or property from the trade or business come to 50 per cent or more of the value of the trade or business (and value is value for estate tax purposes)—in other words, if you withdraw 50 per cent or more of the property from the trade of business—then you have to pay the balance of the estate tax and you lose the extension privilege; the purpose of course being that the government is granting this extension only as a help to you and if you don't need the help because you have drawn the money out, then the privilege is lost.



If there is a distribution, sale, exchange or other disposition of 50 per cent or more in value of the interest in a closely held business, then you lose your extension privileges.

There is, however, an exception of withdrawal of stock, or rather withdrawals made for stock redemptions where the proceeds of the stock redemptions, or a like amount, are applied in payment of the estate tax. For example, if under Section 303 you redeem part of the stock of the corporation in order to pay estate taxes and you do pay that much of the estate taxes, then that is an exception to the rule which prohibits you from withdrawing 50 per cent or more of the value.

There is also an exception to this 50 per cent rule if the exchange is a tax-free exchange, such as reorganization or recapitalization.

There is a further rule that any excess undistributed income in the estate must be applied in payment of the estate tax liability if you don't want to lose the privilege of the extension of payments. In other words, if the estate is receiving income and paying the income taxes and paying some of the income but not all of the income to distributees, the remaining income must be applied in payment of the estate tax in order to continue to qualify for the extension. This excess payment must be made at the time for filing of the income tax return of the estate, or the estate is being held open.

As to the effective date of this new privilege, it applies to any estate where the estate tax return was not due until after the effective date of the Act. Therefore it does have application to decedents whose death occurred in the past if the time for filing the estate tax return had not arrived on September 2, which is the effective date of the Act.

It also will apply, and this might apply to some of your situations, if you have a deficiency in an estate where it is already past the time to file the estate tax return, and perhaps you have filed an estate tax return, if a deficiency is assessed you have the privilege of taking some partial advantage under rules laid out in the statute in payment of the deficiency, or part of the deficiency, on an installment basis. So that might conceivably come up in the case of an estate which has more or less been closed already, if you do have a deficiency.

I think in view of this new provision of the Code it would be your duty, certainly your privilege, to review the wills of all your clients who might possibly benefit from the use of an in-

installment payment and who have an interest which could qualify as an interest in a closely held business. I believe if you have in mind that it would be desirable to take advantage of this, and even if you are not sure whether it would be desirable to take advantage of this, it might be well to amend wills to authorize the executors to take advantage of it if, in their discretion, they thought it would be beneficial to the estate. The fact that this privilege is granted under a federal estate tax law does not necessarily mean, I think, that an estate could be held open in order to take advantage of these installment payments if some beneficiary was demanding that the estate be closed. In other words, we have perhaps one rule of law for administration of estates in the state and another rule of law for the taxation of the estate tax, and they are not necessarily coordinated at this point. So I think it would be well to put in an authorization to the executor to take advantage of this.

You should also consider whether you want to pay the installments, or part of them, out of the income of the estate. Normally I believe estate taxes are paid out of the principal of the estate, and part of the purpose of allowing an extension of payments would be to allow you to accumulate income and use part of the income to pay off the estate taxes. To do so and to avoid any difficulties about it, I think you should specifically authorize the use of income for that purpose. And of course if you are going to authorize the use of income for that purpose you want to be sure you don't leave the family and beneficiaries without an income, either. So you may want to provide some method of encroachment or partial use of income for estate tax payments, partial use for the support of the beneficiary. Those are all matters which you can consider in the individual case, and I throw them out only for your checkmarks to be sure that you consider them. Thank you.

CHAIRMAN MILLER: You might be interested to know—I think most Omaha lawyers already know—that a prominent Omahan appeared and testified in the Senate hearings with regard to tax relief for small businessmen. It may be that this particular section was adopted as a result of his testimony. This lawyer is sitting in the audience so I am not going to embarrass him by identifying him. However, he testified that the tax law was so bad for small businessmen that when he died, for example, even though his lawyer had taken advantage of all the tax benefits possible, his estate was going to have to pay more than \$1,000,000 in estate taxes. And I felt sorry for that small businessman, as many of us do.

We have about ten more sections of this new law on our agenda and time has grown short. There is going to be a meeting of the House of Delegates as soon as we adjourn, and I think I am going to cut it off by asking Harry Cohen to talk about the new section with regard to depreciation.

## DEPRECIATION

Harry B. Cohen

This is Section 179 or 204 of the Small Business Tax Revision Act. This is a new section to the Code. This section provides for a special first year depreciation allowance. To be eligible the property must be of a character subject to the allowance for ordinary depreciation under Section 167. It must be acquired by purchase after December 31, 1957, and must be used in a trade or business or held for production of income, and must have a useful life determined as of the date of acquisition of not less than six years; six years or more is the way the statute reads.

The taxpayer is allowed a 20 per cent special depreciation allowance of the cost during the year of acquisition. If the taxpayer is a corporation the amount of deduction is limited to a purchase price of \$10,000. That does not necessarily mean that you have to pay *one* item of \$10,000. You can take four or five items and build them up to \$10,000. In one article I read it said you presumably could even split an item to get it up to the aggregate amount of \$10,000.

If the taxpayer is an individual filing a separate return, the amount of the deduction is limited to a purchase price of \$10,000. If a husband and wife file a joint return the amount of the deduction is limited to a purchase price in the aggregate of \$20,000. Trusts cannot take the special deduction. Estates presumably can.

Affiliated groups are treated as one unit. By affiliated groups they mean a set of corporations which can file a consolidated return. There is one change there for the purpose of determining whether or not they are controlled, the 50 per cent rule is used instead of the 80 per cent rule. An affiliated group, as is a corporation, can only be treated as one unit. In other words, they are limited to the purchase price of \$10,000.

There is no proration of the purchase price. You can buy this article for \$10,000 on December 31 of your tax year and still get the full maximum 20 per cent deduction.

After this special 20 per cent deduction is taken, the taxpayer then takes the regular depreciation on the balance. For

example, if a taxpayer acquires tangible—this is limited, by the way, to tangible personal property and does not apply to real estate—the taxpayer buys tangible personal property at a cost of \$10,000, assuming that the taxpayer is a corporation, he first takes off 20 per cent of the \$10,000 or \$2,000 off the \$10,000, and the balance of \$8,000 he treats for depreciation purposes under the ordinary depreciation rules that he applies normally.

In the example that I gave about the remaining \$8,000, assume a straight line method and assume a life of ten years, the man would have in the year of acquisition, assuming that it is intangible property having a life of more than six years, in the first year, the year of acquisition, he would take, assuming again that the purchase was effected on January 1 in order to get the full year of depreciation on the \$8,000, he could take a \$2,800 depreciation loss in the year of acquisition.

The election must be made within the time prescribed for the filing of the return. If you have an extension, the election goes to the extension period as well. Once the election is made it is irrevocable.

For the purposes of this section, purchase means any acquisition. There are certain limitations as to how you can acquire the property for the purpose of this deduction. If you buy property and a family relationship exists, in case of loss if you couldn't take the loss because of family relationship, then you can't acquire property in that manner for the purpose of this 20 per cent special depreciation deduction in the year of acquisition.

Also if you are a member of an affiliated group, one corporation of an affiliated group cannot buy the property from another corporation of the affiliated group, and this property would not qualify as well.

The basis of the property in the hands of the person acquiring is not determined by reference to the adjusted basis in the hands of the person from whom acquired. The best example I can give of that is a decedent. If you acquire property from a decedent you can't use that basis for the purpose of determining this 20 per cent special deduction for depreciation purposes.

The taxpayer, as I said before, can select the items on which the 20 per cent deduction is to be taken. The cost is the purchase price. The purchase price does not include so much of the basis of other property as is determined by reference to the basis of other property held at the time by the person acquiring such property on which this special deduction is being taken.

For example, if A buys new machinery costing \$8,000 and trades in machinery with a basis of \$2,000 and is allowed \$1,000 on the trade, under the ordinary depreciation rules the \$1,000 loss could be added to the purchase price for future depreciation at the rate of \$8,000. But for the special 20 per cent depreciation you have to take off that \$1,000 of trade-in that you were allowed from the \$8,000 purchase price and you take your 20 per cent only on the \$7,000.

Then for your ordinary depreciation after you take off the 20 per cent in that particular case, which would be \$1,400, from the \$7,000, the difference is \$5,600. Then you add back the \$1,000 loss that you took on the trade-in and you take your ordinary depreciation on \$6,600.

This is applicable to all tax years ending after June 30, 1958. However, only property purchased after December 31, 1957, can be used for this special deduction.

Someone might raise the question as to whether or not this applies to tangible personal property partnerships. We don't know. The law doesn't say anything about it. I presume it would not because of the unit rule that the law applies to affiliated corporations. I doubt whether partnerships could be used for that purpose, because if you could, say you had ten partners and maybe each of them could have a \$10,000 limitation on the purchase price of \$100,000 worth of property purchased by the partnership for this special 20 per cent deduction.

I didn't mean to imply that the limitation of \$10,000 doesn't apply to partnerships. Partnerships can take this 20 per cent special depreciation deduction but there is a question whether or not the limitation of \$10,000 applies to the partnership or unit or whether or not each partner can take over \$10,000.

CHAIRMAN MILLER: That was the question.

We had intended to discuss briefly the following sections which I will simply mention and will not ask anyone to explain: the Accumulated Earnings Surtax Exemption has been increased from \$60,000 to \$100,000. There is now a three-year carry-back on an operating loss instead of two years. The provisions of the Involuntary Conversion Section have been amended slightly so that we can now get the benefit of reinvesting involuntarily converted property proceeds in *like kind* property with the same effect as your like kind tax free exchanges. And that applies to real estate primarily. You can now in certain situations get an ordinary loss on uninsured casualty losses.

Those are the other sections which we were going to discuss. We will not take the time to do so.

Before we close the meeting I would like to announce that Harry Cohen and Flavel Wright have been elected to a three-year term as members of the Executive Committee of this Section.

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**HOUSE OF DELEGATES  
FRIDAY AFTERNOON SESSION**

**October 3, 1958**

The Third Session of the House of Delegates of the Nebraska State Bar Association was called to order at 4:05 o'clock by Chairman Richard E. Hunter.

**CHAIRMAN HUNTER:** We have some rather important matters of business to get out of the way. The House of Delegates will now come to order.

We will first have the report of the Section on Real Estate, Probate and Trust Law.

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

**Fred H. Richards**

Members of the House: My report consists of five distinct items. You have six Sections to hear from this afternoon and then you will still have open discussion, so that is going to reduce this report down to about five minutes.

Item No. 1 consists of the roster of officers and the Executive Committee members of this Section. This being in written form, Mr. Chairman, I move it be accepted and placed on file. [The motion prevailed.]

Items 3 to 5 are proposals of legislation which have been recommended and prepared by our Section. I move that Items 3 to 5 be referred to the Legislative Committee for consideration, study, and action. [The motion prevailed.]

Item No. 2, Mr. Chairman, consists of proposed Standards which have been adopted by our Section.

**C. M. PIERSON:** I move they be approved.

**RALPH E. SVOBODA:** I second the motion.

**MR. RICHARDS:** These have not been perused except by the Section yesterday. They were submitted and circulated yesterday by the Section and approved in their entirety. Do you want them read?

**CHAIRMAN HUNTER:** I would prefer that they be summarized so that the House has some idea of what they are approving. If any member wishes one read in detail, it can be.

There is a motion on the floor. However, with Mr. Pierson's consent I would like to have him summarize briefly each of those Standards.

MR. RICHARDS: *Proposed Standard No. 62*

Where all persons having or claiming any interest in real estate are made defendants in an action under the provisions of Sections of the law [I'll not read them] the spouses of known and named defendants whose whereabouts and residence are unknown are not necessary defendants in such action unless such spouses are in possession of the real estate involved or their interest affirmatively appears of record.

You don't have to make that unknown spouse a defendant, by this designation—John Jones' wife, Mrs. Jones, first real name unknown—it's not necessary to do that if her name does not appear of record and if not in possession of the real estate.

I move adoption of No. 62.

[The motion prevailed.]

No. 63

Sections 30-601 and 30-603, R.R.S. Neb. should be construed in pari materia, and, the publishing of the notice to creditors and the running of the time for creditors to present their claims may run concurrently.

I move adoption of No. 63.

[The motion prevailed.]

No. 64, in substance, provides that if a piece of real estate has, by a properly conducted proceeding, been cleared of any inheritance tax lien, and the time for appeal goes by and it passes into the hands of a bona fide purchaser for value, that then releases that land from any further determination of inheritance taxes in that same state.

Do I make myself clear? Perhaps I should read the whole thing.

No. 64: Where the Court in a duly conducted proceeding determines the Nebraska State Inheritance Tax status of the property included in said proceeding and when thereafter said property, or a portion thereof, is sold to a bona fide purchaser for value, said Nebraska Inheritance Tax status of said property so sold is not changed in a subsequent Inheritance Tax proceeding.

I move adoption of No. 64.



[The motion prevailed.]

No. 65, in substance, provides that it is no longer necessary to have fictitious names of a defendant in quiet title proceedings. The *in rem* feature includes everything that doesn't appear of record, so it isn't necessary to have fictitious names incorporated in the quiet title proceedings.

I move adoption of No. 65.

[The motion prevailed.]

No. 66

When the death of a title holder occurred prior to September 14, 1953, and five years have elapsed since the date of death, no determination of State Inheritance Tax shall be required.

I move adoption of No. 66.

[The motion prevailed.]

No. 67

The requirement of Section 25-520.01, R.S. Sup. 1957, Nebr. of filing proof by affidavit of the mailing of a copy of published notice in any action or proceeding of any kind or nature within ten days after the mailing of the notice is not jurisdictional, so long as the notice was mailed within the five-day period required by such Section.

I move adoption of No. 67.

[The motion prevailed.]

CHAIRMAN HUNTER: Now the report of the Section on Insurance Law, Mr. Kauffman.

## REPORT OF SECTION ON INSURANCE LAW

Harold W. Kauffman

Mr. Chairman and Members of the House: The Section on Insurance Law met this morning, October 3, 1958. We had the privilege of hearing two excellent addresses by experts in the field of insurance law. Norman E. Risjord, Esq., of Kansas City, Missouri, spoke on "Automobile Liability Insurance." Mr. Risjord is Vice President and General Counsel of Employers' Reinsurance Corporation. Victor A. Lutnicki, Esq., of Lincoln, Massachusetts, spoke on "Frauds and Attempted Frauds against Insurance Companies." Mr. Lutnicki is Vice President of John Hancock Mutual Life Insurance Company.

We elected as new members of the Executive Committee Mr. Theodore J. Fraizer of Lincoln, Nebraska, and Mr. Robert G. Fraser of Omaha, Nebraska. Mr. A. J. Luebs was elected chairman of the Section for next year and Mr. Theodore J. Fraizer was elected secretary.

CHAIRMAN HUNTER: The report of the Section on Taxation by Keith Miller, Chairman.

## REPORT OF THE SECTION ON TAXATION

Keith Miller

Mr. Chairman and Members of the House: The Section on Taxation conducted an Institute in December of 1957 which was excellently received. It was presented at Scottsbluff, Grand Island and Omaha, two days each.

The persons in that Institute were Roger Dickeson, Warren Dalton, Richard Hunter, Laurens Williams, Mac Asbill, Jr., and Robert Veach.

Subsequently we held our annual meeting here this afternoon which was attended by roughly 200 to 250 members. The panel was presented at that meeting at which Laurens Williams, Harry Cohen, John Mason and Douglas L. Barnes, Regional Counsel of the Internal Revenue, spoke. The panel was excellently attended and received.

New members of the Executive Committee of the Section elected were Harry Cohen of Omaha and Flavel Wright of Lincoln.

Immediately after the Section meeting the Executive Committee met and elected John Mason chairman for the coming year. The vice chairman and secretary will be elected at a subsequent meeting of the Executive Committee.

CHAIRMAN HUNTER: Report of the Junior Bar Section by Bob Berkshire.

## REPORT OF JUNIOR BAR SECTION

Robert H. Berkshire

The Junior Bar Section of the Nebraska Bar Association embarked this year on a program to sponsor annually and jointly with the University of Nebraska Law School a seminar in continuing legal education in lieu of having a section program at the State Bar Association meeting.

Consequently on September 19 and 20 a program was held at the University of Nebraska Law School on the subject of

"Damages in Personal Injury Actions." The program was extremely successful both in the subject matter of the lectures and the reception the program received from the members of the Bar.

Approximately 250 members of the Bar from fifty-one communities in the State of Nebraska attended the program. At that time a business meeting of the Junior Bar Section was held and future plans of the organization were discussed. It was determined to petition the House of Delegates to amend the bylaws of the Association so that it would be possible to elect committee members of the Section at some time and place other than the annual meeting of the Bar Association. These amendments were presented to the House of Delegates at their meeting on October 1, 1958 and were approved.

Subsequently the Junior Bar held its annual meeting and elected Robert E. Johnson, Jr., of Lincoln and Robert D. Moodie of West Point as committee members for a three-year term beginning in October, 1958.

At a meeting of the Executive Committee, Edward A. Cook III of Lexington was elected chairman, and John Gradwohl of Lincoln vice chairman. Robert E. Johnson of Lincoln was elected secretary.

**CHAIRMAN HUNTER:** The report of the Section on Practice and Procedure.

## **REPORT OF SECTION ON PRACTICE AND PROCEDURE**

**Robert B. Hamer**

Mr. Chairman and Members of the House of Delegates: The Section on Practice and Procedure, as scheduled on the program, was a panel discussion in connection with suggested amendments on the part of the Subcommittee of the Judicial Council in connection with the preparation and settlement of bills of exceptions, and some other related legislation having to do with procedural matters in the field.

Those who participated were: Professor David Dow, Law School of the University of Nebraska; L. R. Stiner of Hastings; and Edwin Cassem of Omaha.

Following that presentation—this room was filled—by a show of hands to express whether or not they were satisfied with the existing statutes and practice concerning the bill of exceptions or whether they preferred that which was suggested by the Subcommittee of the Judicial Council, the unanimous show of hands

was that the lawyers were dissatisfied with the present practice and expressed an appreciation for the method which was recommended by the subcommittee.

The second matter on our program was a delightful talk by Emile Zola Berman, very well known trial lawyer of New York City. His subject was "Trials and Tribulations," but he spent most of his time giving the details in connection with his defense of the Parris Island Marine sergeant.

In the interim there was an election, and two people were duly elected for three-year terms to the Executive Committee of the Section on Practice and Procedure; namely, George Boland of Omaha and M. M. Maupin of North Platte. Present members of the Executive Committee are: David Dow of Lincoln; Jack Devoe of Lincoln; Joe McGroarty of Omaha; George Boland of Omaha; and M. M. Maupin of North Platte.

There was no opportunity to have an Executive Committee meeting. As a matter of fact, some of them were not in attendance at this annual meeting. Therefore I move that the Secretary of the Association promptly notify Mr. Dow, Mr. McGroarty, Mr. Boland, and Mr. Maupin concerning the fact of their continuing or newly elected status to the Executive Committee and that the Executive Committee promptly thereafter select their own officers.

MR. CHAIRMAN, I further move the acceptance of this report.

CHAIRMAN HUNTER: Do I hear a second?

EDSON SMITH: I second the motion.

CHAIRMAN HUNTER: We will treat that as one motion, making the recommendation to the Secretary to notify these people and asking them to elect their own officers, and that the report be accepted and placed on file. Is there any discussion? All in favor say "aye"; opposed, same sign. The motion carried.

The report of the Section on Municipal and Public Corporations. Harold Rice is the chairman. Since he is not here, is there any member of the Executive Committee of that Section here who can report? Mr. Lane presided in the absence of the chairman. Will a member of that Section get in touch with him to see if they have a report.

While that is being obtained we have a report of the Committee on Revision of the Bylaws, by Paul Martin.

## REPORT OF COMMITTEE ON REVISION OF BYLAWS

Paul Martin

Mr. Chairman and Members of the House: As you know, our Bylaws are very loosely drawn; even this change that we suggest isn't exactly as it should be. The House of Delegates or the Executive Council can change the wording any time they see fit.

The only purpose of an action of this kind is to permit the incoming President to appoint committees, the permanent committees, on a staggered basis of one-, two-, and three-year terms to have continuing work on the part of those committees.

I move that Article III, Section 1 of the Bylaws of the Nebraska State Bar Association be amended to read as follows:

1. As soon as possible after the regular annual meeting of the Association, the President shall appoint standing committees to consist of not fewer than three (3) members each, to wit:

- a. Committee on Legislation
- b. Committee on Judiciary
- c. Committee on Continuing Legal Education
- d. Committee on American Citizenship
- e. Committee on Unauthorized Practice of Law
- f. Committee on Crime and Delinquency Prevention
- g. Committee on Legal Aid
- h. Committee on Public Relations
- i. Committee on Procedure

Those are the present committees as provided for in our Bylaws.

*One-third thereof for a term of three (3) years, one-third for two (2) years, and one-third for one (1) year, provided that after the first such appointment the President shall appoint to vacancies by reason of termination of prior terms.*

CHAIRMAN HUNTER: Is there a second to the motion that the proposed Bylaws change be adopted?

KEITH MILLER: I second the motion.

CHAIRMAN HUNTER: Is there any discussion? This calls for a two-thirds vote. We will vote by a show of hands. As many as favor the adoption of the Bylaw raise your hand; opposed, same sign. Unanimously adopted.

MR. MARTIN: I further move that Article III, Section 3 of the Bylaws be amended to read as follows:

3. In addition to the regular standing committees herein provided, the President shall appoint such special committees as may be authorized by the House of Delegates or Executive Council, *provided that if such special committees shall be of indefinite tenure, appointments thereto shall be according to the staggered terms provided for in Section 1.*

I move adoption of that provision.

KEITH MILLER: I second the motion.

CHAIRMAN HUNTER: Is there any discussion? As many as favor the change raise your hand; opposed, same sign. The motion unanimously carries.

SECRETARY TURNER: The Section on Municipal and Public Corporations has reported that Warren Johnson of Lincoln and Ralph D. Nelson of Lincoln were chosen as members of their Executive Committee. The committee has not selected officers, but if it is the wish of the House I shall do as directed for Practice and Procedure and ask the members of the Executive Committee to designate their officers promptly.

CHAIRMAN HUNTER: The report of the Committee on Resolutions, Barton Kuhns, chairman.

## REPORT OF RESOLUTIONS COMMITTEE

Barton H. Kuhns

Mr. Chairman and Members of the House: You will recall that in the report of the Committee on Resolutions called for Wednesday afternoon I stated that none had been submitted but that there was one resolution which had been formed and would be submitted. That resolution has been submitted. It comes to the Resolutions Committee from the Executive Council. It was prepared and the Committee on Resolutions has unanimously approved this report of the Resolutions Committee which embodies the resolution at the close of the report.

Section 4 of Article II of the Bylaws of the Association provides:

Every resolution presented to the Association shall be in writing. Unless a resolution presented to the Association is of a formal character, or presented by a committee, such resolution shall be referred by the Chair on presentation, without debate, to the Executive Council for consideration and report.

In the instance of the resolution about to be reported, the Executive Council referred the proposed resolution to the Reso-

lutions Committee. It is the opinion of the Resolutions Committee that in view of the foregoing Bylaw of this Association the Resolutions Committee of this House should not oppose presentation, for consideration by the House, of a resolution on a matter of such importance adopted by the Executive Council. On this basis the Resolutions Committee submits the following Resolution as presented to it by the Executive Council.

The resolution is thus presented and it is open to any member of the House who wishes to move the adoption of the resolution.

BE IT RESOLVED: That the President of the Association shall take such measures as he deems appropriate to bring to the attention of the public before the general election in 1958 the following points with respect to the proposed constitutional amendment pertaining to Juvenile Courts, which was enacted as L.B. No. 124 by the 1957 Legislature:

1. That under the proposed amendment the Legislature might provide for tribunals having both law and chancery jurisdiction without being subject to any of the common law or chancery safeguards as to procedure before the tribunal.

2. That in matters coming before such tribunals different laws might be applicable in different parts of the state, or the same act might be treated differently in different parts of the state.

3. That a county could be compelled to have or could be deprived from having such a proposed tribunal by the voters of the judicial district as a whole contrary to the wishes of the people of any particular county.

4. That there is uncertainty as to the method of determining a majority of the electors of a judicial district voting upon the issue of whether to have such a proposed tribunal.

5. That there is no assurance that such a tribunal would be required to comply with other presently existing constitutional safeguards.

6. That there is no stated limitation upon the possible jurisdiction of such a tribunal.

The Resolutions Committee, for the reason I have stated, brings that resolution before the House at this time. The Resolutions Committee feels that coming from the Executive Council it should be brought to the attention of the House for such action as the House deems appropriate.

CHAIRMAN HUNTER: You have heard the suggested resolution. What is your pleasure?

ALFRED ELLICK: I would like to make a few remarks about the resolution. This is a rather controversial subject that deals with the proposed constitutional amendment to be voted on this November concerning giving authority to the Legislature to adopt an act creating a separate juvenile court.

The matter came before the House of Delegates a year ago when the Committee on Crime and Delinquency Prevention in its report recommended that the House of Delegates approve the constitutional amendment. At that time, a year ago, the House refused, or failed to approve that portion of the Committee's report. That is the way the matter has stood during the past year.

I have been somewhat interested and active in Omaha in connection with this juvenile court amendment and there are a couple of things I would like to call to the attention of the House. I will then end up by presenting my motion that the resolution be defeated.

In the first place I realize that there is some controversy as to whether or not we should have separate juvenile courts; and if we could have them what powers they should have.

I would like to point out that the constitutional amendment that we are going to vote on in November simply is an enabling amendment which provides that the Legislature can adopt an act creating separate juvenile courts, and furthermore that if such act is adopted then the district which desires the act to be enforced in their particular district shall also have an opportunity to vote.

So we have first the constitutional amendment; second, the legislative act; and third, local option, in effect, in certain judicial districts, as I understand the amendment.

Now it seems to me that the constitutional amendment as such is a relatively harmless type of amendment. It simply gives the Legislature authority to adopt an act. And I feel that that is the time for individual lawyers, if they see great danger in the proposed juvenile act that is maybe going to be introduced, that is the time to start worrying about whether proper safeguards are given to the protection of children.

In Lincoln you probably don't have a problem but we have in Omaha. A group of us have been working for a number of years to try to change the present method of handling it. The Dean of the School of Law of Creighton has worked together with



us and I think the amendment was largely framed through his efforts. To use a word of Mr. Martin Cannon, if it's a bogie man, start worrying about the dangers here of adopting this amendment. It simply permits the Legislature to proceed as it sees fit with an enabling act.

Second, I question seriously the propriety of this House of Delegates adopting a resolution which I understand has not been given study by a committee of the Bar Association or a committee of this House. As I understand it, this resolution was presented to the Resolutions Committee by an individual member of the House of Delegates; this is not a resolution which was adopted by the Executive Council as such. Am I correct, Mr. Kuhns?

MR. KUHNS: It is my understanding, while I am on the Council, part of the time during the discussion of this I was in the room awaiting any possible resolutions, it is my understanding that the substance of this resolution was adopted by the Executive Council, was framed in accordance with the understanding of the Council, and was presented to the Resolutions Committee.

MR. ELLICK: I don't want to get into a controversy. I, being a member of the Executive Council, did not hear these six points mentioned at all. Nevertheless I certainly agreed that the Executive Council at least refer it to the Resolutions Committee for such action as it saw fit.

In any event, it seems to me there hasn't been a study of this matter made by a committee of either the House or the Association as to the merits of the constitutional amendment or as to whether the objections raised in your resolution are valid or not valid. It seems to me that it is out of place for this Association, for this House of Delegates, to pass a motion that hasn't had what I think would be a proper amount of study and recommendation by a committee of the Association. So on the merits of the matter I frankly think we should keep our mouth shut. Since we took our action in failing to adopt the recommendation of a proper committee of this House, it seems to me we have spoken, as it were, and that the matter should be allowed to stand.

To get the matter before the Chair, I'll move that the resolution be tabled.

EDSON SMITH: I second the motion.

CHAIRMAN HUNTER: It has been moved and seconded that the proposed resolution be tabled. As many as favor the motion signify by saying "aye"; opposed, the same sign. The motion is adopted that the resolution be tabled.

Do you have any further announcements, Mr. Turner?

SECRETARY TURNER: It may be of interest to you to know that despite the opening games of the World Series and the opening of the hunting season we had a total registration of 800 lawyers compared with, I believe, 854 last year when we did not have the diverting sideline attractions.

RALPH E. SVOBODA: How does that stand with the highest registration we have ever had?

SECRETARY TURNER: I am sorry I can't tell you; I don't have it here. Last year was higher.

PAUL H. BEK: What is our approximate membership?

SECRETARY TURNER: Of Active members?

MR. BEK: Yes.

SECRETARY TURNER: Within the state, 1,925. Bear in mind however that a substantial number who carry active memberships are not engaged in the practice of law. We have some banking people, some insurance people, the proprietors of various businesses who, by reason of pride in their profession, carry Active membership but do not engage at all in the practice. I would say that probably we have about 1,800 who might be said to be active practitioners of the profession.

HARRY A. SPENCER: May I rise to a point of order and ask a question of the Parliamentarian, if we happen to have one? Is it possible to table a motion which was not made?

CHAIRMAN HUNTER: It probably is not.

MR. SPENCER: I move that the action which has been taken be expunged from the record.

JOHN R. FIKE: There was no motion made but there was a resolution presented, Your Honor.

MR. SPENCER: By the Resolutions Committee that presented it to the House for such action as it sees fit.

CHAIRMAN HUNTER: Judge Spencer, was your motion to expunge that action?

ALFRED ELLICK: I'll second the motion.

CHAIRMAN HUNTER: All in favor of expunging the action say "aye"; opposed, same sign. The motion carried.

ELMER M. SCHEELE: I move the adoption of the resolution as presented by the Resolutions Committee.

HENRY M. GREETHER, JR.: I second the motion.

EDSON SMITH: The motion to expunge has been adopted. Although I didn't understand the Chairman to say so, I think it would affect all action including the report of the Resolutions Committee. Am I correct? So there is no resolution now before the House of Delegates. Am I correct?

CHAIRMAN HUNTER: I disagree with you for the reason that it was made in the form of a report of the Resolutions Committee. The motion to expunge, as I understand it, was to expunge the *action* of the House of Delegates. There was a motion to table the resolution when in effect there was no resolution before the House. As I understand it, that was the original proposition.

We now have a motion to adopt the resolution.

KEITH MILLER: I now make a motion to table it.

ROBERT K. ADAMS: I second the motion.

HARRY A. SPENCER: There is one point of order. In view of the fact that quite a lengthy talk was made in opposition to the motion, in all fairness before there is a motion to table the other side should be presented. This concerns a matter that is of too much importance to be handled in a way that could do some harm.

MR. MILLER: I will withdraw my motion.

ELMER M. SCHEELE: I would simply like to refresh your memory a little bit because I don't think the matter was presented entirely accurately here this afternoon.

A year ago as a member of the Crime and Delinquency Prevention Committee there was submitted a report which had already been given to the printer and which appeared in the program without the committee ever having met or discussed the matter. Because of the serious constitutional question involved in a matter of this nature, I filed a minority report with the House of Delegates which was presented here and which was adopted, so that the recommendation which had been prepared without a committee meeting going on record in favor of this constitutional amendment was rejected by the House of Delegates after considerable discussion of the merits and the dangers involved in this type of legislation.

Now it seems to me that as lawyers we of all people ought not to go on record in favor of a constitutional amendment of this type with the dangers inherent in it, with the removal of constitutional safeguards for the juvenile delinquent and still per-

mit those same constitutional safeguards for the protection of adults.

I think that this Association would be doing a public service by going on record against this proposal, L.B. No. 124, in this proposed constitutional amendment, because we have at this time a small group of people feeding propaganda to the public that this is supposed to be a cure-all for all the evils inherent in the field of juvenile delinquency. It isn't that at all. I think the most important function we can do is to inform the public of what really is involved and what the inherent dangers are in this proposal.

For that reason I made the motion to adopt the resolution, and I think we would be doing the public a great service by adopting it because no one has yet had the courage to get up and stand against the proposal.

ROBERT J. BULGER: May we have the resolution read again—just the meat of the resolution?

CHAIRMAN HUNTER: Mr. Kuhns, please read the resolution drafted by the Resolutions Committee.

[Mr. Kuhns reread the resolution.]

JAMES F. GREEN: It seems to me there is a fallacy in Mr. Scheele's suggestion that there would be virtue in adopting this. I am not a student of this but at least two of the propositions seem sufficiently general to indicate a non-application of general constitutional provisions, and I doubt that that be true. No suggestion was made here that we adopt a stand favorable to the proposal; the suggestion made was that we should table that particular motion. I would suggest that that thought contains great wisdom.

CHAIRMAN HUNTER: Mr. Bulger.

MR. BULGER: I will yield.

WILLIAM H. LAMME: I am rather confused about the whole issue. It has become so involved that I just want to state my position. Any constitutional amendment such as is proposed which gives the Legislature the right to set up rules and regulations that we are not ordinarily abiding by in our courts and under our rules of law, I am against basically. I don't know where we are on this parliamentary proposition but that is all I want to say.

MR. SCHEELE: I simply want to say, in response to Mr. Green's statement, that my position is no different from what

it was a year ago, or as it was set forth in detail in the minority report which I filed and which was read before the House of Delegates. It has been under consideration for a year.

MR. GREEN: What Mr. Scheele's position is or may have been is not the subject of my comments. It is thrown before this House in its closing hours. I grant that you have studied it and I assume also that so has Mr. Ellick. But what you have tried to do is force us as a body to take a hasty action based upon your representation here. I have great admiration for both your and Ellick's position but I do not have great admiration for your logic in your particular posture at this moment.

MR. BULGER: As I understand this resolution it merely would authorize our newly elected President to express himself in such volume as he should see fit upon these six points that are mentioned there.

If this motion is adopted, as I understand it he has the option of saying what he sees fit. I am wondering if the motion is defeated, or the resolution is defeated, does that implicitly prevent him as President from ever making a statement of preference in this matter when it comes up before the public? And if it does mean that, aren't we unduly hamstringing our officers when they are concerned with it?

If this body wants to go on record with this proposition it is a left-handed way of approaching it. However the action is taken I am questioning that the net result is going to be anything that any of us want. It isn't going to appear as a flat out-and-out declaration of intention on the part of this House as to whether we favor or don't favor the proposed legislation or the proposed amendment. All the resolution says is that it would authorize our President to speak as he sees fit; and I presume that to deny it it would be our intention that he should make no official declaration. Certainly, on a matter of a bill that is primarily a procedural proposition, it would appear that the Bar Association is the group best qualified to comment authoritatively on the subject, and if we defeat this resolution it seems to me we are going to be silencing our officers on something where perhaps we should be speaking.

KEITH MILLER: I suggest in view of the last remark that we might be putting Joe Tye in a spot to ask him to speak on this subject, knowing it is a controversial one. I think, again, we might be creating a record which would be bad if we defeat this resolution. I think the action we started to take originally, to table it, is the proper one.

Every member of this Association, whether a member of the House of Delegates or not, certainly can take his own stand and do as much lobbying or politicking for this particular constitutional amendment as he cares to. He probably owes a duty to the public to look into this matter and learn as much as he can about it and take a stand. But I think we are not taking a stand as an Association, and I wouldn't want Joe Tye to be asked to take a stand for the Association without his having very specific direction.

Therefore I think I am still going to make the motion, but not until I feel everybody has had a chance to talk who wants to talk, because I think we should table this motion.

MR. BULGER: With reference to these six points that are referred to here, is there any question in anybody's mind that these things are true in the way the constitutional amendment and the proposed bill are prepared?

MR. ELLICK: I think there certainly is. This is not a resolution—I still think that Mr. Turner perhaps could settle this question—this resolution was not adopted by the Executive Council of the Association.

CHAIRMAN HUNTER: The Chair concurs with the opinion of the Resolutions Committee that it has met the requirements of the Bylaws as being submitted to them, and I will ask Mr. Turner to read those minutes if there is any question about it.

SECRETARY TURNER: My notes probably will be amplified in transcribing them but it was moved by Judge Spencer that the Executive Council recommend that the Juvenile Court Act be considered by the Resolutions Committee and request that a suitable resolution be drawn thereon.

MR. ELLICK: That is the way I understood the action taken by the Executive Council. They did not adopt or endorse this particular resolution.

SECRETARY TURNER: I don't believe this resolution was before the Council.

HARRY A. SPENCER: In view of the question I think that the record is right in presenting it to the Executive Council. I did make some of the observations that are there, as you will remember. But the Council passed the motion and it was Mr. Kuhns who suggested that some work be done on it and that it be presented in more detail.

I think in view of what has arisen that if we should take action to table, Keith, we are in effect defeating the resolution, and

that is an action that could be misconstrued. I think that probably the best way would be to refer the matter back to the Executive Council for further study and whatever action they deem necessary. I so move.

FLAVEL A. WRIGHT: I second the motion.

MR. SPENCER: That is a substitute motion.

MR. ELLICK: I think I am in order. I don't want to complicate this but it seems that the matter obviously hasn't had proper study by this House or by a committee of the Association as such. It seems to me the simplest thing is to table the entire matter rather than refer it back to the Executive Council where it can be a subject of wrangling back and forth. I would move, and I think I am in order, that the motion and the substitute motion be tabled.

EDSON SMITH: I second the motion.

ROBERT B. HAMER: I second the motion.

CHAIRMAN HUNTER: The motion is to table. All in favor signify by saying "aye"; opposed, same sign. The motion is carried.

MR. SPENCER: I call for a rising vote. I do think you are going to be misconstrued.

CHAIRMAN HUNTER: I will call for a show of hands on it. As many as favor the motion to table, raise your hand; opposed, same sign.

[The vote was 17 for; 7 opposed.]

CHAIRMAN HUNTER: Is there any further business to come before the House?

ROBERT K. ADAMS: I move we adjourn.

ROBERT B. HAMER: I second the motion.

CHAIRMAN HUNTER: As many as favor the motion signify by saying "aye"; opposed, same sign.

The House of Delegates is adjourned. Thank you very much.

[The meeting was then convened as the concluding session of the General Assembly.]

PRESIDENT MARTIN: There being no unfinished business, the General Assembly is adjourned.

[The Fifty-Ninth Annual Meeting of the Nebraska State Bar Association adjourned sine die at 5:10 o'clock.]

## NEBRASKA STATE BAR ASSOCIATION

## Statement of Cash Receipts and Disbursements

Period beginning October 1, 1957 and

ended September 15, 1958

## Receipts:

Active members' dues .....	\$38,560.00
Inactive members' dues .....	5,090.00
Reinstatements .....	163.00
	<hr/>
	43,813.00
 Reimbursement of desk book expense.....	 2,499.99
Reimbursement for football tickets, 1957 season.....	126.25
Interest .....	82.80
Sale of plaques .....	284.55
	<hr/>
	46,806.59

## Disbursements:

Salaries and payroll taxes .....	\$6,219.00
Printing and stationery .....	1,002.02
Office supplies and expense .....	248.02
Telephone and telegraph .....	277.15
Postage and express .....	981.92
Directory .....	1,106.68
Officers' expenses .....	1,833.46
Executive council .....	493.06
Judicial council .....	355.59
Nebraska Law Review .....	7,430.37
Nebraska State Bar Association	
Journal .....	\$1,639.23
Less receipts for advertising .....	729.00
	<hr/>
Public service .....	4,411.58
Less receipts for pamphlets and racks .....	528.70
	<hr/>
American Bar Association and House of Delegates meetings .....	4,348.93
Annual meeting .....	6,816.67
Less reimbursements and exhibit space .....	2,877.00
	<hr/>
	3,939.67



Committee on procedure .....	212.52	
Committee on inquiry .....	777.27	
Committee on continuing legal education .....	223.54	
Committee on cooperation with American Law Institute .....	540.09	
Committee on advisory fee schedule .....	396.13	
Advisory committee .....	532.10	
Title standards committee .....	178.00	
Real estate, probate and trust law section .....	149.15	
National conference committee on state laws .....	150.00	
Committee on joint conference of lawyers and accountants .....	40.75	
Business law institute .....	713.28	
Condemnation institute .....	30.00	
Tax institute .....	2,948.07	
State ex rel Nebraska State Bar Association, Richards .....	(229.80)	
Group life insurance .....	1,022.40	
President's plaque .....	198.85	
Equipment purchased .....	499.22	
Savings bonds purchased .....	2,000.00	
Auditing .....	186.49	
Insurance .....	85.23	
Membership fees .....	50.00	
Miscellaneous .....	48.35	
Maintenance expense .....	195.29	
Suspension letters .....	116.73	
Football tickets purchased to be reimbursed .....	70.00	44,162.64
Excess of receipts over disbursements .....		2,643.95
Cash balance at beginning of year .....		3,293.52
Cash balance at end of year .....		\$ 5,937.47
Cash balance represented by, Continental National Bank of Lincoln .....		\$ 5,937.47

# ROLL OF PRESIDENTS

1. 1900	*Eleazer Wakely	Omaha	31. 1930	*J. L. Cleary	Grand Island
2. 1901	*William D. McHugh	Omaha	32. 1931	*Fred Shephard	Lincoln
3. 1902	*Samuel P. Davidson	Tecumseh	33. 1932	*Ben S. Baker	Omaha
4. 1903	*John L. Webster	Omaha	34. 1933	*J. J. Thomas	Seward
5. 1904	*C. B. Letton	Fairbury	35. 1934	*John J. Ledwith	Lincoln
6. 1905	*Ralph W. Breckenridge	Omaha	36. 1935	*L. B. Day	Omaha
7. 1906	*E. C. Calkins	Kearney	37. 1936	*J. G. Mothersead	Scottsbluff
8. 1907	*T. J. Mahoney	Omaha	38. 1937	*C. J. Campbell	Lincoln
9. 1908	*C. C. Flansburg	Lincoln	39. 1938	Harvey M. Johnsen	Omaha
10. 1909	*Francis A. Brogan	Omaha	40. 1939	James M. Lanigan	Greeley
11. 1910	*Charles G. Ryan	Grand Island	41. 1940	E. E. Chappell	Lincoln
12. 1911	*Benjamin F. Good	Lincoln	42. 1941	Raymond G. Young	Omaha
13. 1912	*William A. Redick	Omaha	43. 1942	Paul E. Boslaugh	Hastings
14. 1913	*John J. Halligan	North Platte	44. 1943	*Robert R. Moodie	West Point
15. 1914	*H. H. Wilson	Lincoln	45. 1944	George L. DeLacy	Omaha
16. 1915	*C. J. Smyth	Omaha	46. 1945	Virgil Falloon	Falls City
17. 1916	*John N. Dryden	Kearney	47. 1946	Paul F. Good	Lincoln
18. 1917	*F. M. Hall	Lincoln	48. 1947	Joseph T. Votava	Omaha
19. 1918	*Arthur C. Wakely	Omaha	49. 1948	Robert H. Beatty	North Platte
20. 1919	*R. E. Evans	Dakota City	50. 1949	Abel V. Shotwell	Omaha
21. 1920	*W. M. Morning	Lincoln	51. 1950	Earl J. Moyer	Madison
22. 1921	*A. G. Ellick	Omaha	52. 1951	Clarence A. Davis	Lincoln
23. 1922	*George F. Corcoran	York	53. 1952	George B. Hastings	Grant
24. 1923	*Edward P. Holmes	Lincoln	54. 1953	Laurens Williams	Omaha
25. 1924	*Fred A. Wright	Omaha	55. 1954	J. D. Cronin	O'Neill
26. 1925	*Paul Jessen	Nebraska City	56. 1955	John J. Wilson	Lincoln
27. 1926	*E. E. Good	Wahoo	57. 1956	Wilber S. Aten	Holdrege
28. 1927	*F. S. Berry	Wayne	58. 1957	Barton H. Kuhns	Omaha
29. 1928	*Robert W. Devoe	Lincoln	59. 1958	Paul L. Martin	Sidney
30. 1929	Anan Raymond	Omaha			

# ROLL OF SECRETARIES

1. 1900-06	Roscoe Pound	Lincoln	5. 1920-27	Anan Raymond	Omaha
2. 1907-08	Geo. P. Costigan, Jr.	Lincoln	6. 1928-36	Harvey Johnsen	Omaha
3. 1909	W. G. Hastings	Lincoln	7. 1937-	George H. Turner	Lincoln
4. 1910-19	A. G. Ellick	Omaha			

# ROLL OF TREASURERS

1. 1900	Samuel F. Davidson	Tecumseh	6. 1914-16	Chas. G. McDonald	Omaha
2. 1901	S. L. Geisthardt	Lincoln	7. 1917-22	Raymond M. Crossman	Omaha
3. 1902-03	Charles A. Goss	Omaha	8. 1923-37	Virgil J. Haggard	Omaha
4. 1904-05	Roscoe Pound	Lincoln	9. 1938-	George H. Turner	Lincoln
5. 1906-13	A. G. Ellick	Omaha			

# ROLL OF EXECUTIVE COUNCIL

1. 1900-04	R. W. Breckenridge	Omaha	28. 1919-22	Geo. F. Corcoran	York
2. 1900-08	Andrew J. Sawyer	Lincoln	29. 1919-20	L. A. Flansburg	Lincoln
3. 1900-02	Edmund H. Hinshaw	Fairbury	30. 1920-20	W. M. Morning	Lincoln
4. 1903-06	W. H. Kelligar	Auburn	31. 1920-27	Anan Raymond	Omaha
5. 1904-07	John N. Dryden	Kearney	32. 1921-21	Alfred G. Ellick	Omaha
6. 1905-08	F. A. Brogan	Omaha	33. 1921-23	Guy C. Chambers	Lincoln
7. 1907-10	S. P. Davidson	Tecumseh	34. 1922-24	James R. Rodman	Kimball
8. 1908-09	W. T. Wilcox	North Platte	35. 1923-26	E. E. Good	Wahoo
9. 1909-11	R. W. Breckenridge	Omaha	36. 1924-26	Robert W. Devoe	Lincoln
10. 1910-12	Frank H. Woods	Lincoln	37. 1924-24	Fred A. Wright	Omaha
11. 1910-10	Charles G. Ryan	Grand Island	38. 1925-28	Paul Jessen	Nebraska City
12. 1910-19	Alfred G. Ellick	Omaha	39. 1925-27	Clinton Brome	Omaha
13. 1911-13	John A. Ehrhardt	Stanton	40. 1927-29	Charles E. Matson	Lincoln
14. 1911-11	Benjamin F. Good	Lincoln	41. 1927-28	Fred S. Berry	Wayne
15. 1912-15	C. J. Smyth	Omaha	42. 1928-29	Robert W. Devoe	Lincoln
16. 1912-12	William A. Redick	Omaha	43. 1928-30	T. J. McGuire	Omaha
17. 1913-15	W. M. Morning	Lincoln	44. 1928-34	Harvey Johnsen	Omaha
18. 1913-16	J. J. Halligan	North Platte	45. 1929-31	E. A. Coufal	David City
19. 1914-14	H. H. Wilson	Lincoln	46. 1929-29	Anan Raymond	Omaha
20. 1915-17	Edwin E. Squires	Broken Bow	47. 1930-32	Paul E. Boslaugh	Hastings
21. 1916-16	John N. Dryden	Kearney	48. 1930-30	J. L. Cleary	Grand Island
22. 1916-17	Frederick Shepherd	Lincoln	49. 1931-31	W. C. Dorsey	Omaha
23. 1917-17	Frank M. Hall	Lincoln	50. 1931-31	Fred Shephard	Lincoln
24. 1917-18	Anan Raymond	Omaha	51. 1932-34	Richard Stout	Lincoln
25. 1918-18	A. C. Wakely	Omaha	52. 1931-32	Ben S. Baker	Omaha
26. 1918-22	Fred A. Wright	Omaha	53. 1933-35	Barlow F. Nye	Kearney
27. 1919-19	R. E. Evans	Dakota City	54. 1933-33	J. J. Thomas	Seward
			55. 1934-36	Chas. F. McLaughlin	Omaha
			56. 1934-34	John J. Ledwith	Lincoln

\* Deceased

57. 1935-35	L. B. Day	Omaha	99. 1946-48	Paul F. Good	Lincoln
58. 1935-37	James M. Lanigan	Greeley	100. 1947-48	Joseph T. Votava	Omaha
59. 1935-38	H. J. Requarte	Lincoln	101. 1947-48	John E. Dougherty	York
60. 1935-38	Raymond M. Crossman		102. 1947-55	Lyle E. Jackson	Neligh
		Omaha	103. 1948-49	Robert H. Beatty	
61. 1935-40	F. H. Pollock	Stanton			North Platte
62. 1935-41	T. J. Keenan	Geneva	104. 1947-50	Frank D. Williams	Lincoln
63. 1935-39	Walter D. James	McCook	105. 1947-50	Thomas J. Keenan	Geneva
64. 1935-37	Roland V. Rodman	Kimball	106. 1948-51	Laurens Williams	Omaha
65. 1936-36	J. G. Mothersead	Scottsbluff	107. 1949-51	Joseph H. McGroarty	Omaha
66. 1936-36	James L. Brown	Lincoln	108. 1949-54	Wilber S. Aten	Holdrege
67. 1937-39	David A. Fitch	Omaha	109. 1948-49	Abel V. Shotwell	Omaha
68. 1937-39	Raymond G. Young	Omaha	110. 1949-55	Paul L. Martin	Sidney
69. 1937-41	M. M. Maupin	North Platte	111. 1949-55	Joseph C. Tye	Kearney
70. 1937-41	Golden P. Kratz	Sidney	112. 1949-51	Earl J. Moyer	Madison
71. 1938-42	Sterling F. Mutz	Lincoln	113. 1950-	Harry A. Spencer	Lincoln
72. 1938-42	Don W. Stewart	Lincoln	114. 1950-56	Paul P. Chaney	Falls City
73. 1940-46	George N. Mecham	Omaha	115. 1950-	Paul Bek	Seward
74. 1940-42	Abel V. Shotwell	Omaha	116. 1950-52	Clarence A. Davis	Lincoln
75. 1940-42	Frank M. Colfer	McCook	117. 1951-55	Barton H. Kuhns	Omaha
76. 1941-43	Virgil Falloon	Falls City	118. 1952-57	Thomas C. Quinlan	Omaha
77. 1941-43	Joseph C. Tye	Kearney	119. 1951-52	George B. Hastings	Grant
78. 1941-47	Earl J. Moyer	Madison	120. 1952-53	Laurens Williams	Omaha
79. 1937-37	C. J. Campbell	Lincoln	121. 1953-54	J. D. Cronin	O'Neill
80. 1938-38	Harvey Johnsen	Omaha	122. 1954-57	Norris Chadderdon	Holdrege
81. 1939-39	James M. Lanigan	Greeley	123. 1954-56	John J. Wilson	Lincoln
82. 1940-40	E. B. Chappell	Lincoln	124. 1955-56	Wilber S. Aten	Holdrege
83. 1942-45	Fred J. Cassidy	Lincoln	125. 1955-58	F. M. Deutsch	Norfolk
84. 1941-41	Raymond G. Young	Omaha	126. 1955-	Clarence E. Haley	Hartington
85. 1942-48	Max G. Towle	Lincoln	127. 1955-58	R. R. Wellington	Crawford
86. 1942-42	Paul E. Boslaugh	Hastings	128. 1955-	Alfred G. Ellick	Omaha
87. 1942-45	John E. Dougherty	York	129. 1954-55	Jean B. Cain	Falls City
88. 1942-49	Yale C. Holland	Omaha	130. 1955-57	Hale McCown	Beatrice
89. 1943-45	Robert R. Moodie	West Point	131. 1956-	C. Russell Mattson	Lincoln
90. 1941-45	B. F. Butler	Cambridge	132. 1956-58	Barton H. Kuhns	Omaha
91. 1943-46	Frank M. Johnson	Lexington	133. 1957-	Paul L. Martin	Sidney
92. 1944-49	Floyd E. Wright	Scottsbluff	134. 1957-	Richard E. Hunter	Hastings
93. 1945-50	John J. Wilson	Lincoln	135. 1957-	John R. Fike	Omaha
94. 1945-48	Robert B. Waring	Geneva	136. 1957-	Thomas F. Colfer	McCook
95. 1944-46	George L. DeLacy	Omaha	137. 1958-	William H. Lamme	Fremont
96. 1945-47	Virgil Falloon	Falls City	138. 1958-	Carl G. Humphrey	Mullen
97. 1945-49	Leon Samuelson	Franklin	139. 1958-	Joseph C. Tye	Kearney
98. 1946-48	Harry W. Shackelford				
		Omaha			