

1957

## Proceedings of the Nebraska State Bar Association House of Delegates Meeting, 1957

Barton H. Kuhns

*Nebraska State Bar Association*

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PRESIDENT BARTON H. KUHNS

1957 OFFICERS OF THE  
NEBRASKA STATE BAR ASSOCIATION

*President*

BARTON H. KUHNS

Omaha

*Chairman of the House of Delegates*

HALE McCOWN

Beatrice

*Secretary-Treasurer*

GEORGE H. TURNER

Lincoln

**EXECUTIVE COUNCIL**

Barton H. Kuhns.....	Omaha
Wilber S. Aten.....	Holdrege
Paul H. Bek.....	Seward
Norris Chadderdon .....	Holdrege
Frederick M. Deutsch.....	Norfolk
Alfred G. Ellick.....	Omaha
Clarence E. Haley.....	Hartington
Hale McCown .....	Beatrice
C. Russell Mattson.....	Lincoln
Thomas C. Quinlan.....	Omaha
Harry A. Spencer.....	Lincoln
Robert R. Wellington.....	Crawford

**HOUSE OF DELEGATES**

**EXECUTIVE COUNCIL MEMBERS**

Barton H. Kuhns.....	Omaha
Wilber S. Aten.....	Holdrege
Paul H. Bek.....	Seward
Norris Chadderdon .....	Holdrege
Frederick M. Deutsch.....	Norfolk
Alfred G. Ellick.....	Omaha
Clarence E. Haley.....	Hartington
C. Russell Mattson.....	Lincoln

Thomas C. Quinlan.....Omaha  
 Harry A. Spencer.....Lincoln  
 Robert R. Wellington.....Crawford

SECTION DELEGATES

Herman Ginsburg .....Lincoln  
 Floyd E. Wright.....Scottsbluff  
 Thomas M. Davies.....Lincoln  
 George A. Healey.....Lincoln  
 Jack M. Pace.....Lincoln  
 Edmund D. McEachen.....Omaha

EX-OFFICIO MEMBERS

Clarence A. Davis.....Lincoln  
 John J. Wilson.....Lincoln

ELECTED DELEGATES

FIRST DISTRICT

Frank A. Hebenstreit.....Falls City

SECOND DISTRICT

T. Simpson Morton.....Nebraska City

THIRD DISTRICT

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

FOURTH DISTRICT

George B. Boland.....Omaha  
 Edwin Cassem .....Omaha  
 Harry B. Cohen.....Omaha  
 Oscar T. Doerr.....Omaha  
 Robert G. Fraser.....Omaha  
 James F. Green.....Omaha  
 Daniel J. Gross.....Omaha  
 Ralph E. Svoboda.....Omaha  
 Joseph T. Votava.....Omaha

FIFTH DISTRICT

Phil B. Campbell.....Osceola  
 Maynard Grosshans .....York

SIXTH DISTRICT

Edward Asche .....Schuyler  
 Charles H. Yost.....Fremont

SEVENTH DISTRICT

Clarence C. Kunc.....Wilber

EIGHTH DISTRICT

Rodney R. Smith.....So. Sioux City

NINTH DISTRICT

Ralph S. Kryger.....Neligh

Donald D. Mapes.....Norfolk

TENTH DISTRICT

Howard S. Foe.....Red Cloud

Richard E. Hunter.....Hastings

ELEVENTH DISTRICT

Arthur O. Auserod.....Bartlett

Ernest A. Condracek.....Greeley

TWELFTH DISTRICT

Merle M. Runyan.....Broken Bow

THIRTEENTH DISTRICT

Milton C. Murphy.....North Platte

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

FOURTEENTH DISTRICT

Charles E. McCarl.....McCook

FIFTEENTH DISTRICT

William L. Brennan.....Butte

SIXTEENTH DISTRICT

W. E. Mumby.....Harrison

SEVENTEENTH DISTRICT

Robert J. Bulger.....Bridgeport

EIGHTEENTH DISTRICT

Hale McCown .....Beatrice

**NEBRASKA STATE BAR ASSOCIATION**  
**MEETING OF THE HOUSE OF DELEGATES**

**OCTOBER 30, 1957**

The House of Delegates was called to order at Hotel Paxton, Omaha, Nebraska, at 9:30 A.M. by Chairman Hale McCown, of Beatrice.

CHAIRMAN McCOWN: Gentlemen, we will come to order, please.

We will call the Annual Session of the House of Delegates of the Nebraska Bar Association open.

The first order of business is the roll call. The Secretary will call the roll.

(Roll call by Secretary Turner.)

SECRETARY TURNER: Quorum present, Mr. Chairman.

CHAIRMAN McCOWN: There being a quorum present, the first item of business is the adoption of the calendar as the order of business. I will take the responsibility for having assisted the Secretary in preparing the calendar and I think it is the correct order of business.

I will ask for a motion approving the calendar as the order of business.

VOICE: I so move.

CHAIRMAN McCOWN: Is there a second?

VOICE: Second.

CHAIRMAN McCOWN: It has been moved and seconded that the calendar be adopted. All in favor say "aye."

Opposed, the same. The motion is carried.

At this time I would like to announce the membership of the Committee on Resolutions. Further instructions will be forthcoming on the calendar as we reach the Resolutions Section.

I will ask Mr. Svoboda if he will act as Chairman of the Committee on Resolutions and Mr. Hunter and Mr. Pierson as members of the Resolutions Committee.

Next item on our calendar is the statement by the President of the Association, Barton Kuhns. Bart.

PRESIDENT KUHNS: Members of the House, I think the occasion for this statement by the President is to bring the members of the House up-to-date on the activities of the Executive Council and the accomplishments of the Association through the year, plus some suggestions which the President might wish to make to the House.

First, I might say there have been four meetings of the Executive Council since our last annual meeting. I want to discuss in just a moment the recommendations which have been made by the Executive Council, and which I think should be formalized by this House at this time. However, before I do that, let me comment on the fact that during the past year there have been three principal activities that are probably the direct result of action taken by the House, as far as the details are concerned.

First, I would call your attention to the Institute Programs which we have had throughout the year. The Executive Council is charged with the responsibility of arranging those institutes in cooperation with the sections, and the particular job was delegated to the Secretary and myself.

I think we have had a splendid number of institutes this year. We had the usual traveling institute on taxation last December; last spring we had an institute here at the Paxton on Practice and Procedure, followed by a half-day institute on Labor Law. Then we had our customary bi-annual institute on New Legislation, which was originated in 1949.

Then there was the institute on Business Law and the Law of Business at Creighton University, and I do want to say that I think that the cooperation of the law schools in the state in these institute programs is quite important. They are programs of continuing legal education, and it has always seemed to me that there should be some tie-in between the institutes conducted by the Bar Association and the law schools.

You may remember that one of the recommendations made last year was that the law schools be invited to participate in the institute programs, and that has been done.

And then we had a very splendid institute down at the University of Nebraska Law School, just a few weeks ago, on condemnation.

I think you will be interested in the fact that the institutes for which there was any comparable institute in preceding years had a much larger attendance this year than ever before, both numerically, and we keep a roll of the registrations at the institute by

places, and sometimes I think that it is interesting to observe the actual dollar saving by the lawyers who are, for example, in the central and western part of the state, who otherwise might have to drive to Omaha, when we take the institutes across the state.

I am heartily in favor of continuing to do that as long as it is reasonably possible.

The second accomplishment this year was this lawyer's desk book, which I think is a very splendid thing. I do want to say, although it has been mentioned in our Bar Journals before, that we are deeply thankful to the six corporate fiduciaries, three banks in Omaha and two banks and the First Trust Company in Lincoln, whose contribution made that lawyer's desk book possible. Actually, and these figures have not been too widely publicized, they contributed a total of twenty-five hundred dollars prorated according to their own plan among themselves to make possible that lawyer's desk book. It has the Title Standards and Rules of the Supreme Court and Notes and Forms in it, but the important thing to me about that desk book, in addition to its convenience and nice appearance, is that, I think, it provides an unlimited means of distributing useful information and material to the lawyers of the state.

My thought is that such things as, for example, the outline that is presented at the Tax Institute might very well be printed on paper which can be fitted into that notebook. It has been suggested that the rules of the Federal District Court should go into that desk book, and when the standardized instructions to juries are ready, that should go in that desk book. There are two limits on what can go into that lawyer's desk book. One is the size of the binder.

Another limit is the expense, because there is quite a little printing expense to some of the things that would go into them.

Then I would call your attention to the fact also that it is not necessary that all of the contents of those desk books be statewide. For example, the Central Nebraska Bar Association is planning or perhaps already has, I am not sure, printed its minimum fee schedule on paper that will fit right into that book.

The reason I emphasize that, is I think it would be helpful to the Association for the members of the House and the lawyers generally to be giving some thought as to just what is the most practical thing to put into that lawyer's desk book, and make the suggestion to next year's officers, for, as time goes on, I think it will be a very helpful thing. While I can not say it did not cost the Association a cent, because the twenty-five hundred dollars



did not cover the full expense of distributing the desk book and printing of the material, nevertheless it went a long, long way in covering it.

I have written letters of appreciation to each of the contributors on behalf of the Association, and I just think that you should know the source of the funds for that desk book.

Then there is one other matter, which was authorized by the House last year and which has been followed through, and that is this matter of group insurance.

You remember that at the time the House met last year, legislative action was required in order to make possible a group insurance policy for professional organizations such as ours, and this House last year directed the Committee, which had been appointed a short time before the meeting of the House, in cooperation with the Committee on Legislation to try to effect an amendment to our laws so as to permit the writing of this kind of insurance, and then upon inquiry made in the House, the motion was expanded and clarified to authorize the Executive Council and the officers of the Association, if favorable legislation was passed, to proceed with the arranging for a group insurance policy.

That has been done; there is a report on it later on in the program today, but I do not want to single out any particular committee for comment, except I do want to assure you that not only in the legislative process, but starting immediately after that bill was signed, this Committee got busy and contacted every insurance company that was thought to have any possibility of being interested, and they have had I do not know how many meetings and conferences, working out as favorable a policy as could be worked out.

Then on October 5th of this year, the Committee came before the Executive Council, having sifted down the possible policies to four, and we came up with the John Hancock Company as being the best and most favorable policy.

You will hear more about that during the course of the meeting, but I wanted to say that to bring you up-to-date.

Referring back now to the matters I mentioned that have been under consideration by the Executive Council. Under our organization the Executive Council has what is called legislative powers during the interim between annual meetings and meetings of the House of Delegates, and I think that is primarily to keep the affairs of the Association running. I do not know of any formal interpretation of this, but I question very much whether the Executive Council should take any action for the appointment of committees

that might have duties extending over the year without bringing them to the attention of the House. This might perhaps properly come under the category of new business, but I think that it would be in order perhaps now to ask your approval.

There are four committees which the Executive Council authorized, with the provision that the committees report back to the Executive Council. Now the Executive Council did not meet again after that action except for a special meeting which was only in connection with this group life insurance policy, but there are four committees that, I think, will probably have an extended amount of work, if you will approve, which I believe should bring in reports to this House a year hence. I will tell you what they are, and then either in toto or separately, as the Chairman sees fit, I would like to suggest that the House direct the continuation of the appointment of new committees. I think appointment of the committees would be best, on the subject matters.

One is the question of a possible state-wide minimum fee schedule, or, as I would prefer to call it, a state-wide advisory minimum fee schedule. There is quite a little agitation about that matter, and my thought would be that the committee should at least investigate the feasibility of it, and perhaps make suggestions as to what items might be included, and perhaps go farther if it sees fit. Certainly nothing like that should ever carry the sanction of the Association until it has the approval of the House of Delegates.

The second is one that perhaps may seem a little strange. I think it is not and perhaps I can pretty well justify my observation by some recent information on it, and that is a special committee on atomic energy law. That is something that the American Bar Association has been urging the state bar associations to do. During the past year Dean Stasson of the University of Michigan Law School has headed up a committee of the American Bar Association, and one of their duties has been to encourage the appointment by state bar associations of such committees.

Now I learned when I was out at a meeting of the Colorado Bar Association that they do have such a committee, and there are innumerable problems involving states rights as against federal rights in the field of atomic energy. There are problems of safety factors, police powers, questions of warehousing, equipment that is used in connection with it, perhaps some regulation of zoning. It is just amazing the number of subject matters that properly fall within this field, and it is the thought and intent of Dean Stasson's committee not to let these state laws grow up in a hodgepodge fashion, but to really prepare and study and have the subject mat-

ter receive the consideration of the lawyers before legislation gets introduced that does not adequately meet the situation. That is the second committee.

The third committee is a Bar Examination Standards Committee, which would be authorized to examine the question of Bar Association standards with the possibility of creating some uniformity with respect to those standards and to work principally in connection with the National Conference of Bar Examiners.

The fourth one is somewhat of a pet of mine. I cannot give you any outside source for it, and I have not such great pride of authorship that I will be offended if you do not go along with it, but it seems to me as if it is high time that the Association had a special committee that will make a very special study of our present corporation law. Not a hasty study. I do not know what the committee might come up with; maybe we can not improve on it in any way, but it seems to me that hardly a week goes by but some lawyers encounter some difficult problems in connection with our present Nebraska Corporation Law, and while the present law is a result of efforts made and recommendations submitted by a committee of this Association back in 1941, and I am not finding any fault with the work of that committee, I just think it would bear examination.

Those are the four committees.

I do have just a little more that I want to say, but would it be in order, Mr. Chairman, to move that the House of Delegates approve the appointment of the special committees on these four subject matters? Or if you want to discuss them separately, I will make four separate motions.

CHAIRMAN McCOWN: Unless there is a desire expressed to have them considered separately, I think that the motion should probably be that the House recommends to the incoming President of the Association the appointment of the committees on these four subjects.

VOICE: Would that be special committees for this next year or two or more standing committees?

PRESIDENT KUHNS: I thought special committees, and they could be continued.

CHAIRMAN McCOWN: Let us put it this way: the motion will be that this House recommend to the incoming President of the Association the appointment of special committees on (1) advisory state minimum fee schedules; (2) atomic energy law; (3) standard bar examinations; and (4) corporation law.

I will consider such a motion to have been made by Mr. Kuhns. Is there a second?

VOICE: I will second that.

CHAIRMAN McCOWN: As many as favor the motion say "aye."

Opposed the same.

The motion is carried.

PRESIDENT KUHNS: Now I want to include in my statement just two other points, and they are included in my remarks that I will be making tomorrow also.

These are matters which I think should receive the careful consideration of the lawyers of the state, particularly of the House of Delegates. I do not go so far as to make any recommendation even to a point of appointment of committees now, because one of the points would involve a change in our rules, and I am very reluctant to put ourselves in the position of going down to the Supreme Court every time somebody has an idea, although there are plenty of available ideas on how our organization might be improved. I think we should proceed with considerable caution and collect all of our thoughts and collect them well before we ask the Supreme Court to change the rules.

But my suggestion is this—it has been mentioned before, but it is impressed upon me terrifically—that it would be desirable in the Association to provide at least a short line of succession to the presidency of the Association. As we are now set up, not until just a comparatively short time before the annual meeting does any person know whether or not he is even under consideration as a possible president of the Association. I think it would be desirable and an improvement in the organization if we had some line of succession.

Now it requires quite a little thought. As you know, we have no vice-president; our only officers are the President, the Chairman of the House and the Secretary and Treasurer. The Chairman of the House is chosen for a two-year term, and I think that is desirable. Perhaps we should have a President-elect.

I will say this: during the past year I considered it one of my duties to attend and I very faithfully attended the State Bar Association meetings in South Dakota, Iowa, Missouri, Kansas and Colorado. In Missouri and South Dakota, the associations are integrated. The others are not, and in each one of those they either have a President-elect, who takes office one year before he becomes President, or they have a provision in their organization whereby

a First Vice-President succeeds to the presidency in the ensuing year.

I think that this Bar Association with its educational program and things in which we have become interested has been getting into the field of big business. I really believe that a better job could be done by the officers if they were in close touch with the program a year ahead.

Now as I say, that is just something to think about.

The other matter which deserves some thought is this. We are the only one of these associations that I speak of, and I think there are probably not any other associations in the country, that is able to put on the institutes which we do without any registration fee or any charge for the institutes.

Now I realize that it would be very unpopular with the membership to commence charging for these institutes. I do not think we need to do so now, but just as a matter of knowledge on your part and understanding of the facts of life and the conduct of the Bar Association activities elsewhere, I thought you should know that most of the Bar Associations in our surrounding states, and I believe it is practically a nation-wide practice, charge a registration fee. It varies in amounts to cover the expense of the institute meetings. It ranges from five to fifteen dollars.

As I say, I think that the suggestion would not meet with favor right now, but I think it is something to think about, and the reason I say it is because it is part of the job of the President of the Association to watch the finances of the Association.

The Secretary submits a monthly report of receipts and disbursements, and the quarterly reports are approved by the Executive Council. I have compared our budget and our expenditures with the expenditures of other associations, and frankly the reason that we are able to get along the way we do get along is because under our rules the Clerk of the Supreme Court is our Secretary and Treasurer.

If we were to allocate as much from our budget as other bar associations do to have what you might call professional secretaries, and believe me I am not suggesting that they do half as good a job as we get done here, we would find that is where the gap is, and that is where we effect a saving.

Now I just think that the members of the House of Delegates ought to know that if it were not for the way in which we operate and for the fact that we get through the services of the Clerk of the Supreme Court, who by virtue of the rules is Secretary of the Association, a tremendous amount of secretarial, not stenographic,

but executive secretarial service to the Association. If we were paying anybody else to do that, if anything happened to George Turner so that we did not have a Clerk who was as efficient in Bar Association matters, we would have a problem.

And I think the way in which it is solved elsewhere and the way it comes about is by reason of the charges that are made for the institutes.

So I think it is well that the House of Delegates should know those circumstances as part of the facts of life. As I say, I would be opposed to taking any formal action on them, but I certainly would be in favor of giving them a good deal of thought over the next couple of years.

That completes my statement. Thank you.

CHAIRMAN McCOWN: Thank you very much, Bart.

In view of the fact that one suggestion by Mr. Kuhns with respect to the succession of the officers of the Association needs to be adopted by the majority of the members of the House of Delegates, is there any desire on your part that the Chairman appoint a special by-laws committee to consider the matter and make specific recommendations at the meeting on Friday for a consideration either at that time or for further consideration at a later meeting?

VOICE: I so move, Mr. Chairman.

CHAIRMAN McCOWN: There is a motion that the Chairman appoint a committee with respect to the by-law changes suggested by President Kuhns in connection with the succession of the officers of the Association to report to the House on Friday. Is there a second?

VOICE: I second the motion.

CHAIRMAN McCOWN: Is there further discussion?

HARRY B. COHEN: Mr. Chairman, do you not think that Friday is a little too early for a report and final adoption? You know what happens on the last afternoon of the Association meetings. I have seen occasions where the secretary has to go out and call some of the members to make a quorum. I think this committee ought not report Friday but between now and the next session, which would give time for publication and publicity.

CHAIRMAN McCOWN: I had two ideas in mind. I do not of necessity mean that we are going to take official action on Friday, although if the House deemed it appropriate they could, of course. I thought that probably in a change of this sort the House might want to circularize its members, perhaps even calling for

a vote on the subject, but I did feel that if we had some specific language by the Committee by Friday it could be determined what action you wanted to take further at that time.

Now while I recognize that in the past we have not had everyone here on Friday, I hope at least this year all of you will be back here.

I might add right now that I hope each member here today will be back here Friday. Last year I made the same remark and most of you got back. But we still need you all back on Friday.

Is there further discussion?

CHAIRMAN McCOWN: As many as favor the motion say "aye."

Opposed the same.

The motion is carried.

I will appoint as Chairman of that Committee Bart Kuhns, with Tom Quinlan and Charles Yost as the other two members, with the suggestion that if they have specific language or specific changes to recommend or any other recommendations, that they simply be presented to the House on Friday.

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

SECRETARY TURNER: Mr. Chairman, the books of the Association have been audited by the firm of Peat, Marwick, Mitchell and Company—they are the successors to Martin and Martin, who have done our auditing for so many years—in Lincoln, covering the period from the audit of 1956 up and to the 30th day of September, '57.

We always close the books at the beginning of the month in which the annual meeting is held.

Their report is: "We have examined the statement of cash receipts and disbursements of the Nebraska State Bar Association for the year ended September 30, 1957. Our examination was made in accordance with generally accepted auditing standards and accordingly included such tests of the accounting records and other auditing procedures as we considered necessary in the circumstances.

"The accounts of the Association reported on herein are maintained on the cash receipts and disbursement basis of accounting. In our opinion the accompanying statement of cash receipts and disbursements of the Nebraska State Bar Association presents fairly the recorded cash transactions for the year ended September 30, 1957, in conformity with generally accepted accounting principles,

applied on the cash basis consistent with that for the preceding period.”

Then they proceed to analyze the receipts of the Association during the year.

As you know, the principal source of receipts is the dues of the members. Our total receipts, including interest and the sale of equipment, were \$43,429.64. The principal items of disbursement, salaries and payroll taxes, \$6,371.35; printing and stationery, \$819.71; office supplies and expense, \$835.08; telephone and telegraph, \$308.99; postage and express, \$1,147.28; publication of the Directory, \$938.20; officers' expenses, \$684.97; expenses of the Executive Council Meetings, \$866.04; expense of the Judicial Council Meetings during the year, \$413.07; publication of the Nebraska Law Review, \$5,268.05; the cost of publishing the Legislative Bill Digest, \$1,681.66.

The net cost of publishing the State Bar Journal, after crediting receipts for advertising, \$820.69. The Public Service Committee, a total expenditure of \$4,947.42. And we had receipts on the sale of pamphlets and pamphlet racks in the amount of \$410.00, so the public service program had a net cost of \$4,536.82. The expense of the three delegates representing Nebraska in the House of Delegates of the American Bar Association, \$2,253.48; the cost of the Annual Meeting, net, after crediting rental for exhibit space and the tickets sold and so forth, \$4,489.25; and various committees running from \$100.00 to about \$300.00 total. The Practice and Procedure Institute, \$1,154.36; the Business Law Institute, \$563.24, but incidentally that is not complete because I do not have yet the expense of one of the speakers sent to us by the American Law Institute; Institute on Condemnation, \$39.90, which does not include the cost of printing; the Annual Tax Institute, \$2,435.11; the Institute on New Legislation, \$1,285.24.

Bonds purchased, \$2,000.00. If you will recall, it was the recommendation of the Budget Committee last year and approved by the House that an additional \$2,000.00 of Association funds be invested in bonds, which now makes a total of \$4,000.00 in government bonds.

The cost of auditing \$175.00, the cost of insurance \$67.00, and we advanced the full amount for the desk book which was \$4,140.62. Since the close of the audit, the fiduciary companies which Bart mentioned have paid to the Association \$2,500.00. So the net cost to the lawyers of Nebraska for the desk book was \$1,600.00.

The auditors show a cash balance at the end of this Association year of \$3,293.52, which has been verified by checking deposits in the two banks in Lincoln.



CHAIRMAN McCOWN: Thank you, George.

I will entertain a motion that the Secretary's report be accepted and placed on file.

C. RUSSELL MATTSON: I so move.

CHAIRMAN McCOWN: Is there a second?

VOICE: Second.

CHAIRMAN McCOWN: Any discussion?

As many as favor the motion say "aye."

Opposed the same.

The motion is carried.

At this time the place has been reached for the introduction of resolutions.

For the benefit of those of you who may have come in a bit late, the Chairman of the Committee on Resolutions is Ralph Svoboda; Richard Hunter and Barney Pierson are the other two members. Resolutions will not be discussed at this time or until the report of the Committee on Resolutions is received, which you will note is the last item of business on today's program.

The Committee will meet at one o'clock in Room 812, and anyone having any additional resolutions which you wish to present to the Committee for later presentation to the House may be presented and discussed with the Committee at that time.

Are there resolutions to be introduced?

MR. VOTAVA: I have a resolution that I would like to have introduced.

CHAIRMAN McCOWN: Mr. Votava.

MR. VOTAVA: Is that to be read, or —

CHAIRMAN McCOWN: If you will, please, simply hand it to the Chairman of the Resolutions Committee, Mr. Svoboda.

Are there any other resolutions to be introduced?

If not, we will proceed to the next order of business on the calendar, and before proceeding, may I make a suggestion?

In order to expedite the work of this House, may I suggest that where the reports of the Committees have been printed in full, the Chairman if possible summarize the reports with particular reference of course to any specific recommendations that may be made in the reports.

First is the report of the Committee on Administrative Agencies, Mr. Tracy J. Peycke, and you will find the report on page 16 of your program.

TRACY J. PEYCKE: Mr. Chairman, I think I can summarize in a very few words what the report deals with. You will recall that last year this House approved an administrative procedure act which had been recommended by the similar committee.

That Act was embodied in a bill, which was introduced in the Legislature, passed by the Legislature without any particular controversy, but vetoed by the Governor.

The report of the Committee last year said that the Legislative Council had under consideration a provision for Uniform Review of the Orders of Administrative Agencies, and there was a possibility that that provision might be combined with this bill, and that happened.

It was to that particular part of the bill that the Governor's objections were directed. In particular he objected to the provision which was introduced to the effect that not only a new and uniform procedure for the review of administrative orders be enacted, but that all existing methods of appeal or review be preserved. And it was that duplication that drew the veto.

The Governor undoubtedly has a point in connection with that.

Our Committee thinks that this whole subject of review needs a good going over, and consequently our recommendation is that this Special Committee be continued in order to give consideration to 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.

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

CHAIRMAN McCOWN: Is there a second?

VOICE: Second.

CHAIRMAN McCOWN: Any discussion?

As many as favor the motion say "aye." Opposed the same sign. The motion is carried.

The formal report of the Committee follows:

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

This Committee was continued the past year "in order to further the program of obtaining an Administrative Procedure Act for Nebraska." With its report in 1956, the Committee submitted a draft of bill which had been adapted from the Model Act.

The Committee's report in 1956 pointed out that the Legislative

Council was considering legislation for uniform procedures for appellate review of administrative action. The report indicated that provisions of this kind might be incorporated in the proposed bill.

L. B. 133 was introduced and was the draft as submitted with the 1956 report, except for very minor changes and with a section added (Section 9) providing a new procedure for judicial review of administrative decisions in contested cases. This section, however, included a clause preserving all existing "means of review, redress, or relief by law."

The bill was passed by the Legislature without opposition but was vetoed by the Governor. In his veto message, the Governor wrote:

I am returning the bill for the following reasons:

- (1) L. B. 133 purports to create uniformity in the procedure of the administrative agencies of the State. In fact, it simply creates an additional administrative procedure.
- (2) It is my belief that uniformity in this field is greatly to be desired. In my opinion, however, L. B. 133 does not give the State of Nebraska this uniformity and therefore I feel this matter should have further study and consideration.

This occurred on the last day of the session and nothing further was done.

The Governor raises a serious question as to the desirability of providing in all cases a new *and additional* review procedure. At the same time, it is not entirely obvious that a new and uniform procedure such as that proposed is suitable for all cases and all agencies.

The Committee feels that this question of review procedures deserves much more consideration. If it remains subject to serious doubts, important improvements in agency procedure should not be held in abeyance by arguments as to methods of review.

*It is recommended that this Special Committee be continued in order to give consideration to 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.*

Tracy J. Peycke, Chairman  
Chas. F. Bongardt  
James D. Conway  
Bert L. Overcash  
Joseph C. Tye

CHAIRMAN McCOWN: The next item of business is the report of the Committee on Budget and Finance, Mr. Warren Johnson, Chairman:

WARREN JOHNSON: Mr. Chairman, members of the House of Delegates. You have heard the report of the Treasurer of the Association and know that the financial accounts of the corporation have been audited. The Committee has reviewed this audit and finds that the financial affairs of the Association have, as in the past, been well managed by the capable Treasurer.

We have nothing to add to the report of the Treasurer, other than I would like to point out one thing that he did not mention.

The receipts of the Association for the calendar fiscal year show \$43,429.64, the disbursements are shown as \$45,483.64, showing an excess of disbursements over receipts in the sum of some \$2,054.00. This, however, does not mean that the Association operated in the red, because of the disbursements, \$2,000.00 of listed disbursements was for the purchase of bonds, which are an asset of the Association and are also reimbursable items as follows: football tickets, \$119.25, reimbursement for desk book, \$2,500.00, which the Treasurer says has already been received, and reimbursement of other items in the sum of \$268.00, making a total reimbursable items \$2,887.25.

So actually the expenses of the Association for the calendar year are \$4,487.25 less than shown.

And there is \$4,000.00 in United States government bonds, cash in the bank as of the end of the period of \$3,293.52.

The Committee has two recommendations. One, that the audit report be received and approved; and secondly, that the surplus funds of the Association as they become available be invested in United States government obligations.

Mr. Chairman, I so move.

CHAIRMAN McCOWN: If I am correct the Executive Council has the authority to approve the investment and budget. I believe, if I may with your permission, Warren, I will change that to read that the House recommends to the Executive Council the investment of any surplus funds in U.S. government bonds. Is that satisfactory?

MR. JOHNSON: Yes, sir.

CHAIRMAN McCOWN: Is there a second?

VOICE: Second.

CHAIRMAN McCOWN: Is there any further discussion?

As many as favor the motion say "aye."

Opposed, the same.

The motion is carried.

The next item of business is the report of the Committee on Cooperation with the American Law Institute, and in this connection I will make that report as Chairman of that particular committee.

I think all of you are aware for a number of years this Association has paid the expenses of one delegate to the American Law Institute Meeting. I am sure you are all familiar with the work on the restatement of model codes and all the other work of the American Institute.

The recommendation of the Committee is that this Association be represented at the next annual meeting of the Institute, and that the expenses of the delegate be paid by this Association.

I will now move that the report of the Committee be approved.

JUDGE SPENCER: I second the motion.

CHAIRMAN McCOWN: Is there further discussion?

As many as favor the motion say "aye."

Opposed, the same.

Motion is carried.

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 taken at the Annual Meeting in 1956, the Nebraska State Bar Association was represented at the Annual Meeting of the American Law Institute held in Washington, D. C. May 22-25.

It is deemed unnecessary to review or outline the many discussions, reports and actions of the Institute at the Annual Meeting. The members of the Nebraska State Bar Association are, we believe, conversant with the work of the American Law Institute in connection with the restatements, various model codes and the many invaluable publications and activities of the American Law Institute. Neither time nor space limitations will permit the more accurate and specific outlining of the many useful and scholarly contributions of the Institute toward the development of the law for the advantage of the public as well as the profession.

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.

*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 McCOWN: The next item is the report of the Committee on Crime and Delinquency Prevention, Mr. James F. Brogan, Esquire. You will find the report of the Committee on page 28 of your programs.

MR. BROGAN: Mr. Chairman, and members of the House of Delegates. Before going ahead with this report, I would like to state that the name of Elmer Scheele should be deleted from the members of the Committee approving of the report, and he specifically asks that he be shown as dissenting from the report.

I have a letter from Mr. Scheele stating his reasons, which, if you wish to hear, I will be glad to read.

This is a majority report.

First of all, during this past year the Nebraska Legislature enacted into law a probation law, which is now getting into operation over the state of Nebraska. It is something which this Committee and this Association has worked for, and it gives considerable promise of being successful.

Our first recommendation is that this particular committee continue to observe the operation of the law with an eye to suggesting any possible improvements in the operations of our new probation law.

There is nothing to go on yet because the new officers are just being appointed, and there is very little to report on along that line except it is getting into operation with the hiring of probation officers.

There are several items which this Committee has had under consideration, not just this year, but for the past two or three years. They are the compensation of county attorneys, our sex offense laws, the no-fund and insufficient-fund check laws, possible employment of a state pathologist, and the possible transfer of criminal investigation and law enforcement functions from the Department of Roads and Irrigation to the Department of Justice.

The Committee has accumulated a certain amount of information and material in its research on these items, and our second

recommendation is that the incoming committee continue to study these items, since it is not possible yet to make any specific recommendations in these fields.

The third recommendation of the Committee is this: the Committee endorses the proposed amendment to our State Constitution providing for authorization of separate juvenile courts. L.B. 124 of the 1957 Legislature provides that the amendment shall be submitted to the voters in November of 1958, and this Committee recommends—a majority of this Committee, I probably should say—recommends that the proposed juvenile court amendment receive the approval of this Association.

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

CHAIRMAN McCOWN: Mr. Brogan, in view of the lack of unanimity of the Committee on the second portion of the report, may I suggest that you make it in two portions: First, that the Committee continue the study of matters and study and observation of the new system, and, secondly, the juvenile court amendment.

With that understanding, with the first motion that the Committee be continued and that it continue to study and observe the operation on the parole system, is there a second?

MR. SVOBODÁ: Do I understand that there was no dissent on that?

MR. BROGAN: Mr. Scheele's dissent is actually limited to the third recommendation, as I understand.

CHAIRMAN McCOWN: Any further discussion?

As many as favor that motion say "aye."

Opposed, the same sign.

The motion is carried.

The Secretary advises me, and also Mr. Brogan has mentioned that he has Mr. Scheele's minority report. Before proceeding with that, the second portion of the motion is for the endorsement of the proposed amendment providing for authorization of the separate juvenile courts as contained in the recommendation of the Committee.

First, is there a second?

VOICE: Second.

CHAIRMAN McCOWN: Before asking for open discussion I will ask Mr. Brogan to read the minority report of Mr. Scheele with respect to that particular report.

MR. BROGAN: (Reading) "October 28, 1957, Mr. James F.

Brogan, Chairman, Bar Association Committee on Crime and Delinquency Prevention, Madison, Nebraska.

“Dear Sir: Reference is made to our previous correspondence concerning the recommendation contained in the Committee report with reference to LB 124. As I told you in my letter of October 23, 1957, I am somewhat dubious about the final recommendation contained in the Committee report. I know how difficult it is to get the members of a Committee such as this together for a meeting; however, I do feel that matters of the import and complications involved in LB 124 should be given their thorough and careful study before a recommendation such as that proposed should be made.

“I also feel that it would be a mistake for the Nebraska State Bar Association to take such a positive position without giving the matter more study and consideration than as yet has been afforded it.

“You state in your letter of October 24, 1957, that you had thought that this matter was completely noncontroversial and have requested that I state my objections to the proposed recommendation.

“Section 9, Article 5 of the Constitution of the State of Nebraska provides the district courts shall have both chancery and common law jurisdiction and such other jurisdiction as the Legislature may provide.

“Page 2, if LB 124 receives a majority vote of the electors in November, 1958, it will give the Legislature the authority to divest our judicial system of a vital portion of the common law and equity jurisdiction granted by the Constitution. No one can accurately predict the exact manner in which the Legislature would exercise such authority once conferred upon it, nor to whom the jurisdiction thus shorn from our courts will be given. To say glibly that such legislation is noncontroversial in view of the fact that it is merely permissive legislation does not alter the inescapable conclusion that it is a measure designed to take away from our judicial system an important function which we have successfully entrusted to our courts in the past.

“If the members of the Nebraska State Bar Association wish publicly to recommend to the electors that our courts are no longer worthy to exercise jurisdiction in this area previously conferred by the Constitution and that as lawyers we wish instead to entrust to the Legislature the decision as to by whom and in what manner that jurisdiction should be exercised, they should do so with the full realization of the significance of their action because of the vital importance of the subject matter of LB 124 especially to members of the legal profession; and because of the radical departure it pro-



poses from our historical concept of common law and equity jurisdiction vested in our constitutionally established courts, I feel compelled to file this minority report.

"I feel the matter is too important to be handled perfunctorily. Since it was not even considered or discussed by the Committee, I feel action by the Bar Association on the Committee's recommendations should at least be deferred for another year so adequate consideration can be given to the matter. Very truly yours, Elmer Scheele."

CHAIRMAN McCOWN: Thank you.

MR. VOTAVA: Mr. Brogan, would you summarize or outline this L.B. 124 to us?

MR. BROGAN: L.B. 124, Mr. Votava, proposes two steps. L.B. 124 would put on the ballot next November the question of whether our Legislature shall be authorized to provide legislation for the establishment of separate juvenile courts.

Now that is step one.

Step two is this, that this enabling legislation provides also that in the event such courts are established, they can not go into operation in any judicial district until approved by a majority of the voters of that judicial district.

Now, L.B. 124 simply puts on the ballot next November the question of whether our Legislature shall be authorized to provide for separate juvenile courts, for appointment of judges, and so forth. Now that briefly is what L.B. 124 calls for.

HERMAN GINSBURG: Mr. Chairman.

CHAIRMAN McCOWN: Mr. Ginsburg.

MR. GINSBURG: I think as an ex-officio member of the House I do have the privilege of the floor to speak on this matter.

CHAIRMAN McCOWN: You do.

MR. GINSBURG: I want to rise to state that I am very, very much opposed to the adoption of this resolution. I have read L.B. 124 and I do not like the language of it at all.

L.B. 124 says that, notwithstanding the provisions of Section 9 of Article 5, which Section 9 says that the District Court shall be vested with chancery and common law jurisdiction, notwithstanding the provisions of this section, the Legislature may create courts to be known as juvenile courts, with such jurisdiction and powers as the Legislature may prescribe.

I call your particular attention to the fact that it does not say with such jurisdiction over juveniles as the Legislature may prescribe, but leaves as broad, as broad can be, with such jurisdiction

and powers and terms and so forth of the judges as the Legislature may prescribe. That means as I take it once we permit or allow the adoption of such an amendment to our Constitution there would be nothing in the world to prevent the Legislature from taking away from our district courts any field that they wanted.

The mere fact that the court is called a juvenile court does not necessarily mean, the way the language reads, that the jurisdiction is to be limited to juveniles. And even if that were held to be the case, what is the jurisdiction? Are they going to take the divorce cases where there is custody of juveniles? Are they going to take that into the juvenile court? What about ages? Are you going to put everybody under twenty-one in the juvenile court? Are they going to take all matters of annulment, divorce, family relationships and so forth?

And bear in mind that the bill is broad enough so that if it is adopted they could eliminate rights of appeal, eliminate all your jurisdictional restraints that we now, as lawyers, are used to.

We consider it as a part of our fundamental heritage. It seems to me that it ill behoves the Bar Association, which is dedicated to law and to the protection of the rights of the people under law, to sponsor or to say that we recommend the adoption of an article in our constitution which takes away these rights, rights of appeal, rights of a hearing.

I don't know a thing about juvenile law, and I am not interested particularly, but I understand part of the agitation has been caused by the fact that the Supreme Court has held that certain judicial processes can not be done away with in juvenile hearings. Be that as it may, how can we as lawyers go before the public and say we are in favor of taking away from the courts certain parts of their common law and equity jurisprudence, and turning it over to a court that is going to be unlimited in any respect except just as the Legislature may provide?

To me that seems a precedent that is a bad thing for a bar association; if we are in favor of that for juveniles, somebody can come along some day and say we ought to do that for automobile accident cases, and set up a special court for that, and this, and this and that, and the other thing.

It seems to me that even if we were to be in favor of the general thing that they are trying to attempt, and very unfortunate language is used, at least the language should have been restricted to such a jurisdiction over juveniles as the Legislature may prescribe; but the language is unlimited, with just such jurisdiction as the Legislature may prescribe.

For that reason it seems to me that we of the Bar Association

ought to be very strongly opposed to such a measure rather than for it.

CHAIRMAN McCOWN: Is there any further discussion?

ALFRED G. ELLICK: Mr. Chairman, I would like to talk for just a moment about this bill, and also mention some of the background concerning it. About three or four years ago in Omaha we had a citizen's juvenile court committee, which made a considerable study of our juvenile court procedures and court setup in both Omaha and Lancaster County.

One of the recommendations of that very large committee was that a separate juvenile court be created or established or authorized, whereby among other things the judge could be appointed rather than elected.

After that committee announced its report, Mr. Tracy Peycke of our Omaha Bar was named Chairman of a second committee to carry out the provisions of the first citizens committee. And Dean Doyle of Creighton Law School was requested to draft a legislative bill, which would separate the powers of our District Court in Douglas and Lancaster counties to give them separate authority over juveniles.

Now there are some serious defects in our present system. It was the feeling of this committee, and I think most of you realize that in most of the states in the United States there are created the separate and distinct juvenile courts.

The bill drafted by Dean Doyle was reviewed by the Attorney General's office, and it was then felt that a constitutional amendment would have to be adopted authorizing a separate juvenile court for the reason that Article 9 of our Constitution provides that the jurisdiction of all courts shall be uniform.

As a result of that ruling, a small group—I think Dean Doyle of Creighton Law School, Tracy Peycke and I had a small hand in it—prepared this L.B. 124, which was submitted to the last Legislature and adopted.

To me it is, I think, a harmless bill, it is a permissive bill, and I don't see the objections to it that Mr. Ginsburg states that he feels.

The bill is very short and I would like to read it to you, and it may be helpful.

“Section One: That at the general election in November, 1958, there shall be submitted to the electors of the State of Nebraska for approval the following amendment of Article 5 of the Constitution of the State of Nebraska, which shall be a new section to be known as Section 27 and which is hereby proposed by the Legislature:”

Then it goes on to recite the section that is proposed.

"Section 27. Notwithstanding the provisions of Section 9 of this article the Legislature may establish courts to be known as juvenile courts with such jurisdiction and powers in proceedings involving children as the Legislature may provide.

"The terms qualifications, compensation and method of appointment for election of judges of such courts, term qualifications, compensations and method of appointment for election"—I repeat—"for judges of such courts and rules governing proceedings therein may be fixed by the Legislature. No such courts shall be established or afterwards in any district court judicial district unless approved by the electors of such district."

Then Section 2 states that a proposed amendment shall be to the electors in the manner prescribed in Article 16, Section 1, of the Constitution of the State of Nebraska, and sets forth how it shall be set out on the ballot.

So we have first the adoption of the constitutional amendment in November, 1958, which authorizes the Legislature to adopt a court which has authority over the matters involving children. Second, the Legislature would have to go forward and adopt such legislation if it saw fit, and I believe there is the point where the matters raised by Mr. Ginsburg should be presented. Third, the legislation does not become effective in any district until it is adopted by the voters in this district.

I do want to say, without going into all the details, that the matter has received most careful consideration by our Juvenile Court Committee in Omaha. The bill was largely drafted by Dean Doyle of Creighton Law School, and I believe that it certainly would be constitutional in all respects.

It is simply permissive and will help to accomplish something that many, many people, at least in Omaha and Lincoln, Lancaster County, feel is very desirable, objective and worthwhile legislation. And I submit that the report of the Committee should be adopted in this respect.

CHAIRMAN McCOWN: Is there further discussion?

Mr. Cassem.

MR. CASSEM: I just wanted to raise a question in this connection. I take it that the Citizens Committee that initiated this line of thinking, and I believe they were made up of club women and such, reached a conclusion that on our district bench in this district we did not have judges competent to handle this branch of the law.

I just question the wisdom of approaching the problem in that

manner. In others words, if you think your district judges are not competent, the question is, do you amend the Constitution to set up rump courts in which you hope to get competent judges? I am just a little bit curious as to the basic philosophy underlying this approach to it.

VOICE: I would like to answer that question.

I don't think there was a feeling that there was no district judge capable of handling juvenile problems on our district bench. I think that the primary feeling was that under our present system of election of judges, there is no way of separating or segregating the judges so that they are elected separately, so that a person interested in juvenile court matters can run and be elected on that basis.

I think any lawyer in Omaha, Nebraska, is familiar with the arrangements we now have on our District Court and the method used for selecting the judge of the juvenile court or domestic relations court.

It is frequently doled out as punishment and given to the one judge who has not the strength in numbers among his voting fellow judges to get some other job.

It is a terrible situation, and I think we all realize it. At least, I think a great majority do.

CHAIRMAN McCOWN: Anything further?

MR. COHEN: May I ask a question? How many states have provisions—

CHAIRMAN McCOWN: Excuse me, I had already recognized Mr. Yost.

MR. YOST: May I say at the outset that I am opposed to this measure, and I want to say that I agree and concur with everything Mr. Ginsburg said.

I realize Omaha had a problem. I am not so sure they have it now, but it does not seem feasible to me that by creating another court and some more judges you are going to correct the situation that you have in Omaha, or that you had in Omaha, I should say. Of course they propose a measure that has to be voted on and you can not put it on the district that does not want it. Certainly out of Omaha in my district the judges are competent and handle juvenile matters in a very wonderful way, and I would not want to see that interfered with. We have two wonderful judges in juvenile matters and we could not possibly do better in the handling of matters of juveniles than they are now handled in our district.

CHAIRMAN McCOWN: Mr. Cohen, did you have a question?

MR. COHEN: I just wondered how many states had special provisions for juvenile courts.

CHAIRMAN McCOWN: Mr. Brogan, can you answer that?

MR. BROGAN: I can not answer that.

CHAIRMAN McCOWN: Mr. Mattson.

MR. MATTSON: If for any other reason this should have opposition, it is my observation, as I heard Al read it, that the Legislature is going to be given the power to set up the qualifications. What assurance are we going to have that they are going to require the same qualifications that are now required for the District Court?

I think we have to face the situation that with the Legislature being composed now with not too many lawyers in it, we are going to be rather weak in connection with the matter of lobbying against the social agencies and some of the other agencies that may be back of this same kind of bill, and depriving people of the full administration of justice which we, as lawyers, should guard and make sure that lawyers are on these courts.

For that reason alone I would oppose this.

CHAIRMAN McCOWN: Is there further discussion?

MR. GINSBURG: Mr. Chairman, just one thing by way of explanation. I do not claim to be infallible, and I might have misread it, but the act, L.B. 124, as appears in the Gant publication leaves out that phrase "such jurisdiction involving children." It is not there. It just says, "with such jurisdiction as the Legislature may give it."

CHAIRMAN McCOWN: Is there further discussion?

JUDGE HARRY SPENCER: I might say, even if it were there, there would be nothing to prevent the Legislature from eliminating the constitutional safeguards, and in answer to Harry Cohen's question, we have a juvenile court act. I will admit it has some defects.

CHAIRMAN McCOWN: Is there further discussion?

(There was no response.)

CHAIRMAN McCOWN: The motion now before the House is the endorsement of the proposed amendment to the State Constitution providing for the authorization of separate juvenile courts, L.B. 124; that this Association approve it.

All those in favor of the motion say "aye."

Opposed.

The noes have it. The motion is rejected.

Thank you very much, Mr. Brogan.

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 the 1957 Legislature enacted into law a state-wide probation system to be administered by the district judges. The enactment of this bill was the combination of efforts by this Association and other interested groups to get a state-wide probation system into operation in Nebraska. *We recommend that this Committee continue to study and observe the operation of this new system.*

The Committee has continued its study of the following matters:

1. The adequacy of compensation of county attorneys.
2. Sex offense laws.
3. Juvenile delinquency and family problems.
4. Laws affecting the issuance of no-fund and insufficient-fund checks.
5. Employment of a state pathologist.
6. Transfer of criminal investigation and law enforcement functions from the Department of Roads and Irrigation to the Department of Justice.

*We recommend that the Committee continue to study these matters.*

*This Committee endorses the proposed amendment to our State Constitution providing for authorization of separate juvenile courts. L.B. 124 of the 1957 Legislature provides that the amendment shall be submitted to the voters in November of 1958, and this Committee recommends that the proposed juvenile court amendment receive the approval of this Association.*

James F. Brogan, Chairman  
Virgil E. Northwall  
Elmer M. Scheele  
Betty Peterson Sharp  
William J. Hotz, Jr.

CHAIRMAN McCOWN: The next item of business is the report of the Committee on the Judiciary. You will find the report on page 26. Mr. Robert Denney, Chairman.

MR. DENNEY: Mr. Chairman, members of the House of Delegates. After that last discussion I am a little bit leery of getting up here to start my recommendations for this Committee.

This Committee in their deliberations this year kept in mind Rule 3 of Article 6 of the Rules of the Supreme Court which defines the duties of this Committee as follows: "It shall be the duty of the Committee on Judiciary to consider and recommend to the As-

sociation action concerning the relation between the Bench and Bar, and the procedure and rules of court.”

Now we have six specific recommendations, and with the consent of the House of Delegates I would like to take those up one at a time and move their adoption. To begin with, this Committee itself felt that there was a definite need for a judiciary committee in each judicial district. We find in polling different districts that there is a lack of close relationship between the Bench and the Bar, which could be obviated by a judiciary committee.

We therefore recommend 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.

I move the adoption of that recommendation.

CHAIRMAN McCOWN: Is there a second?

VOICE: Second.

CHAIRMAN McCOWN: Any discussion?

As many as favor the motion say “aye.”

Opposed, the same sign.

The motion is carried.

MR. DENNEY: The Committee also felt that such local committees should be asked to report their progress and suggestions to the Committee of this Association, the results to be included in the next annual report of this Committee so that like Committees throughout the state may benefit from the same, the theory being here that there be a clearinghouse between legislative sessions. Local judiciary committee action should be sent in to this Committee to disseminate to other local committees to improve the relationships between the Bench and the Bar.

Mr. Chairman, I recommend the adoption of the second recommendation.

CHAIRMAN McCOWN: Is there a second?

VOICE: I will second the motion.

CHAIRMAN McCOWN: Any discussion?

As many as favor the motion say “aye.”

Opposed, the same sign.

Motion carried.

MR. DENNEY: The third recommendation is more or less dovetailed with the second one that suggested legislation on procedure be solicited from such local bar committees, be given careful study and recommendations made.



I move the adoption of the third recommendation.

CHAIRMAN McCOWN: Is there a second?

JUDGE SPENCER: Second.

CHAIRMAN McCOWN: Any discussion?

All those in favor of the motion say "aye."

Opposed, the same.

The ayes carry.

MR. DENNEY: With reference to the fourth recommendation, the Committee discussed how to maintain a closer relationship between the Bench and the Bar in line with the duties, and we therefore recommend 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.

We move the adoption of the recommendation number four.

CHAIRMAN McCOWN: Is there a second?

F. A. WRIGHT: I second the motion.

CHAIRMAN McCOWN: Any discussion?

As many as favor the motion say "aye."

Opposed, the same.

The motion is carried.

MR. DENNEY: The Committee gave considerable thought to the fifth recommendation, which is that if it appears necessary to get the American Bar Plan for the selection of judges adopted, either that it be amended so that the plan will be applicable to the metropolitan areas of Omaha and Lincoln or that it be put on a local option basis that would permit each judicial district to determine the desirability of adopting the American Bar Plan.

The Committee in going over this matter decided that when this matter was brought up, I believe about two or three years ago, that it was a lackadaisical attitude on the part of the members of the Bar on getting the petitions signed to get the matter before the voting public. Also, there was some thought that there was some opposition in the metropolitan areas to this American Bar Plan, or what we many times refer to and is known in this Association as the Missouri Plan of a local Committee suggesting to the Governor where a vacancy occurs of a competent man to fill the office of District Judge, that that man be appointed, and then his name go up on the ballot for approval of the public at the end of his tenure of office.

We felt that that was a good plan, that it was working very effectively in the state of Missouri, and we felt that the matter should again be taken up by this Association and pushed to the point where we could get the selection of judges that are capable and competent and also, in listening to this discussion of the previous Committee report, it might obviate some of the objections in a metropolitan area with reference to some judges who do not want to or are not capable of handling juvenile matters.

We therefore move the adoption of Recommendation 5.

CHAIRMAN McCOWN: Is there a second?

MR. HARRY COHEN: Question. It is your idea to amend the American Bar Plan so as to provide for some election method by each local judicial district?

MR. DENNEY: To adopt the plan.

MR. COHEN: You are also asking for amendments of the American Bar Plan. How can that be done when it seems to me that our selection of judges is state-wide? It is not just any judicial district. In other words no judicial district has the right to—

MR. DENNEY: We are submitting the recommendation to the Association that they consider it from two angles, either putting in the American Bar Plan purely in the metropolitan areas or putting it on a state-wide basis, but leaving it on a local option basis, so that each judicial district would decide whether or not to adopt the plan.

MR. COHEN: So what you are trying to do is raise the whole question again?

MR. DENNEY: That is right. We are not coming to this Association saying we think this plan is best, but let us get it back up, get a workable plan and try to get it into form.

CHAIRMAN McCOWN: Before there is any further discussion, the motion has not as yet been seconded.

MR. SVOBODA: I second the motion.

CHAIRMAN McCOWN: Very well.

Mr. Votava.

MR. VOTAVA: I want to say that I oppose this recommendation. I think that our district judges throughout our entire state with the same qualifications should be selected alike, have no local option in one and appointment in another district, or whatever you may want. It ought to be uniform, so I am opposed to this recommendation.

CHAIRMAN McCOWN: Anything further, Mr. Cassem?

MR. CASSEM: First let me say that I think that this measure is the most important single enterprise that the Nebraska Bar Association has.

Now then, to begin with we could confront this problem, and it is particularly acute in the metropolitan areas. The selection of district judges is in many respects ninety percent a metropolitan problem.

Now out in the state they have the good fortune to be able to acquaint the electorate with the personalities and qualifications of their district judges. In Omaha, for example, we have had cases of mistaken identity in our District Court. Mr. Charles Bongardt in a very enlightening article some years ago very acutely analyzed this problem and showed that the election of judges is not a traditional Anglo-Saxon right or liberty, but an outgrowth of the rural radicalism of the Populist Party movement and that sort of thing in the middlewestern part of the United States a century or century and a half ago, that in most areas of Anglo-Saxon jurisprudence or where it prevails, the election of judges is not a traditional thing at all.

Now then, I think we all know in Omaha what our problem has been. The electorate of Omaha actually does not know most of them. In fact, this is even true of college graduates that you may be acquainted with. If you interrogate them just prior to a judicial election or just after a judicial election you will find out they do not know the judge or his qualifications or what court he is running for or what the difference is between the courts, or anything of the kind. And as I say, the results have been very sad in some instances.

Now they do not have that problem out in the state to a marked degree at all. Now then, a year ago I think I said something like this, that if this plan is to succeed it must be recognized as a problem of metropolitan areas, and any area that progresses or changes from an urban to a metropolitan area will develop the same problem.

Now I think that the only way that we are ever going to get this thing solved is to put it upon a local option basis.

I think it should be done, and, as I say, I think it is the single most important enterprise that the Nebraska State Bar Association has.

CHAIRMAN McCOWN: Any further discussion?

F. A. WRIGHT: Mr. Chairman.

CHAIRMAN McCOWN: Mr. Wright.

MR. WRIGHT: I have one question relating to the wording of this recommendation number five. It appears ambiguous to me that

you could interpret it first of all to mean that if it appears necessary to get this plan going, why then we should amend it. If that necessity exists we should amend it to make it applicable only to Omaha and Lincoln; or you could interpret it to mean if in order to get the plan at all it should be amended, we should make that amendment.

Now what it seems to me is we should push the plan itself as a state-wide plan, and if it can not be accomplished on a state-wide basis, then to push it on a metropolitan basis. That would be my understanding of what really has been recommended here.

MR. DENNEY: With the further consideration that it be put up on a local option basis because, as Mr. Cassem says, there would be definite opposition out in the rural areas, because they are well acquainted with their district judges, and they do not have the problems.

MR. WRIGHT: Well, that is what I was getting at, if not on a state-wide basis then on a local basis mainly in Omaha and Lincoln, but it seems to me if we pass this resolution as it is now we are going to have trouble from here on in, and I was wondering if it could not be clarified.

MR. DENNEY: Well now, the theory of the Committee was first that the American Bar Plan should be adopted in Nebraska. Second, because of failure in the past it might become necessary to amend it, and that amendment could go one of two ways, either just limit it to the metropolitan areas or adopt the American Bar Plan by submitting it on a local option basis throughout the state of Nebraska.

CHAIRMAN McCOWN: May I suggest this—is this correct? If recommendation number five had the following sentence appearing immediately prior to the specific recommendation, "That this Association approve and recommend the American Bar Plan for the selection of judges," and then the language which you now have.

MR. WRIGHT: I think that would clarify it in my mind.

CHAIRMAN McCOWN: Is such an amendment satisfactory to you, Mr. Denney?

MR. DENNEY: Yes, it is, and I am sure it is with the Committee.

CHAIRMAN McCOWN: With that understanding and with that amendment to the motion, is that satisfactory to the second?

MR. SVOBODA: Yes.

CHAIRMAN McCOWN: Is there further discussion? Mr. Ellick.

MR. ELLICK: I would like to endorse Mr. Cassem's remarks. It seems to me there is no particular objection to having the selection of judges handled differently in Omaha and Lincoln than in the

rest of the state, and I feel that the American Bar Plan in those two cities would go a long way to help the juvenile court problem that we were discussing in the last resolution.

MR. GREEN: Mr. Chairman, for just a moment I would rise to join dissent. I am in favor of the American Bar Plan, but I think it utterly ridiculous to suggest that a plan should be fragmented throughout the state. I for one would endorse on a state-wide basis but would oppose it on a fragmented basis or local option. I think it is unsound and unrealistic and incompetent.

CHAIRMAN McCOWN: Is there further discussion? Mr. Cassem.

MR. CASSEM: Well, let me say in answer to what Jim says that it is purely a practical matter. If the people outstate who are fortunate enough to know their judges, are able to become acquainted with them and vote intelligently for them wish to retain that, I do not see why they should not.

And if you will not give them that chance, they are going to defeat this measure, and now the important thing is to get this measure through. I think it should be submitted as a bill to put into effect the ABA system in metropolitan areas and give local option to the rest of the state to adopt, if and as and when they please.

VOICE: Is this recommendation intended to require either that it shall be limited in its application to metropolitan areas or put on a local option basis? Is that an alternative proposition and not both of them?

MR. DENNEY: Generally that is the idea; that is the wording; that is correct.

VOICE: Well, what is the thought as to who should decide which of those proposals is to be stressed?

MR. DENNEY: We thought that this matter should come up before the Legislative Committee of the Association before any action should be taken. This is the thought, to bring it up, and this might be a way to get the American Bar Plan adopted in Nebraska. We do not take the specific point either that we want to limit it to the metropolitan areas or that it should be on a local option basis.

And I see Mr. Cassem has another theory, possibly making it mandatory in the metropolitan areas and local option throughout the state.

MR. CASSEM: And if proper, Mr. Chairman, at the appropriate point I would like to make a motion to that effect.

VOICE: Do I understand that the Committee could not agree as to which of these would be used?

MR. DENNEY: That is not true. We knew it would be a point of discussion before the House of Delegates, and we submit both ideas and feel that both ideas should be taken up and the matter should be discussed here.

JUDGE SPENCER: Did I understand that the Committee was unanimous for the American Bar Plan but thought of this as a practical solution?

MR. DENNEY: Yes, that is right.

JUDGE SPENCER: It seems to me that there is only one member of the Committee from a metropolitan area. I wonder if that would create the opposition.

MR. DENNEY: Leo Eisenstatt and Robert Troyer are from Omaha.

CHAIRMAN McCOWN: Mr. Cohen?

MR. COHEN: I did a lot of work the last time we tried to get these petitions signed for the American Bar Plan, and I do not recall that we had a lot of resistance around here to the Plan. It was a question of not having enough, as one of the Committee reports put it. I do not think we had enough time with which to go after these petitions and get the thing on the ballot. I am inclined to agree with Mr. Votava on this question. I think that our judicial system is a state-wide system, and if we are going to adopt one plan we ought to adopt it for state-wide purposes. The system is a good system. It works in other states and we have a marvelous recommendation for it in the state of Missouri where it worked on a state-wide basis. You can not get all of these things done at once.

I happen to be living in a metropolitan area, but I get out in the state, and like everyone else I find within the Association in the state the lawyers are recognized as real fine people and they are recognized as leaders. If the lawyers adopt a uniform system for the state, I have a lot of faith in the rural areas to sell it to the electorate. I do not like to pussyfoot. I do not like the idea of this forcing; putting it on a local option basis, you have a pretty good chance of playing politics with the system itself all over again in the metropolitan areas. There is a lot of opposition that can be organized on a political basis in the metropolitan area if it is placed on the local option. Let us try to sell this thing as a package, as a whole. It is a good system, and if we like it, let us recommend the one and not pussyfoot about it.

CHAIRMAN McCOWN: Now is there further discussion?

Now as many as favor the motion will say "aye."

Opposed the same.

I think I had better call for a show of hands.

All those in favor will raise their hands, please.

Now all those opposed the same.

The motion is carried.

JAMES GREEN: Mr. Chairman, I should like to be recorded as voting no.

MR. CASSEM: At this point would it be appropriate for the Chair to entertain the motion that I mentioned a moment ago, namely, that the Association record its preference that the bill be presented in a form which makes the ABA Plan mandatory for the metropolitan areas and on a local option basis for the other parts of the state?

Is that motion appropriate at the present time?

CHAIRMAN McCOWN: Is there a second to that motion?

VOICE: I second the motion.

JUDGE SPENCER: Mr. Chairman.

CHAIRMAN McCOWN: Judge Spencer.

JUDGE SPENCER: May I raise a question on that. I am just wondering about that particular motion. We will have portions of the state that have a choice, forcing on metropolitan areas something in which they have no choice. I think if you are going to do it at all, Squire, you will have to make it local option all the way through. That is, I doubt the validity of this particular proposition.

MR. CASSEM: Theoretically it is based on this proposition that we want to get it through. We do not want to cram something down the throats of people outstate that they neither want nor obviously need. There is no clear proof that they need it.

In Omaha we think the proof exists that we must have it.

MR. GREEN: Mr Chairman.

CHAIRMAN McCOWN: Mr. Green.

MR. GREEN: Mr. Cassem thinks we should not cram anything down the throats of anyone else, and so I move that the motion be tabled.

VOICE: Second.

CHAIRMAN McCOWN: The motion to table takes precedence. It has been seconded. All those in favor of the motion to table say "aye."

Opposed, the same.

Tabled.

MR. DENNEY: The final recommendation—

MR. SVOBODA: A point of information, Mr. Chairman.

CHAIRMAN McCOWN: Mr. Svoboda.

MR. SVOBODA: Do I gather from Mr. Cohen's remarks this will again be by way of petition for constitutional amendment or will we try to have the Legislature try to enact a measure to submit it to the electorate?

CHAIRMAN McCOWN: As I understand it, Mr. Svoboda, the specific recommendation and motion does not include any recommendation as to method of procedure to obtain the end. I am not sure. What is the Committee's understanding?

PRESIDENT KUHNS: Do I understand that you propose to put this before the Legislative Committee of this Association which will then devise a method and means to submit it to the people?

MR. DENNEY: That is right, but it would seem to me—well, the method three years ago was by petition, is that not correct?

PRESIDENT KUHNS: We are not going to go through that again.

MR. DENNEY: I think we will have to.

PRESIDENT KUHNS: What if the Legislature would enact a measure to submit it to the people?

MR. DENNEY: We never went into that so far with the discussion, Mr. Kuhns, so I can not answer that. I just have not given it enough thought.

MR. CASSEM: Let me call attention to some factors existing there. It was a tremendous enterprise the last time and it fell short, as we all know, of the necessary signatures. Now that method is not necessary if the Legislature will submit it to the people, refer it, in other words, instead of the people initiating it.

Now let us remember that since that time we have had a presidential election with a record vote, so that the number of signatures we would have to get on the next petition would be a terrific undertaking. I am confident that this thing should be submitted to the Legislature in an effort to persuade the Legislature to refer it.

CHAIRMAN McCOWN: Very well.

MR. DENNEY: The final one. We made considerable study. There has been a lot of Legislative advancement this last session with reference to the county judges. We find, though, throughout the state, with reference especially to the rural areas, that the county judges are drawing from two hundred to two hundred fifty to three hundred dollars a month. They have one of the most vital judiciary jobs and they are drawing less than water commissioners,



city clerks and people of that kind. The requirements for eligibility to the office we feel should be higher, and we therefore recommend that continued effort be made by the Bar 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.

I move the adoption of the recommendation.

CHAIRMAN McCOWN: Is there a second?

VOICE: Second.

CHAIRMAN McCOWN: Any discussion?

As many as favor the motion say "aye."

Opposed, the same.

The motion is carried.

The formal report of the Committee follows:

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

Your Committee on Judiciary submits the following report:

In making this report the Committee has confined its activities to Rule 3 of Article VI of the Rules of the Supreme Court which defines the duties of this Committee as follows: "It shall be the duty of the Committee on Judiciary to consider and recommend to the association action concerning the relation between the Bench and Bar, and the procedure and rules of court."

It is the opinion of the Committee that there is a definite need for judiciary committees in each local bar association with the same defined duties as above set forth for this Committee.

That the profession should review periodically, through these local committees, the Canons of Legal Ethics having to do with (1) The Duty of the Lawyer to the Courts, (2) The Selection of Judges, (3) Attempts to Exert Personal Influence on the Court, and, from the Canons of Judicial Ethics (4) A Summary of Judicial Obligation, so that both the active practitioner and those on the bench might uphold and increase the public confidence in our "system for establishing and dispensing justice."

That since the American Bar Plan for the selection of judges did not receive favorable state-wide consideration, that this Association consider the plan from another approach.

*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 if it appears necessary to get the American Bar Plan for the selection of judges adopted that it be amended so that the Plan will be applicable either to the metropolitan areas of Omaha and Lincoln, or that it be put on a local option basis that would permit each judicial district to determine the desirability of adopting the American Bar Plan.

6. 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.

Robert V. Denney, Chairman  
Leo Eisenstatt  
Barlow Nye  
Lester R. Stiner  
Robert R. Troyer

CHAIRMAN McCOWN: The next item of business is the report of the Committee on Legal Aid by Winsor C. Moore. You will find the report on page 20.

MR. MOORE: Mr. Chairman, members of the House of Delegates. When this Committee on Legal Aid was appointed about one year ago, we checked back to our prior annual reports and found very little guidance for this year's activity. It was the function of this Committee therefore to survey the situation of legal aid in Nebraska and to make certain recommendations or suggestions to the next Committee on Legal Aid.

You will read on page 20 that we, in surveying the legal aid situation in Nebraska, attempted to gather for you certain statistics as to the number of cases and the types of cases decided and adjudicated on legal aid activities.

We found that to our knowledge at least there are only three legal aid clinics in Nebraska: one at Creighton University, one in Lincoln and one at Sidney.

The Legal Aid Clinic operated at Creighton University processed about two hundred fifty applications. The Legal Aid Bureau in Lincoln processed approximately one hundred seventy-two cases. It is interesting to know that at both of these clinics, domestic relations cases constituted approximately one-third of those cases.

The Legal Aid Clinic at Sidney is rather inactive. They reported processing only eight cases.

In our suggestions, we are pointing out at the bottom of page 21 that we suggest that for the ensuing year the Committee on Legal Aid might study the matter more thoroughly to determine whether some simple plan can be devised to accommodate the few persons who might need legal aid in those communities where legal aid groups are not yet justified.

In this connection we point out that the local Bar Association might set up a legal aid committee for their respective county or city. We also suggest that the Legal Aid Committee for the ensuing year might consider the preparation of advisory rules to be distributed to the local Bar Association committees, who in turn could contact the public welfare office in their communities, such as the public assistance officer, who would handle referrals.

So it is those suggestions we would like to pass on to the next Committee on Legal Aid.

With this, I move the adoption of this report.

CHAIRMAN McCOWN: Is there a second?

MR. SVOBODA: I second the motion.

CHAIRMAN McCOWN: Is there any discussion?

As many as favor the motion say "aye."

Opposed, the same.

The motion is carried.

The formal report of the Committee follows:

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

Your Committee on Legal Aid submits the following report:

The Legal Aid Clinics in Omaha, Lincoln and Cheyenne County continued to function during the past year. No other Nebraska cities or counties, to the knowledge of this Committee, have an organized legal aid program. In the annual report of this Committee a year ago, it appears that the Scotts Bluff County Bar Association was initiating a study in to the possibility of establishing a Legal Aid Clinic. This Committee made an inquiry concerning the present status of the study but found that no further information is available.

The Omaha Legal Aid Clinic, conducted at The Creighton University, reports that during the past academic year, approximately 250 applications for legal aid were received and processed. These applications presented a wide range of problems, including small claims, evictions, negligence claims, bankruptcies, adoptions, proceedings to obtain birth certificates, change of name, paternity cases, nonsupport, separate maintenance, divorce and others. A large percentage of the cases fell into the field of domestic relations. Many of the problems presented might properly be classified as economic rather than legal. Many of the processed cases stemmed from poverty and alcoholism. Approximately 25 legal actions were instituted in Nebraska courts. The remainder of the questions were disposed of on the basis of formal or informal advice or by reference of the client to an appropriate social agency. This summarizes in a general way the work of the Omaha Legal Aid Clinic during the past year.

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, 1956, to September 1, 1957:

Domestic Relations	64
Penitentiary Cases	28
Economic Problems	20
Contracts	8
Small Collections	7
Landlord-Tenant	16
Accident Claims	7
Criminal Matters	5
Tax Matters	4
Wills	3
Miscellaneous	10
	<hr/>
Total	172

The Legal Aid Clinic established by the Cheyenne County Bar Association in Sidney reports that eight cases were handled the first year the Clinic was organized but that during the past year only four cases were processed, two of these pertaining to domestic relations where the parties were divorced and controversy arose relative to the custody of children. One case concerned a judgment brought against these same parties in the County Court. The remaining case was reported as unclassified. It was believed by the Secretary-Treasurer of the Clinic who made the report that the low number of cases handled was due to the fact that not many people actually know about the Clinic and that some publicity should be given to its purpose.

Your Committee on Legal Aid believes that there are many

cities throughout the state which have legal aid problems occasionally but not frequently enough to justify the formal establishment of a Legal Aid Clinic. Accordingly, the Committee on Legal Aid for the ensuing year might study the matter more thoroughly to determine whether some simple plan can be devised to accommodate the few persons who need help in those communities where the usual type of legal aid group is not justified. Consideration, for instance, might be given to the feasibility of all local Bar Associations setting up Legal Aid Committees for their respective counties or cities. Also, the Committee on Legal Aid for the next year might consider the preparation of advisory rules to be distributed to the local Bar Association Committees, who in turn could contact public welfare offices in their communities, such as the Assistance Office, to handle referrals from the needy. By this means, legal aid perhaps could be more widely spread over the state but at the same time limited to those who are actually unable to pay the cost in the usual manner.

Winsor C. Moore, Chairman  
 Robert H. Berkshire  
 Byron M. Johnson  
 Charles B. Paine  
 Dewayne Wolf

CHAIRMAN McCOWN: I will ask at this time, Mr. Moore, if you will also submit the report on Legal Education and Continuing Legal Education. Mr. Doyle will not be here until this afternoon, and the report you will find on page 25. It is the report on Legal Education and Continuing Legal Education.

MR. MOORE: This is a very short report, and the theme of the report is that the Committee on Legal Education and Continuing Legal Education has found that the Bar Association has cooperated with the law schools of the state in presenting legal institutes for practicing attorneys at those institutions.

The Committee feels that this policy should be encouraged and it should be continued, and they recommend, or they suggest, that the subject should be one of continuous study.

Inasmuch as there is no recommendation, I move that this report be filed.

CHAIRMAN McCOWN: Is there a second?

VOICE: Second.

CHAIRMAN McCOWN: Any discussion?

As many as favor the motion say "aye."

Opposed, the same.

The motion is carried; thank you very much, Mr. Moore.

The formal report of the Committee follows:

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

The Committee has noted that during the past year the Association has cooperated with the law schools of the state in presenting legal institutes for practicing lawyers at such institutions. The Committee believes that the cultivation of a closer relationship between the Association and the law schools in Nebraska is highly desirable and should be encouraged. Joint sponsorship of such institutes will contribute to a better understanding of the resources of the law schools and improve the program of continuing legal education in Nebraska.

The request that additional practical law training should be provided is repeated annually. This is a question upon which a diversity of views prevails. Basically it involves a definition of the function of the law school in the broad field of legal education. A closer relationship between the Association and the law schools will bring about a deeper appreciation of the nature of the problem and the effective means of solving it. The subject is one for continuous study.

James A. Doyle, Chairman  
E. D. Beech  
Henry M. Grether, Jr.  
George A. Healey  
Pliny M. Moodie

CHAIRMAN McCOWN: At this time we will drop back on your calendar to the report of the Committee on American Citizenship, Chairman James F. Green. The report you will find on page 27.

MR. GREEN: Mr. Chairman, gentlemen. I should approach this task with face flamed with shame. However, it is God's grace to the lazy that one who is lazy is rarely sensitive, otherwise he would not be lazy.

So the Chairman has complimented me by suggesting a report.

The report which you may have noted suggests the absence rather than the presence of such activity. As a matter of fact my deficiency is even greater than that reflected by the printed word, and to prove to you how great it really is I might allude to a story perhaps known to all of you, and that is of the little girl who was giving her family a problem because unfortunately she had learned to use profanity.

Her mother and her father became determined that she should no longer be permitted to venture out in public until she learned to control herself, so as to not embarrass them and their teaching of her.

On an occasion they were persuaded, however, by a neighbor to permit her to attend the birthday party of the neighbor's daughter, and they assented only upon the condition that if the little youngster should say anything improper at all that she should at once be sent home.

The young lady was dressed beautifully for the occasion, her face washed, her hair coifed, and she went to the party, and she was not gone ten minutes until she returned to her home.

When she did, her mother thrust her into bed to await her father's punishment. When he came home and received the report, he went to the room, turned her over his knee and thrashed her soundly.

And then he said, "Now what in the world did you say?"

She said, "I have been trying to tell you that the damned party isn't until tomorrow."

Now, frankly, until someone was kind enough to call me I thought this party was tomorrow, so as I say the deficiency is even greater than that indicated by the printed word.

As the report would indicate, this Committee did not function, although it was urged to do so by letters from its members. To them I must extend all compliments, to the Chairman all damnation.

As indicated by the report, he accepts it, for I wrote the report, and therefore the accusation is mine and I would not for a moment avoid it.

I chose this device on purpose. It is not quite as accidental as it may have appeared to you to be, nor even as thoughtless as it may have appeared to you to be.

Some years ago I sat on this self-same Committee, and during the week prior to our meeting we were hastily summoned to Lincoln for a meeting which was reported to you with about three pages of recommendations for your consideration.

You dispatched those recommendations rather promptly.

I am, as you were, intolerant of device. We did have a worthwhile suggestion, which emanated I think in part from not only the mind but the charitable heart of the President of this Association because he felt that love for his Chairman which wanted to see him avoid the embarrassment which might be his. He did not realize that God's grace to the lazy is that they are seldom sensitive, but the suggestion was made, and appropriately, that we might try to demonstrate for you those judicial procedures involved in the admission of new persons to our citizenship.

That suggestion was not ignored. It was explored with those who have the judicial responsibility for that function and it was believed by them that it would not be appropriate to bring such a function here, and it was believed by us that it would not be possible to remove lawyers from here to there for such a function, and was therefore abandoned for what seemed good reason.

As I said to you, this report was not accidental. It was intended, and intended for a purpose. As suggested by the cold simplicity of the printed word, a committee which does not function is a useless committee; it is a cancerous growth which destroys and certainly does not add to strength. If a committee is to serve, it should function or it should not exist.

I believe it important and have sought this device to bring it to your attention that committee chairmen in particular should meet early in the year, that their committees should meet to function early in the year, and if they did not and do not, then in all honesty they should not come to you at the last minute with hastily born proposals intended only to save their face.

I am for the active committee, willing and anxious to serve actively on this or any other committee, and believe that the functioning of committees should have been encouraged.

My experience is not limited in this regard to this particular organization but has spanned others, and I have always considered nonfunctioning committees a form of dry rot. That is an observation, not as a recommendation.

As I suggested to you in the report, the members of the Committee are not to be held similarly responsible, for they were anxious and willing to perform whatever function should come before them, and I recommend them to you as I condemn to you their Chairman.

Thank you very much.

CHAIRMAN McCOWN: There being no action of the Committee, their report will be placed on file.

Jimmy's attempted public confession reminded me of the woman whose husband was not the soul of piety. He had continuing trouble, he was in trouble all the time, and finally caused trouble to her all the time. She finally went to her minister and gave him a long detailed and complete account of all the misdeeds and misconduct of her husband. When she got through, the minister said, "Indeed, ma'am, your husband is a miserable sinner."

She said, "Reverend, he sure is a sinner, but he ain't miserable. He enjoys every minute of it."

The formal report of the Committee follows:



### Report of the Committee on American Citizenship

The Committee on American Citizenship herewith submits its report which is indicative of a lack of activity, rather than of activity. For this reported fact, the Chairman of the Committee must assume responsibility and, by himself writing this report, does assume responsibility. This seems a good point at which to emphasize the fact that a committee can not and does not serve unless it be called to meet, to consider and to plan. A functioning committee adds strength to the organization. A nonfunctioning committee weakens. It must be pointed out that members of the Committee individually performed valued work in this field and were willing to give more of themselves had they been called upon to do so.

The work responsibility of a Committee is an important one. American citizenship, with its inherited privileges, carries with it great responsibility which need understanding today more than ever before. To the end of the development of programs which will contribute to this result, the Committee should be called upon to meet early after its members are designated next year. Then the various programs suggested can be put into operation, and a report of accomplishments, rather than a report of ambitions, can be submitted.

James Green, Chairman  
 Earl J. Lee  
 Frank J. Mattoon  
 L. F. Otradovsky  
 John Samson

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

The report you will find on page 17.

MR. HERMAN GINSBURG: Mr. Chairman, and members of the House. The report of the Committee on Legislation is quite lengthy. As a matter of fact, if we were to tell you everything that the Committee had done during the year, it would take up the entire pamphlet.

I have some observations that I want to make which may be valuable to you in considering the recommendations, which you will find at the end of the Committee's report.

Many of you will remember that last year there was considerable discussion as to the proper function of the Committee on Legislation. Is it a committee that is to be just a group of lobbyists to run down before the Legislature and appear on behalf of the Bar Association at particular times, or is it really to be, as the name indicates, a Committee on Legislation?

I have been informed by President Kuhns that the Executive

Council shortly prior to the last session of the Legislature, did prescribe the functions of the Legislative Committee, which was to be more than simply a matter of lobbying, but it was to act as a coordinating body.

Apparently, and I say this without meaning any disrespect to any of the sections of the Association or any of the committees, the word did not get around, because some of the committees did not cooperate or did not, may I say, coordinate with us. You will find references to various legislative bills in various of the committee reports that were never referred to the Legislative Committee.

As a matter of fact the Legislative Committee referred bills to various committees and sections and asked them for reports and did not get any.

Yet I find those bills referred to in the reports of those committees.

I call that to your attention. I think that is due to the fact that this has been a change which probably has not been well known through our organization generally.

Some of the difficulties that we had this morning, for instance with L. B. 124, I feel could have been avoided had there been coordination between the committees instead of the House being confronted with a *fait accompli*, with a bill that has been adopted. I think it would have been a wonderful thing if that bill would have been referred to the Legislative Committee, the Legislative Committee in turn would have referred it to the Committee on the Judiciary and the Section on Practice and Procedure, had a real study made, and then come back before the Legislature and told the Legislature what the feeling of the Bar was.

As it was, I am one member of the Legislative Committee, and I think I speak for all the rest. I did not even know there was such a bill being presented.

Some of you who attended the clinics on new legislation when held will recall that various speakers made derogatory comments about some of the bills that were enacted, and they were enacted, and perhaps I am taking too much credit, but they were enacted at least in large respect without the knowledge of the Legislative Committee, without having any opportunity on the part of anyone to study them on behalf of the Association and point out the defects.

So much for that facet of our work.

I was very interested when within about a week after I was appointed as Chairman of the Committee I received a letter from a Committee of the American Bar Association calling my attention to the fact that a previous Legislative Committee had been given a

copy of a model nonprofit corporation act which the American Bar Association was sponsoring, and which that Committee apparently reported to the American Bar would be studied and would be presented to the Legislature.

I got a letter from the Chairman of the American Bar Association saying, "Well, now what are you going to do about this nonprofit corporation act?"

I had to write him back and say I have not even heard of it. No other member of the Committee had and they did not know anything about what had transpired in the past.

This may not be the appropriate place for that, but I did the same thing as the previous Committee did. I said, "Well, we will study that for the future." Of course I had no time to do so. I think at this time I should call attention to a letter which I received from the American Bar Association Committee. Again I am going to read part of it because it is something that I think this House should pass on or somebody as representing the Association.

"When I last heard from you, you were hopeful that the Committee on Legislation of the Nebraska State Bar Association would study the model nonprofit corporation act, and consider its submission to the 1959 session of your Legislature. The article by Mr. Luedtke in the Nebraska Law Review should, it seems to me, give some impetus to the proposed study. There is presently a vacancy on the American Bar Association Committee, and since the Nebraska Bar Association is considering a study of the model act, I should like if possible to have a Nebraska lawyer as a liaison member of the American Bar Association Committee." He asked me to appoint someone. I had no authority, and I do not know what the pleasure of this House would be, but it is something that the American Bar Association thinks worthy of consideration. My own feeling is that we ought to appoint someone to serve with that Committee.

But most important of all, the thing that I learned that impressed me most of all was the fact that the Bar Association has fallen down on the job. We owe a duty to our citizenry to help them in seeing that defects in laws are remedied, and wherever there have been new developments that can be advantageous to the public, they should be studied.

We have never done that. I understand that the Judicial Council does that. I think that the Legislature itself has a committee that is supposed to work between sessions of the Legislature. We were appointed right when the Legislature went into session and did not have any time whatsoever to study any legislation.

As a matter of fact the speed with which the Legislature acted was amazing to me. Many times we would get the report of the bill

in this Bill Service that our Bar Association put out. By the time we got the report that the bill was pending, it had already been set for hearing, and I know in two instances I tried to poll the various members of committees on the Bar Association, and before I could even get a return the Legislative Committee had had their hearing and made their report. So we have to act during the intervals between the sessions of the Legislature itself. Merely starting in after the Legislature goes into session is entirely too late.

If you will forgive a further personal reference, I would like to mention L. B. 589, which has aroused so much comment throughout the state. It has apparently been taken as being something so drastically new.

Back in 1953 in the Nebraska Law Review there was an article on the Mullane case and the possible effects on the Nebraska statutes, but this Bar Association did nothing about that, never concerned itself at all about the problem until the Judicial Council took it up some time after the Legislature had been in session, and then very hurried action had to be taken, and the bill was presented without really ample time for consideration.

Also during the course of the session I received numerous letters from various members of the Bar pointing out defects. I remember one man wrote about the defects in our garnishment statutes; another man wrote me and wanted us to get a bill presented or have a study made about the appointment of trial examiners before the various administrative agencies of the state, and so on and so forth. I want to say as far as the Committee was concerned, we were impressed with the fact that these were problems that should be studied, but we were also cognizant of the fact that it was not possible within the period of thirty to sixty days for the Committee on Legislation to take care of the problems presented, and with that introduction I now turn to the recommendations of the Committee, because these recommendations are intended to take care of these background problems that I have mentioned.

Now while the recommendations are numbered from one to five, and perhaps can be considered as separate recommendations, yet I do not feel that they are. They are numbered one to five more by way of convenience than as being separate recommendations, because they all fit in together with a uniform plan.

What we wanted to do was to provide a procedure for the future that would take care of the manner of coordination between the various committees and sections of our Association itself, and also fulfill the public functions which we, as lawyers, owe to the public.

The recommendations are as follows: one, that this Committee be placed in charge of a legislative program of this Association; and

that all committees and sections of the Association be required to clear all legislation to be proposed, and all legislation to be opposed, to this Committee for review.

Two, that the Legislative Committee be authorized to submit to any section or committee of this Association any subject matter which such Committee considers desirable for study; and to require such Committee or Section to report thereon, together with a draft of any suggested legislation.

Three, that the Legislative Committee be authorized to cooperate with the Legislative Council, the Judicial Council and other appropriate bodies between sessions of the Legislature in the study and review of such matters as the Legislative Committee may consider appropriate and within the scope of the legislative program of this Association.

Four, that before the convening of the Legislature, the Legislative Committee submit to the Executive Council of this Association its proposed legislative program, and obtain approval thereof.

Five, that after obtaining the necessary approval by the Executive Council of this Association, the Legislative Committee be authorized to appear before the Legislature and to sponsor such legislation and take such action as may be deemed appropriate to obtain enactment of the legislative program of this Association; and for that purpose, the Legislative Committee to have authority to call on any committee or section of the Association to appear in behalf of such program.

Now you will notice that these are really not separate recommendations. They are five steps in one recommendation that we have a continuing study. And I want to emphasize that point: the Legislative Committee is not going to decide whether legislation is good or bad; it is simply going to act as a coordinating body which will in turn report or refer the matters to the appropriate sections or committees of the Association, and then when they come back with their report we will make up an agenda, so to speak, and submit it to the Executive Council and get its approval, and then we are ready to act.

In other words this means a Committee that will function all year long and every biennium between the sessions of the Legislature rather than the very unsatisfactory method of its being appointed just when the Legislature gets in session and then running up and trying to get some bills introduced.

With that reason, Mr. Chairman, and if there are no objections, instead of moving the adoption of each number of our recommendation, I move the adoption of the recommendations of the Committee.

CHAIRMAN McCOWN: Is there a second?

VOICE: Second.

CHAIRMAN McCOWN: Is there any discussion?

As many as favor the motion say "aye."

Opposed, the same sign.

The motion is carried.

MR. CASSEM: Mr. Chairman.

CHAIRMAN McCOWN: Mr. Cassem.

MR. CASSEM: First, I think that is an outstanding analysis of the problem which Mr. Ginsburg has made. I have one further suggestion. It seems to me that this Legislative Committee should be established in odd-numbered years, to last two years, because having the Committee's personnel completely changed in October before a Legislative session, of course, shoots the horse right out from under the program.

Now it takes a year and three months to work up a program for the Legislature. In other words, the Committee that now starts after this Association meets this time will have until a year from January to get this program together. Well, that is little enough. All right then, let that Committee last two years, in other words until October, 1959; at that time let them be succeeded by another committee which in turn has a year and three months prior to the Legislative session of 1961.

I think in that manner we will go some distance toward eliminating or alleviating the problem which Mr. Ginsburg finds is inherent in this situation.

CHAIRMAN McCOWN: Mr. Cassem, do I understand your comments to be in the nature of a motion?

MR. CASSEM: Well, then, if it is appropriate to make a motion to that effect—I have in mind, of course, the constitutional background and all that—I so move.

CHAIRMAN McCOWN: In order that the motion may be a little more thoroughly understood, I will say this, as I understand it. If I am incorrect, correct me. The motion is a recommendation by the House of Delegates that the Legislative Committee be appointed in the even-numbered years to serve for a term of two years.

MR. CASSEM: I may have missed it. I think it should be the odd-numbered years. The Legislature meets in the odd-numbered years.

CHAIRMAN McCOWN: To clarify it a little more, we might say that the Legislative Committee be appointed at the end of the

odd-numbered year to serve for the succeeding even-numbered year and the session of the Legislature succeeding.

JUDGE SPENCER: Mr. Chairman, point of order. I think this requires a change in our rules, and all we can do is make a suggestion.

CHAIRMAN McCOWN: That is correct, and so that is the reason the motion is worded that way, that it be recommended.

Is there a second?

VOICE: Second.

CHAIRMAN McCOWN: Is there any discussion?

MR. SVOBODA: Let me say, Mr. Chairman, just what Mr. Ginsburg has talked about. Lawyers find in their daily work defects in the statutes, they are called to the Chairman's attention, then all at once January 1st of the odd-numbered year, and an avalanche of bills. There should be some central clearinghouse where the Committee could be acting with reference to the coming session of the Legislature and work up a program. I think this recommendation that Mr. Cassem makes is very important.

CHAIRMAN McCOWN: Any further discussion, Mr. Wilson?

MR. WILSON: I think your recommendation is fine, but are you not going to have to go a little farther to change your by-laws of the Association, because the by-laws provide that the President shall appoint his committees, and are you tying the hands of the incoming President?

I think we will have to amend the by-laws.

CHAIRMAN McCOWN: That is the reason it is a recommendation at the moment. I am not sure whether it would require a change of by-laws. If you were going to specifically require that, I think it would, but coming as a recommendation, I think it can be handled.

Mr. Kuhns.

PRESIDENT KUHNS: Supplementing what has been said and introducing one further thought, I would like first to refer a little to the background of Mr. Ginsburg's report. You may remember that last year unfortunately there was only one recommendation contained in the report of the Committee on Legislation. That had to do, I believe, with your venue statute, and this House more or less authorized as an emergency measure last year the Executive Council to provide a legislative program of the Association, in which would be incorporated the recommendations of the different committees and sections as approved by this House, as well as those of the Legislative Committee. I think that that worked pretty well.

I do not know that I approve of it as a permanent arrangement, and I am heartily in accord with the recommendations of Mr. Ginsburg's Committee, and in passing I can not refrain from saying that Mr. Ginsburg's Committee is one of the committees that really did an outstanding job, worked very hard and very faithfully before and during the legislative session, and they have given a lot of thought to this problem.

There is, however, one other facet to the problem, and again I am not going to suggest this be embodied in any change of rules or by-laws right now, but I do want to bring it to your attention. It is not quite enough to reflect the attitude of the members of the Bar toward a legislative program to develop an affirmative legislative program. One of the things which comes up with these six hundred and some odd bills which are introduced. Many of us would think that if the House were in session now the House would oppose that bill. It is not part of our program; we have had nothing whatever to do with it, but we think it is undesirable. There has been and I think there still is—Mr. Ginsburg was confronted with it during the legislative session—the case in which some bill is introduced which certain members of the Bar who are serving on the Legislative Committee feel is undesirable. They have not been in a position really to go before the Legislative Committee and say that the State Bar Association disapproved of this. Sometimes there are situations when a person ought to be in a position to do that. It is, in my mind, a little more difficult to work out a solution than the things Squire worked out, but it goes along with it, because the fundamental problem here is the problem of being sure that the legislative program, affirmative and negative, of the Association reflects the sentiments of the lawyers. It is quite an inroad on the democratic process to confer a lot of authority on that Committee, and yet it does seem to me that something should be worked out so that the negative aspects of the Committee's problems should be considered as well as the affirmative.

I just bring that to your attention as what seems to me to be sort of a problem.

CHAIRMAN McCOWN: One suggestion would be that the legislative program include both positive and negative.

PRESIDENT KUHNS: Yes, but sometimes you do not know until the twentieth day of the legislative session what a person is going to come up with. Then they come up and say, "What does the Bar Association think about it?" And then we receive letters on questions that say, "Is the Bar Association going to oppose this?"

Who am I, who is Paul Martin, to go before a committee and say that the Bar Association opposes it? I question whether the



Committee on Legislation could do that. I do not have the answer, but I want to be sure that the problem is considered.

CHAIRMAN McCOWN: I do not believe we have yet voted on Mr. Cassem's motion with respect to the appointment of the Committee. Is there further discussion?

All those in favor of the motion say "aye."

Opposed, the same.

The motion is carried.

The formal report of the Committee follows:

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

The Committee on Legislation submits the following report:

Upon its appointment, the Committee received from President Barton H. Kuhns an outline of the legislative program of this Association which the Committee was expected to present to the Legislature. The Committee is pleased to report that the legislative program of the Association was successfully carried out with but few exceptions. L. B. 133, which was sponsored by our Association, was vetoed by the Governor. This bill dealt with administrative procedure, and it is interesting to note that the bill as enacted by the Legislature contained provisions which were not in the draft as submitted by the Association's Special Committee on Administrative Agencies. It is the belief of this Committee that the changes made in the bill by the Legislature, after it had been initially proposed by our Bar Committee, were the cause of the veto by the Governor. It is also interesting to note that the Governor, in his veto message, stated that the subject deserved and required further study, so as to provide for one uniform procedure affecting administrative agencies, rather than simply to provide an additional cumulative procedure, which was the effect of the proposed bill. This subject deserves continued study by an appropriate committee of our Association.

The Committee was not able to obtain a sponsor for a State Tort Claims Act, and it seemed to be the rather unanimous feeling that this was a subject which would best be deferred for future action in a later year.

Two bills sponsored by the Real Estate Section of the Association, namely L. B. 199 and L. B. 200, were indefinitely postponed by the Judiciary Committee. In the main, this action was due to organized opposition by certain groups, and to the fact that a sufficient educational campaign as to the merits of these bills had not been had.

All other bills which this Committee had been instructed to sponsor, including the county judges' retirement bill, the several uniform acts, and the recommendations of the Judicial Council, were successfully urged before the Legislature and were enacted.

Various other bills which had been introduced and which concerned activities of certain sections or committees of the Association were referred to the appropriate sections or committees for action. It might be observed, however, that this procedure of referral did not work out very satisfactorily because of the time element involved. By the time the Legislative Committee considered a bill and then submitted it to the appropriate committee in whose jurisdiction the subject matter lay, it was in most instances too late for anything to be done. The speed with which the Legislature operates in the consideration and enactment of proposed legislation requires that this Association adopt a procedure whereby a more expeditious handling of the consideration of proposed legislation can be had.

This Committee also appeared against certain legislation which had been proposed and which the Executive Council of this Association disapproved; and in the instances involved the Committee was successful in its opposition. However, here again the time involved in studying a bill, reporting the same to the Executive Council and securing action thereon in many cases militated against any successful action on the part of this Association.

To report on each and every bill which was studied by this Committee and either sponsored or opposed would extend this report beyond any reasonable length. It should be stated, however, that in line with the legislative program as outlined by our President, Barton H. Kuhns, the Committee met frequently during the legislative session and to the best of its ability endeavored to consider all pending legislation with a view toward determining whether the same required any action on the part of our Association. Where the Committee deemed legislation was in accord with the legislative program of the Association, the Committee did appear to sponsor such legislation before the appropriate committees of the Legislature; and where it was deemed the legislation should be referred to other committees, that was done; and in some instances, as before stated, the Committee appeared in opposition to proposed legislation.

On the whole, the Committee feels its activities to have been successful, and that it has carried out the legislative program of the Association. The members of this Committee were received with unfailing courtesy by the various committees of the Legislature, and the Bar Association's recommendations were given every consideration by the Legislature as a whole.

It will be recalled that at the last meeting of the House of Delegates there was considerable discussion as to the exact function of the Committee on Legislation; and that problem still remains unsolved. During the course of the legislative session this Committee received many communications from various lawyers, calling attention to defects in the laws and recommending that legislation be proposed to take care thereof. There has been pending before the Committee for some years a proposed model code for nonprofit corporations which has been submitted by the American Bar Association, and as to which this Committee has felt itself unable to act, simply because of lack of time and facilities to make a proper study. Various other suggestions have been made to the Committee concerning the need for legislation to bring certain of our statutes up to date, or to eliminate defects which have occurred therein, as shown by the experience of the Bar. It has been suggested that the Legislative Committee serve as a standing committee for this purpose, and that it make a continuous study, report and recommendations as to all such matters. However, it has also been pointed out that in many instances the subjects involved lie within the scope of the activities of other special committees or sections of the Association, who would be better equipped to pass thereon. Furthermore, there is a considerable problem in being able to obtain the necessary manpower who could devote the time which would be required to such a continuous study and report. However, the Committee does feel that this subject requires action on the part of the Association; and that it is the duty of the Association to be more active in this matter so as to assist in eliminating defects in our laws and in improving our laws generally. It is evident that our present procedure does not meet the need, since our efforts are sporadic and do not keep pace with the legislative speed. It is quite evident that any legislative program of this Association should be well established long prior to the convening of the Legislature, rather than to try to have bills drafted and sponsored hurriedly after the Legislature meets.

*The Legislative Committee makes the following recommendations:*

(1) *That this Committee be placed in charge of the legislative program of this Association; and that all committees and sections of the Association be required to clear all legislation to be proposed, and all legislation to be opposed, to this committee for review.*

(2) *That the Legislative Committee be authorized to submit to any section or committee of this Association any subject matter which such committee considers desirable for study; and to require such committee or section to report thereon, together with a draft of any suggested legislation.*

(3) *That the Legislative Committee be authorized to cooperate with the Legislative Council, the Judicial Council and other appropriate bodies in between sessions of the Legislature in the study and review of such matters as the Legislative Committee may consider appropriate and within the scope of the legislative program of this Association.*

(4) *That before the convening of the Legislature, the Legislative Committee submit to the Executive Council of this Association its proposed legislative program, and obtain approval thereof.*

(5) *That after obtaining the necessary approval by the Executive Council of this Association, the Legislative Committee be authorized to appear before the Legislature and to sponsor such legislation and take such action as may be deemed appropriate to obtain enactment of the legislative program of this Association; and for that purpose, the Legislative Committee to have authority to call on any committee or section of the Association to appear in behalf of such program.*

Herman Ginsburg, Chairman  
 James N. Ackerman  
 Sterling F. Mutz  
 Robert R. Perry

P. S. Mr. Robert Van Pelt served as a member of the Legislative Committee until his appointment as United States District Judge, at which time he felt it inappropriate to take any further part in the work or recommendations of the Committee. Judge Van Pelt is therefore not to be considered as having taken any part in this report.

CHAIRMAN McCOWN: There does not appear to be any member of the Committee on County Law Libraries present, so I suggest that the report of the Committee does not contain any specific recommendations other than these; it is recommended that more effort be made by Association members in these counties to acquaint non-lawyer county judges and county commissioners with the importance of modern law libraries.

It is the Committee's opinion that the program for establishment and expansion of county libraries throughout the state be continued and that the existence of the Committee be prolonged for another year.

Do I hear a motion to approve the report of the Committee?

JUDGE SPENCER: I so move.

CHAIRMAN McCOWN: Is there a second?

MR. MATTSON: Second the motion.

CHAIRMAN McCOWN: Any discussion?

As many as favor the motion say "aye."

MR. CASSEM: Just one second. When that Committee is about to make a recommendation emphasizing the importance of county libraries, I think that they should be admonished to make an especially strong one to the Douglas County Commissioners in view of the efforts of the Omaha Bar Association during the past year, which have been fruitless, as far as the Omaha or the Douglas County Commissioners are concerned.

MR. SCHEELE: Mr. Chairman.

CHAIRMAN McCOWN: Mr. Scheele.

MR. SCHEELE: Is there any action required by the House on Mr. Ginsburg's recommendation that a member should be appointed to the American Bar Committee? I do not know that there is.

CHAIRMAN McCOWN: I assume that that would be a duty of the President. I think that Mr. Ginsburg had no specific recommendation at this time, and that is pending.

I have two comments before we close for the noon session.

The first is a suggestion that in view of the action which you have just taken with respect to the Legislative Committee, each of you and each member of the Bar take cognizance of the fact of the change in policy and get the information to the Committee from time to time and work with the Committee in the best way possible.

As a second one, I will repeat the suggestion which Judge Carter asked me to make on behalf of the Judicial Council, which handled only procedural matters. We hope that each lawyer in the state of Nebraska, from time to time when any matters of that sort come up involving procedural matters, will submit them to the Judicial Council. Now things involving nonprocedural matters as well as procedural matters should have the same action and consideration by each member of the Bar on behalf of the Legislative Committee under the authorities which you have just given them.

With this comment we will declare a recess until 1:30, again in this room. And may I remind you again that the Committee on Resolutions will meet in Room 812 at one o'clock. Anyone who has any resolutions which they desire to present or have considered by that Committee at that time, please present them in Room 812.

Is there any further business before the noon recess? If not, we will stand adjourned until 1:30 in this room.

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The House of Delegates re-convened at 1:30 p.m. on October 30, 1957.

CHAIRMAN McCOWN: I believe if we could get under way we should be able to complete this early in the afternoon in order that you may proceed with your other affairs.

I will call the meeting to order.

The first item of business on the afternoon program is the report of the Committee on Group Life Insurance.

Ted Fraizer.

TED FRAIZER: Gentlemen, due to the fact that the report is not in the program, I have filed a written report, but will make these remarks orally.

Due to the trip to the London meeting of the American Bar, my father and I ended up with a pleasant task of working on the group life plan during the summer, in cooperation with John Fike and Harold Kauffman, both of Omaha. You will recall that a year ago this group, based upon a report then submitted, authorized the Association to go ahead legislatively to seek the necessary legislation which would enable a professional association to participate in group life insurance; and further to authorize the Executive Council after enactment of the successful legislation to proceed with the adoption of a plan.

During the '57 session of the Legislature the Department of Insurance introduced a bill to revise the entire group life law, and to that bill an amendment was sponsored by this Committee in cooperation with the Legislative Committee of the Association to make a special provision, which was rather unusual, in group life law for a professional association group, and the cooperation, of course, of all of the Association at the Committee hearings and in contacting Legislators made this law possible.

Then during the summertime the Committee requested that those companies who have already shown an interest in the Nebraska Bar group life plan be furnished a recommended program and plan, and in addition to those companies who had already shown an interest, all Nebraska domiciled companies who write group life insurance were invited to make suggestions.

Based upon these suggestions there seemed to be two alternatives. One was a plan whereby a level premium would be charged, but the amounts of insurance would decrease from year to year as attained age increased. Because the group life law had a maximum of ten thousand dollars coverage in it, it was deemed that a level amount of coverage plan, with an increase of premiums, would be more suitable.

First, it would provide more insurance at a cheaper rate for the younger lawyers, and for the older lawyers, middle-aged and

older lawyers it would continue to provide a greater amount of insurance, and even though the rates were somewhat increased, it would be the cheapest form of insurance available to them.

Based upon the preliminary recommendations of the many companies, a set of specifications was then sent to all companies so that a final bid would be submitted on the same basis, and that basis was that there should be ten thousand life coverage to and including age sixty-five, thereafter insurance benefits to decrease at the rate of a thousand dollars a year.

The companies were to make their own suggestions as to medical requirements. The Committee was very pleased, and when the matter was taken to the Executive Council, they were likewise pleased with the attitude and the apparent good reputation of the Nebraska Bar Association in that several companies were willing to reduce their medical requirements to an absolute minimum.

Based upon the fewest number of requirements and the lowest premiums bid upon several plans representing several companies were taken before the Executive Council. As a result of their deliberations, and I can personally assure the members of this House that for several hours the Executive Council pored over the details of the group plan before them, the plan of the John Hancock Mutual Life Insurance Company of Boston was selected.

There has been placed in the mail, and I trust that all of you men have now received it, the pamphlet describing the plan, together with enrollment cards. In order that this group may help and encourage others with whom you talk, I will briefly relate that the plan can be placed in effect as soon as twenty-five percent of the members of the Bar sign their application cards, and attach thereto their first semi-annual premium check.

There are absolutely no medical requirements whatsoever; you just have to be warm.

The twenty-five percent is based upon those members of the Bar Association who have not yet attained the age of sixty-six. So out of our total membership of approximately thirty-one hundred, there will be several hundred age sixty-six and over who are not eligible initially in our plan; but it will cut down on our percentage. With very, very good luck through good response and good enrollment tomorrow, it is very possible that all of the members of the Association who sign their cards and leave their checks here will have ten thousand life insurance in force on their way home.

You will remember a couple years ago that one of our good members did have a fatal automobile accident on the way home.

That is a brief summary of the activities of this Committee. We do recommend that a Group Life Insurance Committee be continued following this 1957 annual meeting for the purpose of coordinating the final phases of putting the plan into effect and securing additional enrollment in order to have the plan favorably balanced and at the end of the first policy year to make a review of the operations of the plan and recommend to the House of Delegates or the Executive Council the disposition of the dividend or return of premium which will then be disbursable.

It is further recommended that the House of Delegates authorize the Executive Council full power and authority in all matters relating to the Nebraska State Bar Association group life plan and the distribution of dividends and return of premiums accruing therefrom.

I move the adoption of this report. And are there any questions?

JUDGE SPENCER: I second the motion.

CHAIRMAN McCOWN: Are there any questions?

MR. SVOBODA: A friendly question. A life insurance counsellor who does not represent the John Hancock Life Insurance Company said that the rate is twenty percent below what you might call the average professional rate, and that is a little boost for your stock.

MR. FRAIZER: It is certainly close to that percentage. Naturally, attorneys have a favorable occupational classification, and Nebraska has one of the most favorable, if not the most favorable, mortality factor in the United States. Those things, coupled together, certainly indicate that.

Our review indicates that our rates here in Nebraska are definitely below those of the American Bar plan and below the Minnesota Bar plan, and we have a broader plan than the Iowa Bar.

Also in this are the Denver Bar Association, which has a plan in effect, and we consider that our plan is much more favorable than that.

Our plan is particularly favorable in getting the program started. In many group plans, as you men know, it takes a while to get enough people interested in them to put them into effect, but having this very low minimum requirement, the plan should be able to be put into effect, well, we hope November 1st, which is Friday of this week, but certainly at the latest on December 1st.

Before further enrollment there will be representatives of the underwriting company at the Tax Clinic and at least at the larger



area Bar Associations during the next several months. It is important that all people enroll quickly, because it is possible that if you do not enroll at this time, then in accordance with the plan, medical evidence of insurability can be required; but if everyone enrolls quickly, they can get in, no matter what their present state of health is.

As far as the over-all operation of a plan of this type is concerned, it is important that we do get broad coverage, because although we could get twenty-five percent of the Bar Association, of whom say ten percent are otherwise uninsurable because of medical history, we get too many of those people and we are going to have a concentration of poor risks and the dividend ratio is going to be unfavorable. If we have a favorable claim experience and claim ratio is based on fifty to fifty-five percent of the gross premium, then we can anticipate, and I am going to be very conservative here, at least a one-third return of premiums next year.

JUDGE SPENCER: Ted, are there some extra applications at the desk?

MR. FRAIZER: There will be a booth here, and I am sure they will have additional copies of the booklet.

CHAIRMAN McCOWN: Is there additional discussion?

MR. RUNYAN: An attorney asked me this yesterday, and I am interested too. The report said that any member of the Nebraska State Bar was eligible, and I believe I understood Mr. Fraizer to say now only those who have not yet attained sixty-six years are eligible. Is that right?

MR. FRAIZER: That is the way we set our specifications. It is very possible if we get sufficient enrollment quickly that they will be able to broaden that coverage. Of course it is true really just from the practical standpoint that your premiums are getting pretty stiff over age sixty-six, and there is also the problem of the possibility of a more acute physical medical situation. So on the date the plan goes into effect one could be pretty close to the deathbed, and still receive coverage.

So for that reason it is our anticipation there will have to be a cut-off age at sixty-six.

CHAIRMAN McCOWN: Is there further discussion?

If not, as many as favor the motion say "aye."

Opposed the same.

Motion is carried.

The formal report of the Committee follows:

### **Report of the Group Life Insurance Committee**

The Committee on Group Life Insurance rendered a report to the House of Delegates during the 1956 annual meeting of the Nebraska State Bar Association recommending the support of enabling legislation to authorize professional associations to be covered under the provisions of the Nebraska Insurance Code relating to group life insurance, and that upon the favorable enactment of such legislation a plan for group life insurance of the Nebraska Bar Association be established. These recommendations were favorably acted upon by the House of Delegates and authority delegated to the Executive Council to convert those recommendations into effect.

During the 1957 session of the Nebraska Legislature, your Committee, in co-ordination with other committees of the Association, proposed and secured the adoption of Section 5 to L.B. 286, thereby authorizing the issuance of group life insurance to a professional association. L. B. 286 initially was a revision of the group life insurance portion of the Nebraska Insurance Code.

Following the passage of this act, your Committee requested the various insurance companies who had shown an interest in this legislation to recommend a plan or plans of group life insurance which would be suitable to this Association. All Nebraska insurance companies writing group life insurance were contacted, in addition to the other companies showing an interest in this coverage.

The suggested plans were reviewed by your Committee. The alternatives were: to have a level premium plan with decreasing amounts of insurance at progressive ages, or to have a plan whereby the amount of insurance coverage would remain constant but with the premium increasing from time to time, depending upon the attained age. The latter plan providing the greater amount of insurance over a longer span of years was deemed to be the most satisfactory for both the younger and the middle-aged and older members of the Association.

Final specifications were established by the Committee and submitted to all companies which had shown an interest in this coverage. From the final proposals by the underwriting companies, the plans embodying the fewest limitations, together with those having the most favorable rates, were recommended to the Executive Council for final consideration. From these, the Executive Council selected the plan proposed by John Hancock Life Insurance Company of Boston, Massachusetts.

A brochure and application card have now been mailed to

every member of the Association, and possibly during the 1957 annual meeting there will be a sufficient favorable response from the members to permit the plan to become effective forthwith.

During the period that your Committee was analyzing the suggested plans of group coverage for our Association, a poll of the membership was taken concerning their attitude toward such group coverage. Out of a membership of approximately 3,100 members, responses were received from 938 members favoring the group life insurance plan, while 248 members expressed opposition to such a plan. This overwhelmingly favorable response was encouraging to all those considering the advisability of this program.

*It is recommended* that a Group Life Insurance Committee be continued following this 1957 annual meeting for the purpose of co-ordinating the inception of the plan, securing additional enrollment in order to have the plan favorably balanced, and at the end of the first policy year, to make a review of the operation of the plan and recommend to the House of Delegates or Executive Council the disposition of the dividend or return of premium which will then be disbursable.

*It is further recommended* that the House of Delegates authorize the Executive Council full power and authority in all matters relating to the Nebraska State Bar Association Group Life Plan and the distribution of dividends or return of premiums accruing therefrom.

C. C. FRAIZER, Chairman  
 T. J. FRAIZER, Acting Chairman  
 JOHN R. FIKE  
 HAROLD W. KAUFFMAN

CHAIRMAN McCOWN: The next item of business on the program is the report of the Committee on Unauthorized Practice. Is Mr. Reddish here?

SECRETARY TURNER: He has asked that a member of the Committee present it.

CHAIRMAN McCOWN: You will find a report of the Committee on page 24.

JOHN C. BURKE: Mr. Reddish is not in the city at this time and he has asked that I make the report for the Committee. The Committee report is set forth at length at page 24 of your meeting program, and I will not read same. However, Mr. Reddish asked that I read the following recommendation to you.

General complaint has been received concerning unauthorized activities of bankers, accountants, real estate agents and in-

surance underwriters. No specific complaint justifying Committee action, however, has been filed. The Committee does recommend that each lawyer respond to the opportunities to outline to the public and to the members of the various business and professional groups the services of an attorney and the dangers of unauthorized practice.

I recommend that the report be adopted along with the recommendation.

CHAIRMAN McCOWN: Do I hear a second?

MR. MATTSON: Second.

CHAIRMAN McCOWN: Any discussion?

As many as favor the motion say "aye."

Opposed, the same sign.

The motion is carried.

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 as follows:

No further proceedings have been had on the citation against the George S. May Company discussed in the report of the 1954 meeting of the Nebraska State Bar Association.

No other references have been received by the Committee from the Executive Council. Although general complaint has been made concerning unauthorized activities of bankers, accountants, real estate agents and insurance underwriters, no specific complaint has been filed which would justify action by the Committee. In the absence of specific complaints, the Committee believes that usually the problem of unauthorized practice by members of other businesses and professions having frequent contact with the public can best be handled through conferences on the local level. *The Committee does recommend that each lawyer respond to an opportunity to outline to the public and to the members of the various business and professional groups the services of an attorney and the dangers of unauthorized practice.* At all times, the statements of principles adopted by the American Bar Association and various business and professional groups should serve as a guide in determining the validity of both general and specific complaints.

ALBERT T. REDDISH, Chairman

JOHN C. BURKE

PAUL P. CHANEY

A. J. LUEBS

GREYDON L. NICHOLS

CHAIRMAN McCOWN: The next item of business is the report of the Advisory Committee, Mr. Raymond G. Young, Chairman. Ray.

MR. YOUNG: Mr. Chairman, and gentlemen. It was not possible for us to complete our report for the publication of the printed program because we always like to include in the report an up-to-date report of the activities of the eighteen district committees.

My report is not very long, and I can read it in less time than it would take to tell you about it.

The formal report of the Committee follows:

### **Report of the Advisory Committee**

During the year now ending, the Association lost by death one of its most eminent members, Mr. James G. Mothersead. When the Committee, Advisory to District Complaint Committees was created by the Executive Council in March, 1938, Mr. Mothersead was named an original member of the Committee. In October, 1940 the Supreme Court adopted the Committee as an official agency, renamed it The Advisory Committee and appointed Mr. Mothersead as a member. He served continuously with outstanding ability until his death February 7, 1957. His enthusiasm, his splendid ability, sound judgment and deep understanding contributed much to the success of our bar integration and to the effectiveness of our disciplinary procedures. He enjoyed the high esteem of judges and lawyers. His wise counsel will be missed and his name will be held in affectionate regard by all of us who knew him well.

The Supreme Court appointed Mr. Lester A. Danielson of Scottsbluff to the vacancy created by Mr. Mothersead's death.

The Supreme Court entered judgments of suspension in two cases in which The Advisory Committee conducted reviews and held rehearings.

One complaint is in process of review by the Committee. One petition for rehearing is pending before it.

During the year the Committee, by exchange of views of all its members, rendered seven advisory opinions on a wide variety of questions submitted by members of the Association and chairmen of local committees. The subjects considered were, briefly, these:

Propriety of accepting employment against former client.

Preparation of wills by attorney naming himself (a) a co-trustee, (b) sole trustee with wide discretionary powers.

What, if any, function has The Advisory Committee in determining whether a public attorney has properly refused to act?

May one appointed County Attorney continue in defense of one accused of crime in another County?

Propriety of attorney's preparation of articles on pending legislation for newspaper publication.

Duty of County Attorney in inheritance tax matters relating to an estate which he is handling as a private practitioner.

Is it correct practice for a member of a Committee on Inquiry to sign charges to be heard by the Committee?

Extensive correspondence was had with members of District Committees in relation to practice and procedure under the rules.

The Chairman prepared a detailed answer to the questionnaire submitted by the American Bar Foundation Special Committee on Canons of Ethics, which is conducting a comprehensive survey of the entire subject with special reference to the serious efforts now being made to revise Canon 35 on "Improper Publicizing of Court Proceedings."

The 1955 revision of the Rules has been noticeably beneficial, especially in two respects, to-wit: The provision for two alternate members of each District Committee on Inquiry has reduced delay in cases of disqualification of one or two regular members; and the method provided for the appointment of special investigators has been helpful in cases requiring lengthy and difficult investigations.

The District Committees have performed their duties effectively, making their informal investigations promptly, dismissing where no merit was found, adjusting minor differences and proceeding without delay when hearings were required.

In brief, the actions of the District Committees may be summarized as follows:

In Districts 2, 6, 8, 11 and 15 no matters have arisen requiring attention and no charges are pending.

Informal investigations resulted in dismissals for lack of merit in Districts 5, 10, 13 (two matters), and 17 (three matters).

District 1: Committee is about to hold a hearing upon charges referred to it from District 18.

- District 3 (Lincoln): One investigation is under way; one minor difference was adjusted.
- District 4 (Omaha): Charges are pending in two cases; minor differences were adjusted in three matters.
- District 5: One investigation is being made.
- District 7: Charge of advertising is being held in abeyance upon respondent's agreement to desist.
- District 9: One hearing is to be held soon.
- District 10: One case is pending.
- District 12: One case was decided and will be sent to the Advisory Committee for review when transcript is completed.
- District 14: One case is pending.
- District 16: One case is being held in abeyance because of pending court action. In one case, application is being made for appointment of investigator.
- District 17: One case was decided and record sent to Advisory Committee for review. One investigation is withheld, pending court action in similar case.
- District 18: Because of disqualification of members of Committee, one case referred to Committee in District No. 1.

The Advisory Committee recommends that each member of a Committee on Inquiry procure the following works of reference:

1957 edition of Opinions of the American Bar Association Committee on Professional Ethics and Grievances

Legal Ethics, by Henry S. Drinker

Opinions of the Committees on Professional Ethics of the Association of the Bar of the City of New York and the New York County Lawyers Association (1956 edition, published by Columbia University Press)

Conduct of Judges and Lawyers, by Phillips and McCoy  
Bar Associations, Attorneys and Judges; Organization, Ethics, Discipline, by George Brand.

RAYMOND G. YOUNG, Chairman  
CHARLES F. ADAMS  
RAYMOND M. CROSSMAN  
LESTER A. DANIELSON  
GEORGE B. HASTINGS  
LLOYD L. POSPISHIL  
FRANK D. WILLIAMS

CHAIRMAN McCOWN: Will the report be treated as a motion that the report be approved? I will ask if there is a second.

VOICE: Second.

CHAIRMAN McCOWN: Any discussion?

As many as favor the motion say "aye."

Opposed, the same sign.

The motion is carried. Thank you.

MR. COHEN: May I ask a question? How about those cases where opinions have been rendered on inquiries? Are those opinions that you listed available to the Bar?

MR. YOUNG: No.

MR. COHEN: Anything that is transmitted on that would be of interest to the Bar as a whole.

MR. YOUNG: I might say I have in preparation now a revision of a brochure which I wrote three or four years ago on disciplinary procedures in Nebraska. I am bringing the history of the disciplinary machinery down to date, and in that little publication which will be available to all members of the Association I will include a synopsis of all of the opinions which have been rendered by the Advisory Committee.

MR. SVOBODA: Have there been opinions rendered on all of these seven ethical topics?

MR. YOUNG: Oh, yes; this was a rather light year. A year before, I remember, we had eleven, and usually it runs about eight or ten.

MR. COHEN: Could those opinions not appear in our Bar Journal as they come out? It seems to me they are of sufficient importance to the Bar as a whole to know what those are, because they are relevant.

SECRETARY TURNER: With the consent of the Advisory Committee, I would certainly be happy to publish them in the Bar Journal, with this clarification: I would eliminate all names.

MR. COHEN: Yes.

SECRETARY TURNER: If it suits the Committee, I will be glad to do it.

MR. YOUNG: Well, I am sure that would be acceptable to the Committee, and I would be glad to do it, that is, the substance of the rulings which appear to be of general interest to the Bar. Of course many of these matters we pass on are merely rulings as to procedure under the Supreme Court rules.



MR. COHEN: Well, one that would be of wide importance, it seems to me, would be whether or not you can be the trustee of a will. The brochure will be circulated. You said it would be available; will members get copies of it when it is out?

MR. SVOBODA: Or is he suggesting now that George print it in the Journal?

SECRETARY TURNER: I will be glad to do it either way. If the Committee would like to have a brochure prepared, it would be a nice addition to your desk book, if it is punched to fit your desk book.

MR. SVOBODA: Or in the Journal.

SECRETARY TURNER: Either way.

MR. CAMPBELL: I think that the desk book would be more satisfactory.

MR. YOUNG: I might suggest that the substance of the opinions be put in the Journal until such time as we are able to complete the revision of this brochure.

MR. SVOBODA: Do you want a motion on that?

CHAIRMAN McCOWN: If you wish.

MR. SVOBODA: I will make such a motion.

MR. COHEN: Second.

CHAIRMAN McCOWN: It has been moved and seconded. Any discussion?

As many as favor the motion say "aye."

Opposed, the same.

The motion is carried.

JUDGE SPENCER: How about those that were covered this year? There were some there that were of interest.

CHAIRMAN McCOWN: I think any of general interest could be included in the first one.

SECRETARY TURNER: The next will be the January issue, and we will work it out between now and then.

CHAIRMAN McCOWN: The next item of business is the report of the Committee on Oil and Gas Law, and in the absence of the Chairman, Mr. Paul Martin will make the report.

You will find it on page 22 of your program.

MR. MARTIN: Laurence Clinton, who is Chairman of the Committee, called George Turner and said that he had blown a gasket in North Platte (I hope on his automobile), and asked that I make the report.

The Committee recommends that the special Committee of Oil and Gas Law be continued in the future. There was very little work for the Committee to do this year, but it is felt that with the future development of the oil and gas industry in Nebraska there will be further problems presented in which the lawyers of Nebraska and their clients will be concerned.

The Committee recommends that a special subject of study for the next Committee be the matter of legislation to effect compulsory unitization for the purpose of secondary recovery. Many of the original fields in western Nebraska have reached the point where water flooding or some other repressuring method is required to obtain the maximum recovery from these fields. Other fields will reach this stage in the next few years. The solution of this problem is important to the economy of the oil-producing areas and those areas which may produce oil in the future.

The Nebraska State Bar Association should continue its interest in oil and gas law, and a Special Committee on Oil and Gas Law will serve a useful function as a watchdog in such matters.

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

CHAIRMAN McCOWN: Is there a second?

VOICE: Second.

CHAIRMAN McCOWN: Any discussion?

As many as favor the motion will say "aye."

Opposed, the same sign.

The motion is carried.

The formal report of the Committee follows:

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

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

Two bills relating to oil and gas matters were introduced in the 1957 Legislature. The first of these, L.B. 507 (Oil and Gas Lien Act) made provision for liens for labor, materials and services furnished in connection with the development and operation of oil and gas leasehold estates, and in connection with the construction of pipelines. This bill was passed by the Legislature and became law September 20, 1957. This Act embodies substantially the recommendations of the previous committees on oil and gas law.

There was also introduced L.B. 300, pertaining to oil and gas conservation. The Committee did not participate in the drafting

of this Bill or appear before the Legislature in connection with it. Each member of the Committee did, however, study this Bill in order that the Committee might be in a position to make recommendations should this appear prudent. It did not. The Bill was the source of strong controversy in the Legislature and was defeated.

*This Committee recommends that the Special Committee on Oil and Gas Law be continued in the future. There was very little work for the Committee to do this year, but it is felt that with the future development of the oil and gas industry in Nebraska there will be further problems presented in which the lawyers of Nebraska and their clients will be concerned.*

*The Committee recommends that a special subject of study for the next Committee be the matter of legislation to effect compulsory unitization for the purpose of secondary recovery. Many of the original fields in western Nebraska have reached the point where water flooding or some other repressuring method is required to obtain the maximum recovery from these fields. Other fields will reach this stage in the next few years. The solution of this problem is important to the economy of the oil-producing areas and those areas which may produce oil in the future.*

*The Nebraska State Bar Association should continue its interest in oil and gas law, and the Special Committee on Oil and Gas Law will serve a useful function as a watchdog in such matters.*

LAWRENCE M. CLINTON, Chairman  
GEORGE B. DENT, JR.  
PAUL L. MARTIN  
S. E. TORGESON  
JOHN H. WILTSE

CHAIRMAN McCOWN: The next item of business is the report of the Committee on Public Service, Mr. John J. Wilson, Chairman. You will find the report of the Committee on page 29 of your program.

MR. WILSON: Members of the House. I am not going to read this report—it is all printed—but I do want to call your attention to two or three items which we, as members of the State Bar Association, can only carry out by helping ourselves. This is not a one-man function; this is a function of every active member of the Nebraska State Bar Association.

The Committee can do certain things for you, but you must do the rest of the things for yourselves. We have struggled along with newspaper items. I am happy to say that through the efforts

of you lawyers in your home-town papers we are getting better coverage than we have at any time since that service started.

The television programs are conducted principally by lawyers. The script was prepared by the Committee, and you lawyers are appearing and carrying that out.

The Committee has been getting out some pamphlets, and there are two new pamphlets which most of you received before you came to Omaha. Judging by the requests for the free copies and the copies for which you pay in the office of the Secretary, they must be received with some satisfaction. And I want to say this for the Social Security pamphlet: it is as near accurate as we can get it. It was submitted to the Social Security Director in Omaha before it was printed. Whether you agree with the facts in there or not, they must be correct, because before it was printed Pliny Moodie, who did a marvelous job with the help of John Cassel, sent it to the Social Security Director in Omaha, who kept it two weeks and sent it back without any changes. So if you quote from the pamphlet, you must be quoting the law.

I think we are the first state which has attempted to put out that type of pamphlet. I have seen the pamphlets of many states and that is the first time I have seen a Social Security pamphlet, and I believe that it is an aid to most lawyers.

Again we carried on the legislative bill service. We are using the jury manuals and the display racks. I think every lawyer would do well to get one. If you don't know what they look like, there is one just outside this room with the pamphlets in it.

I think they do a great job of displaying the pamphlets to the public and of getting them into the hands of laymen.

The television programs are all free, and we are indebted to the television and radio stations for giving us free time. I think in the future there will be more television, with the new station in Omaha, which wants to carry a Bar-sponsored program.

The only recommendation that we have is that the present public service program, including distribution of pamphlets and juror's manuals, furnishing of newspaper columns to the weekly newspapers and the production of TV and radio programs, be continued.

And with that, I move the adoption of the report and the recommendation, Mr. Chairman.

CHAIRMAN McCOWN: You have heard the motion; is there a second?

JUDGE SPENCER: Second.

CHAIRMAN McCOWN: Any discussion?

As many as favor the motion say "aye."

Opposed, the same.

The motion is carried.

I might add my comment about the two new pamphlets, which I think are excellent. I believe we received them Monday, the day before yesterday. I have only reviewed them briefly, but I think you will find them extremely useful, and just as a reminder, each member of the Bar is entitled to receive twenty-five copies of each pamphlet free. If you want additional ones, they are only a penny apiece, a dollar a hundred. I think you will find them very useful. They both look extremely good.

MR. RUNYON: Mr. Chairman, I wondered if there is any revision on the pamphlet of joint tenancy?

CHAIRMAN McCOWN: Jack, could you answer that?

MR. WILSON: I do not know, but it is revised from its original form.

SECRETARY TURNER: About a year ago.

CHAIRMAN McCOWN: I was going to guess about a year and a half.

MR. WILSON: We had some changes, and it was supposed to be correct to current law at that time. If anyone knows of any incorrect statements, get the word to the proper source and it will be corrected to keep them current.

MR. GINSBURG: I do not know if this is of any consequence, but I think that the very last issue of the Federal Reporter Second there is a case where a court of appeals reversed a conviction in a criminal case because of what they thought were some errors in a manual for jurors that had been prepared by the local bar association that had been distributed to the jury panel before they were picked.

I think perhaps we ought to look into that case. They had some serious questions. The court paid homage to the Bar for its willingness, its desire and work in putting out the manual, but nevertheless the jury was given the wrong impression, and that conviction could not stand. And I call that to the attention of the Committee and to the attention of this House. You might want to look into that.

CHAIRMAN McCOWN: I believe it has been considered, Herman. I do not believe they are furnished to federal jurors. Is that correct, Jack?

MR. WILSON: Mr. Chairman, at the time this manual was prepared the same question was raised. If you will read our manual, there is nothing in ours that has anything to do with instructions. It outlines the orderly manner of procedure, order of trial and functions of jurors and does not try to state what the law of the case is or the instructions. The federal jurors manual prepared by the Circuit Judge from Saint Louis carries, I know, some definitions, such as preponderance of evidence, willful negligence and so forth. The District Judges on the Committee at the time felt that ours was all right. We have checked ours, and feel we are safe in sending it out.

The formal report of the Committee follows:

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

Your Committee on Public Service makes the following report:

#### **THE ESSENCE IS THE SPIRIT OF PUBLIC SERVICE**

“There is much more in a profession than a traditionally dignified calling. The term refers to a group of men pursuing a learned art as a common calling in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose. Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose.

“Historically there are three ideas involved in a profession: organization, learning, i.e., pursuit of a learned art, and a spirit of public service. These are essential. A further idea, that of gaining a livelihood, is involved in all callings. It is the main if not the only purpose in the purely money-making callings. In a profession it is incidental.

“The best service of the professional man is often rendered for no equivalent or for a trifling equivalent and it is his pride to do what he does in a way worthy of his profession even if done with no expectation of reward. This spirit of public service in which the profession of law is and ought to be exercised is a prerequisite of sound administration of justice according to law. The other two elements of a profession, namely, organization and pursuit of a learned art, have their justification in that they secure and maintain that spirit.”

—Roscoe Pound, Dean Emeritus of the Harvard Law School, in his “The Lawyer from Antiquity to Modern Times” (1953), a report to the survey of the Legal Profession, pages 5, 6 and 10.

## OPPORTUNITIES FOR SERVICE

"No pursuit in life is more honorable or useful than that of a stout adherence to all the precepts and principles of morality, or the possession and practice of the highest and noblest virtues that elevate and adorn human nature. Not even the office of the holy minister opens up such a wide field for simply doing good to one's fellow man. The lawyer's province is to aid in the administration of the law, when followed as it should be. None requires more rigidly of justice, to assist the oppressed, to uphold the weak, to contend against the strong, to defend the right, to expose the wrong, to find out deceit and to run down vice and crimes of all grades, shades and characters. What a field is his for calming passions, allaying strife, composing disputes, settling quarrels and quieting contentions."

—Alexander H. Stephens, onetime lawyer of Georgia and Vice-President of the Confederate States, in his "Recollections of Alexander H. Stephens" (copyright 1910 by Doubleday & Company, Inc.), page 387.

"In addition to these [duties to the court and his clients], some of which are public and some professional, there is no end to the calls that a lawyer will have to serve in his local community and its institutions. Some of these will be remunerative and many will be gratis, but in either event the dignity of his profession, his integrity as a lawyer and his honor as a citizen require that he serve with candor, fidelity and sincerity."

—Opinion of the Florida Supreme Court, per Justice Glen Terrell, as reported in 74 So. (2d) 221, 224.

## PAMPHLETS

Distribution of all five pamphlets continues. Demand has been so great that reprinting has been necessary. In fact, 30,420 pamphlets were distributed in 1957. The ones most frequently requested are those on "Joint Tenancy," "Wills," and "Buying and Selling Real Estate," with "Are You Sure You Want to Sign That?" and "What to Do in Case of an Auto Accident" only slightly behind the leaders.

The Committee has prepared two new pamphlets for distribution—"Be a Good Witness" and "How Does the Social Security Law Affect You?" These pamphlets are in the hands of the printer and may have been distributed by the time of this meeting. If not, you will receive them in due time.

## JURORS' MANUAL

The attractive "Manual for Jurors" in Nebraska has been distributed again this year. This service was first started in 1954. We pay special tribute to the Clerks of the District Court and the Jury Commissioners who have aided in seeing that a copy of the manual is placed in the hands of each juror. A copy is enclosed with each jury summons. No change in the context was made except to correct the names of the lawyers who are now serving as district judges.

## PAMPHLET DISPLAY RACK

Lawyers are continuing to purchase pamphlet display racks for their offices and other public offices within their cities. These racks are attractive and provide a convenient way to exhibit the pamphlets that are offered to the public. These racks may be purchased from the Secretary's office for \$2.00.

## NEWSPAPER ARTICLES

The series "You and the Law" is being continued, and in the two years it has appeared in the local newspaper, we have had insertions in 80 newspapers or a total of 617 insertions. Again, we urge you lawyers and local bar associations to make a renewed effort to see that these articles are carried in the local newspapers.

## TELEVISION PROGRAMS

The bi-weekly programs over KMTV in Omaha carried 67 programs in the three years in which we have been asked to participate.

KHOL at Axtell carried 75 programs in the two years that this was on the calendar. This program has now been discontinued over this TV station.

A new program has now been carried over KRNY at Kearney, and since its commencement we have made 37 appearances.

In each instance, scripts are prepared in advance under the direction of the Committee, and local lawyers are invited to participate.

The Committee welcomes suggestions from members to be included in these programs.

## LEGISLATIVE BILL SERVICE

During the 1957 legislative session this past year, a mimeographed synopsis of each bill introduced in the 1957 session of the Nebraska State Legislature was mailed to each active member of



the Association. This service told the nature of all bills introduced and the standing of each bill during its consideration before committees and on general and select file. This service also listed the sections of the statutes amended or repealed, introduced at the end of each month and a compiled list of sections of the statutes amended or repealed was included in the last service mailed.

*It is, therefore, recommended that the present Public Service Program, including distribution of pamphlets and Jurors' Manuals, furnishing of newspaper columns to the weekly newspapers and the production of TV and radio programs be continued.*

JOHN J. WILSON, Chairman  
 P. M. MOODIE  
 HARRY WELCH  
 EDWARD F. CARTER, JR.  
 RAYMOND E. McGRATH  
 JOHN B. CASSEL

CHAIRMAN McCOWN: The next order of business is the report of the Joint Conference of Lawyers and Accountants, Mr. Warren K. Dalton. The report you will find on page 23 of your program.

MR. DALTON: There is not a great deal to report because, as has been true in the past, this conference, which was set up to settle, or at least to discuss, disputes between lawyers and accountants, had no particular disputes to discuss this year.

There is one matter of interest.

The respective Committees of the American Institute of Accountancy and of the American Bar Association finally in 1956 have recommended a course of procedure which this Association adopted in 1951, specifically, the appointment of a joint committee of lawyers and accountants in each state to attempt to arbitrate or otherwise dispose of disputes between lawyers and accountants before they get into court. The recommendations which were made which are set out in the report are substantially the plan that was adopted in 1951 when this conference was established.

The agreement reached at our meeting was that the Joint Conference of Lawyers and Accountants was the committee which the American Bar Association and American Institute were recommending should be appointed in Nebraska, and therefore we felt there was no further or new action to be taken by either the accountants or the lawyers in this state.

I would suggest this: it may have been done in the past—I do not know—but I would suggest if any lawyer knows of situ-

ations in which accountants are deviating too far into the field of the practice of law and should be brought to task about it, that the matter might be brought to the attention of the joint conferences, because, as I say, we had no indication that anyone was having any specific problems this year.

There are no recommendations, so I move the adoption of the report.

CHAIRMAN McCOWN: Is there a second?

VOICE: Second.

CHAIRMAN McCOWN: Any discussion?

MR. DALTON: Before you vote, I should call your attention to the language of the report, which says that the Bar Association will have the responsibility for arranging for and paying for the meeting in 1958. It is our turn this year.

CHAIRMAN McCOWN: If no further discussion, all those in favor say "aye."

Opposed, the same sign.

The motion is carried.

The formal report of the Conference follows:

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

The members of the Joint Conference of Lawyers and Accountants appointed from the Nebraska State Bar Association report as follows:

The Joint Conference was initiated in 1951 by the appointment of five members from the Bar Association and five members from the Nebraska Society of Certified Public Accountants. In that year a "Statement of Principles Relating to Practice in the Field of Federal Income Taxation" had been approved by the American Institute of Accountants and the American Bar Association, and the formation of the Joint Conference was intended to assist in obtaining mutual understanding in this field.

This year the usual annual meeting was held in Lincoln on June 28. The lawyers were guests of the accountants, and were most suitably provided for.

Three points were covered at the meeting.

First, in 1956, a number of recommendations were made by respective committees of the American Bar Association and American Institute of Accountants. These were in substance: That the

1951 "State of Principles" should be the basic guide for cooperation between lawyers and accountants in tax matters; that joint committees should be set up in each state and at the national level to resolve controversies between lawyers and accountants in this field; that disputes should be referred to these committees before there is resort to litigation; and that, at least in the early period, the national committee should be advised of, and participate in, discussions on the state level so as to establish uniform precedents.

These recommendations were discussed, and it was agreed that the Joint Conference was the committee, the formation of which was recommended. Therefore, no further action need be taken in this regard. It was agreed that compliance with the recommendations would require no revision of current procedures.

Second, there was a request for suggestions as to areas of conflict between lawyers and accountants. It appeared that the principal problems in this field, at the moment, involve the proper classification of and appropriate limitations upon persons who are admitted to practice law and are also Certified Public Accountants. It was agreed that such problems are not suitable for action by the Joint Conference, although they are a common interest of the two state associations.

This led to the third point, which was a general discussion of L. B. 266, adopted by the 1957 Legislature. This bill is a licensing law for accountants. The accountants are hopeful that under it they will be able to exercise substantial control over public accountants and public accounting practices. The law will enable the accountants to enforce any agreements which may be reached as to the proper spheres of action of lawyers and accountants in the tax field. Heretofore the only method of regulating this area was through the Committee on Unauthorized Practice.

It may well be noted that the members of the Joint Conference from the Bar Association will have responsibility for arranging for, and paying for, the meeting in 1958.

Warren K. Dalton, Chairman  
James W. R. Brown  
Harry B. Cohen  
Roger V. Dickeson  
Vance E. Leininger

CHAIRMAN McCOWN: The next item of business is the report of the Committee on Resolutions. Mr. Svoboda.

MR. SVOBODA: Mr. Chairman. The Committee on Resolutions appointed by the Chairman, consisting of myself as Chairman of the Committee, and Mr. Pierson and Mr. Hunter, received

two resolutions, including the one that you heard introduced by Mr. Votava this morning. I will read it.

"WHEREAS, The House of Delegates of the Nebraska State Bar at its last annual meeting approved Constitutional Amendment No. 3 permitting the Legislature to absolve real estate from taxes and assessments delinquent for a period of time not less than ten years as the Legislature determined, and further resolved that the lawyers lend their support in explaining the measure to the voters to the end that the electorate could make an intelligent decision on the question; and

"WHEREAS, the measure lost by a vote of 194,858 for and 206,006 against chiefly because the voters did not understand the measure; and

"WHEREAS, the measure will be re-submitted to the voters at the 1958 general election under L. B. 292 passed by the recent Legislature in simpler legal language and with the Statute of Limitations of not less than fifteen years; and

"WHEREAS, this proposal together with an anticipated implementing statute will aid in clearing land titles and is very desirable legislation,

*Resolved*, That the House of Delegates of the Nebraska State Bar Association approve L. B. 292, and be it further resolved that the lawyers of Nebraska be urged to explain it and the forthcoming Constitutional Amendment stemming from it, so that such Amendment will pass at the election."

Mr. Chairman, the Committee approved the resolution with a recommendation that it be further implemented by the Legislative Committee of this Bar Association, and I so move.

CHAIRMAN McCOWN: Is there a second?

VOICE: Second.

CHAIRMAN McCOWN: Any discussion?

JUDGE SPENCER: Question.

CHAIRMAN McCOWN: As many as favor the resolution say "aye."

Opposed, the same.

The motion is carried.

MR. SVOBODA: The other resolution which came to the Committee on Resolutions was transmitted to us from the American Bar Association and its appropriate committee, namely the Special Committee on Lawyers in the Armed Forces.

I will read the resolution.

“A RESOLUTION ENDORSING SENATE BILL 1165,  
85th CONGRESS

“WHEREAS, there has been introduced in the Congress of the United States Senate Bill 1165, which provides for additional pay and promotion for members of the legal profession serving with the armed services in a legal capacity, bringing the pay and promotion status of military lawyers to a level commensurate with the special professional pay and promotion schedule now available to members of the medical and other learned professions serving with the military; and

“WHEREAS, it is the sense of this Association that lawyers should receive such commensurate compensation and rank, for their professional training and skill are certainly as valuable to the armed forces as those of the other learned professions; that the armed services are having great difficulty in procuring and retaining even a minimum of military lawyers, and that if they are unable to do so, it will be impossible to administer properly the present Uniform Code of Military Justice; that said Code was made the basis of military justice largely through the efforts of civilian lawyers, and that we therefore have a responsibility to ensure its successful operation; and that, finally, this Bar has a peculiar interest in and knowledge of the needs and problems of the armed services;

“*Therefore, be it resolved,* That this Bar Association endorses Senate Bill 1165, and urges upon the Congress of the United States its passage, and the Secretary be and he is directed to send copies of this Resolution to the members of the United States House of Representatives and the United States Senate from this state, and to the American Bar Association.”

The Committee on Resolutions unanimously adopted such resolution, and recommends it to you for approval.

CHAIRMAN McCOWN: That will be treated as a motion for adoption. Do I hear a second?

VOICE: Second.

CHAIRMAN McCOWN: Is there any further discussion?

As many as favor the motion say “aye.”

Opposed, the same.

Motion is carried.

Thanks very much to the members of the Committee on Resolutions.

Now, gentlemen, we have completed the program assigned on the calendar for today’s business.

Before closing, is there any business which needs to be taken up at this time? If you will note, and I want to call your particular attention to it, the next regular session of this House will be at 4:00 P. M. on Friday.

It is necessary that all of you, if possible, be here at that time. Normally we can complete that in the matter of an hour if everyone is here promptly, and we hope to be able to start promptly at 4:00 on Friday.

Is there anything that any member has to bring before the House at this time?

JUDGE SPENCER: Mr. Chairman.

CHAIRMAN McCOWN: Judge Spencer.

JUDGE SPENCER: If the session should end before 4:00, is it possible to start the meeting of the House of Delegates before 4:00?

CHAIRMAN McCOWN: Yes, I should say that in the event the regular session Friday afternoon of the Bar Association should conclude in time for us to commence this session of the House before 4:00, we will endeavor to do so. In other words, it will immediately follow the proceedings of the regular assembly on Friday afternoon, at the earliest possible time, and we presume at 4:00.

I would like to suggest all of you be here by 3:30 if possible.

There being no further business, this session will be adjourned until approximately 3:30 and not later than 4:00 P. M. on Friday, the day after tomorrow.

Thank you very much for your cooperation throughout.

(Thereupon, at 2:35 P. M., the session of the House of Delegates was adjourned until 4:00 P. M., Friday, November 1, 1957.)

## NEBRASKA STATE BAR ASSOCIATION

## THURSDAY MORNING SESSION

OCTOBER 31, 1957

The opening session of the fifty-eighth annual meeting of the Nebraska State Bar Association was called to order at 10:00 o'clock A.M. at Hotel Paxton, Omaha, Nebraska, by President Barton H. Kuhns.

PRESIDENT BARTON H. KUHN: The fifty-eighth annual meeting of the Nebraska State Bar Association will be in order.

Dr. Thomas R. Niven, pastor of the First Presbyterian Church of Omaha, will give the invocation. Dr. Niven.

DR. NIVEN: Eternal God, we rise to bless Thy name and to give Thee thanks for life in these times.

We thank Thee, O God, for this land of ours and its laws, for its history, for those who have been the custodians of its great values.

Now that we are the custodians of this great treasure, we pray, O God, that Thou will give us wisdom of the great Association to do what we can, not only to speak of law, but to qualify law in the minds of those who are lawless, of those who are negligent of their whole duty.

We pray that Thy inspiration may be in the hearts of these men as they meet together in this great Association. The inspiration and confidence may be born again in our hearts that we may go back to our homes, mindful of the great lawgiver. May we in the spirit of Christ not only remember the letter of the law, but may we love the name of God and the life of God as it has expressed itself through this great nation's light.

Grant to bless each one of us and all of our interests as we commend ourselves to Thee in this great convocation.

We ask it in the name of the eternal law of life. Amen.

PRESIDENT KUHN: In the absence from the city of President Ed Garvey, of the Omaha Bar Association, Vice-President Ed Cassem will give the address of welcome on behalf of the Omaha Bar.

MR. CASSEM: Mr. Chairman, and gentlemen of the Nebraska State Bar Association. On behalf of the Omaha Bar Association we bid you warmly welcome to Omaha. I think that I also at the same time must convey the regrets of our popular President, Mr. Edward Garvey, and I think I should reveal to you that at this moment Ed is trying a case in Southern California.

Now I do not know how you get that kind of business, but I know that it would not take a great deal of it to make this practice of law fairly gratifying.

Now we want to welcome you and thank you for the business which you sent us during the past year, and at the same time apologize for not having been able to send more to you; but also to tell you that we think this is a temporary thing, and that you can look forward to an increase during the coming year.

Now we want to welcome you and invite you to see the sights, if there are any, but of course you know the local resident is never a very good judge of that.

Several years ago, in fact something over twenty years ago, I went down to Lexington, Kentucky, to take some depositions (incidentally it has been my observation that about the only travel a lawyer can afford is what he works in taking depositions), but as you doubtless know Lexington, Kentucky, was the girlhood home of Mary Todd Lincoln.

The law firm which was guiding me around down there was the firm of Stoell, Buehr, Townsend and Clark, and Mr. Townsend of that firm was an American authority on the life of Lincoln and had some several publications to his credit.

In a leisurely hour he put me in his car and took me around to see some of the historical sights of Lexington, including the former home of Mary Todd Lincoln.

He stopped there, and said, "Now this house is still privately occupied." He said, "You know, the people in this town have no sense of history. If this house were over in Springfield, Illinois, some local historical society would have bought it, and they would have stocked it with furniture of the period, and they would be charging twenty-five cents admission, and it would be open to the public; but not here."

"Why," he said, "the story is told about the student of Lincoln who came to Lexington. He got off the train down at the Old Southern Railroad Company depot, and walked over to the ramshackle old automobile with this old colored man driver, which passed for the local taxicab, and got in, and he said, 'Driver, take me to the Mary Todd Lincoln house.' "

"And the old colored man scratched his head and said, 'Boss, I done thought that I knowed every sportin' house in town, but I never did hear of the Mary Todd house.' "

"Now," he said, "that is the way it is here. These people have no sense of history."



Now we want you to look around and notice such things as our new auditorium, of course, and also our new Doctors Building which is out this direction quite a ways. Take a good look at that, because it is just chuck full of guys that no longer are interested in spending thirty minutes at the courthouse for fifty bucks.

I tell you this to apprise you of how things change.

Now, of course, there are many things that we want you to notice, and some things that we hope you will not notice. Among the latter is how much older some of us are getting. Now, of course, again we think that is a temporary thing, and it may improve.

I think I should say to you that the Omaha Bar Association neither accepts nor disclaims credit for whatever degree of civic virtue prevails in these parts. If the phrase "burglars in blue" rings a bell and brings a recollection, just let me remind you that it was one of the members of our Association that coined the phrase and not the condition.

Now we really hope that you have a wonderful time. Just having you here sort of peps us up a little bit, and if you come across anything, see or hear anything, which you think might take our minds temporarily off the high price of office rent in Omaha, please drop in before you leave and share it with us.

Welcome to Omaha.

PRESIDENT KUHNS: Thank you very much, Squire. I want to say at this point, and I will do so again before the proceedings are over, that Mrs. Cassem, together with Mrs. Dan Gross, is co-chairman of the Women's Committee, and they have made the preparations and planned a program of entertainment for the ladies, and we are deeply indebted to them.

I have had a good many pleasant visits with Mrs. Cassem during the last few weeks concerning the details of those arrangements, and, Squire, I want you to know that we appreciate all that she has done and your help.

Mr. C. Russell Mattson of Lincoln, a member of the Executive Council, will make the response on behalf of the Association. Mr. Mattson.

C. RUSSELL MATTSON: Mr. President, distinguished guests and members of the Association.

It was a distinct honor for me to be invited to make the response. We certainly appreciate the hospitality that Omaha has shown and the hospitality of the Omaha Bar. I know that increasingly over the years it is more and more inviting for us to come into Omaha and to be so splendidly entertained.

The only suggestion that I might have in connection with the entertainment of the ladies, which has certainly been excellent in the past and I know will be that way today, is that if Mr. Cassem has any influence with his wife, I might suggest that the ladies' program be extended so our wives could stay out of the downtown stores.

It is always a pleasure for all of us to come into these Association meetings. I know I speak not only for the outstate lawyers, but for the Omaha lawyers, for the pleasures we have in renewing old acquaintances, pleasures we have in reminiscing, pleasures we have in the visiting and the association we have with our old friends.

I am a little sorry that Ed Garvey is not here, because I wanted to thank him publicly for an example of continuing legal education that he gave me in the District Court on a small appeal out of the Muny Court here a few weeks ago. I felt like Daniel in the lion's den, being a stranger in Omaha these days, although I grew up here. When the panel was called, there was a lady from Lincoln on that panel, and I made the sad mistake of giving her a big grin.

Well, she did not last very long when preemptory challenges came.

I wanted to thank Ed publicly for the continuing legal education he gave me, not to ever grin at anyone I know when they are called on a strange panel.

Speaking of continuing legal education, I think one of the most important factors about our meetings is the splendid work, and I want to take this opportunity on behalf of all of us to express appreciation to the executive groups or the committees that handle the section work.

I think they have done excellent work. I think we all agree that one of the finest parts of coming into Omaha is the continuing education that we get from the sections.

Again in closing, Mr. Cassem, may I express the appreciation and thanks of all of us to the organized Bar of Omaha for this splendid hospitality you have afforded us. Thank you.

PRESIDENT KUHNS: Thank you very much, Russ.

The rules of the Association provide at this juncture of the proceedings for an address by the President. Since there is no other occasion provided for the President to submit to the Association a report, it would seem that this occasion affords an opportunity first for the President to make to the Association an accounting of his activities and of the affairs of the Association and, sec-

ond, certain pertinent observations and comments appropriate to an address to a bar association.

To a certain extent the printed program for this annual meeting reflects the activities of the various Committees of the Association through their reports to the House of Delegates.

The House and the Executive Council in turn report their actions to this gathering. Likewise, the section programs reflect the contribution of the sections to the Association. There can be little doubt that bar associations throughout the country in more recent years have progressed from the days of purely social gatherings and speeches by prominent politicians to activities more designed to bring direct benefit to the practicing lawyer.

More and more it has become recognized that the practice of law is a complicated business which requires the practitioner to keep constantly up-to-date on statutory developments, both state and federal, on innumerable federal regulations in all areas of the law, and on an ever-increasing abundance of case law.

No longer can an individual enter the practice of law, qualified by a good background of legal education, and expect to remain reasonably proficient through those matters of law business which will develop simply through his own experience.

Continuing legal education is more than a mere phrase: it is an absolute necessity for the successful lawyer, and it extends not only to those fields which might be regarded as special areas of law, but also to the general practice in its broadest sense. Literally hardly a week goes by throughout the year that there are not institutes on some subject matter or other being held under the sponsorship of one or more bar associations throughout the country.

Your Association during the past year has kept pace with that trend. In addition to our traditional Institute on Taxation, which has now been held annually for fourteen years, we had our Institute on New Legislation, which traveled across the state just a few weeks after the adjournment of the 1957 Legislature, to acquaint the lawyers with salient bills affecting him in his everyday practice.

Last spring there was a very successful institute in Omaha on Practice and Procedure, followed by a half-day Institute on the Law of Labor Relations. It has always seemed to me that institutes, being devices for continuing legal education, properly had some affiliation with law schools. The co-sponsorship of institutes by the Association and our two law schools became a reality this year, with the splendid Institute on Business Law and the Law Business held at Creighton University early in September, followed a few

weeks later by another fine institute on the very pertinent subject of condemnation at the University of Nebraska Law School.

By these institutes the very latest trends on the subject matters of taxation and business law, practice and procedure, labor law, law office management and eminent domain were presented to the lawyers.

One of the projects of the Association this year which does not find a place in the report of any committee or section is the distribution of the Lawyer's Desk Book. This useful and attractive binder was distributed in early September to every member of the Association, together with the latest edition of the title standards, the rules of the Supreme Court and certain forms of notices. The usefulness of this desk book as a convenient method for keeping all of that material which every practicing lawyer needs to have handy is almost unbounded.

The only limitations are the cost of the printing, and the size of the rings. A number of suggestions for additional material have been received. The Rules of the Federal District Court, Standardized Instructions to Juries, quick summaries of statutory filing fees and even costs, and tax tables for state inheritance taxes as well as federal taxes are among the proposed fillers now under consideration. Some local and district bar associations are planning to print their minimum fee schedules to fit the desk book. It is my belief that at an early date almost all of the printed material distributed by the Association, other than letters, might very well be standardized to fit the Lawyer's Desk Book.

After a while this material might become obsolete, and it is an easy matter to remove it and destroy it. The distribution of this desk book is not, as might first appear, an extravagance of the Association. It was made possible by the generosity of six corporate fiduciaries whose names are listed on the inside cover of the desk book. These corporate fiduciaries contributed twenty-five hundred dollars to our Association to defray the cost of these desk books. In and of itself, this contribution of twenty-five hundred dollars is a wonderful gift, for which we are highly appreciative. Even more than the material contribution, however, is the circumstance that, while in a number of states the lawyers in the trust departments of banks are locked in litigation over questions of an authorized practice of law, here in Nebraska there exists the cooperative recognition upon the part of financial institutions in our two largest cities of the necessity of recognizing the demand for legal services in estate planning and in banking transactions of all sorts.

This spirit of good will on the part of corporate fiduciaries has

an intangible value far over and above the checks written to our Association in payment for the desk book.

At the meeting of the House of Delegates last year, the officers of the Association were directed to take appropriate steps to procure the adoption of legislation which would permit the writing of group life insurance for the Association. Our Committee on Group Life Insurance has had a full year of activity. First, during the legislative session, and in cooperation with our Committee on Legislation, there was the problem of amending our statutes to permit group life insurance for professional associations such as ours. Such legislation was enacted and became effective September 20.

As soon as the bill was passed and signed, our Committee commenced work inviting all known insurance companies writing this type of insurance to submit proposals. After a tedious process of sifting these proposals and comparing the terms of various contracts and the actual cost, after taking into account probable dividends, the Committee met with the Executive Council on October 5 and submitted four possible plans of group life insurance with as many companies, which was the result of the elimination of other proposals after careful study by the Committee.

As a result of the study made by the Executive Council with the assistance of the Committee on Group Life Insurance, the group policy submitted by the John Hancock Mutual Life Insurance Company was determined to be the most desirable. Applications have been distributed to the members of the Association, and are now available on the mezzanine floor. Without any medical examination or medical inquiry at all, it is now possible for the members of this Association to obtain the equivalent of term life insurance on a cost basis far below the premiums which any one of us would have to pay individually.

The non-medical feature is necessarily limited to those applicants who get in on the program at the beginning, so it is urged that you look over the material submitted. I am confident that most of you will conclude that you can not afford to be without such insurance.

Incidentally, the study made by our Committee included a comparison of the cost of such insurance to a number of other bar associations, and I believe there is none where the premium rate is quite so favorable.

As many of you know, it has become one of the traditions of bar associations in this part of the country to invite the officers of bar associations of adjoining states to our annual meetings. We will be honored at our speaker's table this evening with the presi-

dents of the Bar Associations of Iowa, Colorado, Kansas and Missouri, and the State Bar of South Dakota will also be represented. Pursuant to this custom. I have attended the bar meetings of the State Bar Associations in each of these states. In doing so I had the privilege of meeting the presidents of the State Bar Associations, all the way from Illinois to Utah and from North Dakota and Minnesota to Tennessee and Oklahoma.

In addition I have attended two meetings of the National Conference of Bar Presidents. Unquestionably there has been a decided advantage in getting to know Bar officials of other states on a first-name basis.

Many of the problems on which our committees have worked are problems which exist in the other states. The interest of lawyers in the various subject matters of law, as presented in section programs and institute meetings, is quite uniformly the same as ours, with, of course, the special emphasis one finds in mineral law in Colorado and other Rocky Mountain states.

Each of these bar associations has its traditions. Without in any way detracting from the honor we pay our guests visiting us today from these other bar associations, I do want to say, and with full modesty, because I claim no credit for it, that we have an Association of which we may well be proud, and which stands very favorably in all respects alongside the state associations of our neighbors.

Two features impressed themselves upon me wherever I went. One is that the Nebraska lawyer certainly gets his money's worth from his dues to our State Association. I believe that without exception all of our neighboring states which have dues comparable to ours make additional charges for registration at institute meetings. Just a week ago last Saturday I was in Colorado Springs for the meeting of the Colorado Bar Association. After I had registered and while the gentleman who had taken me in charge as my host was called momentarily to the telephone, I picked up some literature consisting of institute programs and papers which were laid out on the registration desk. My host returned and insisted on my having all I had looked at and more too without charge, just as the young lady was telling me that I had picked up seventeen dollars worth of institute material.

In other states I was handed copies of institute programs and institute outlines, for which the registrants were paying upwards of fifteen dollars. I mention all of this, not to recommend at this time that we start charging a registration fee for institutes, but rather to acquaint you with the facts of institute life in other bar

associations, and with the thought that as time goes on, we may come to a day when registration fees for institutes will become necessary.

In order that you may have the full picture, I have examined the budgets of some of the other bar associations, and the real answer is that under our rules the Clerk of our Supreme Court is automatically our Secretary and Treasurer. A number of other bar associations have well-paid secretaries, and good bar secretaries are not available even at teamster's wages. I find myself joining the uninterrupted line of my predecessors who have paid tribute on this occasion to the invaluable service of our efficient Secretary and Treasurer to all lawyers of this state.

There is one other observation which has impressed itself upon me throughout the year, both in my visits to other bar associations and through my own experience at home. I do not bring this to your attention with any recommendation that we should seek a revision of our rules immediately. In fact I am one of those who believe that we should be quite slow to run to the Supreme Court for a request for a change to our rules every time someone has what appears to be a good idea for improvement. There is great value to this stability which comes through infrequent changes in our rules. We do have here in Nebraska, however, a rather unusual situation, which, as I understand it, is really a hangover from days gone by when it was not so difficult to persuade someone to accept the presidency of our Bar Association. These were the days of State Bar Association politics. The hangover consists in disqualifying for the presidency anyone who currently has the opportunity of being particularly familiar with Bar Association affairs, and as part of that same arrangement we have no line of succession to the presidency of the Association.

In each of the other states in which I have visited, it is not the president for the ensuing year who is being honored by election at the annual meeting. In each instance it is either a president-elect or a vice-president, who by tradition automatically becomes president a year hence. This arrangement has two decided benefits. First, it provides the association with a president who during at least one year (in Missouri the line of succession is even longer) preceding his assumption of office, has had the opportunity to familiarize himself thoroughly with all of the affairs and activities of the Association. In most of the states he sits at the right hand of the president at the functions and activities at which the president serves.

From the personal point of view of the individual, this arrange-

ment enables the man who becomes president to plan his own office affairs in such a manner that he can devote the time required during the year of his presidency, without too great a personal sacrifice.

Without wishing to seem immodest, I think it may be well for you to understand just what this Association expects of a conscientious president. And I mention these items in all modesty, because I am truly fearful that my administration will be noted more for what it has not accomplished than for what it has done.

Your President, however, now attends State Bar Association meetings ranging from two to three days each in five adjoining states. Because of the distance, Wyoming seems not to have been included in the exchange of invitations to me. Including traveling time to meeting places and these other places, such meetings can well consume ten to twelve days throughout the year.

In addition, there are two meetings throughout the year of the National Conference of Bar Association Presidents. This coming year one meeting will be in Atlanta and the other in Los Angeles. At the two meetings last year there was not a single state that was not represented either by its highest or next to highest official. These two meetings are the equivalent in time to another week.

Then the President really should be on hand at all meetings of institutes sponsored by the Association. Recognizing the desirability of our traveling institutes, because of the geographical situation in Nebraska, these institutes consume another week or ten days.

In addition, there are a number of luncheons and evening meetings of local and district bar associations throughout the year.

I think perhaps the most delightful occasions during the past year for me were the meetings of the Northeastern Nebraska Bar at Norfolk, the Central Bar at Broken Bow, the Fourteenth District Nebraska Bar at McCook and the meeting of the Western Nebraska Bar at Sidney.

While our good Secretary carries more than his full share of responsibility, the normal correspondence of the President of the Association fills a half a drawer of a filing case. Then there are meetings of the Executive Council, four or five throughout the year, usually lasting a full day. The President has some responsibility in connection with the quarterly preparation of the Journal, to say nothing of participation in arrangements for this meeting.

Then too, to really do the job as President, he should meet from time to time with the executive councils of the sections, and perhaps with some of the committees at their meetings, and in



a legislative year the President is also called upon to appear before legislative committees in connection with particular bills which the Association may favor or oppose.

I do not mention all of these matters because this year more than in prior years your President has devoted time to these various functions. I think perhaps some of my predecessors have been overly modest in refraining from accounting for their efforts on behalf of the Association. But my real purpose is to bring to your attention that the supervision of this great Bar Association of approximately two thousand active members is really big business.

I think we should be giving consideration to the desirability of revising our organization in the reasonably near future to the extent of choosing a president-elect one year in advance, or some other similar arrangement for a succession in office.

So much for the report part of my address.

Now I would like to say just a few words about those things which I consider should be foremost in the minds of the members of this and other bar associations today.

Among the principal functions of a bar association are the welfare of its members and the public interest. The welfare of the members, it seems to me, has two facets. One is providing facilities for the continuing legal education of our members, which is provided through the institutes. The other is improvement of the economic condition of the Bar, which in these days of rising costs of business of all sorts involves studies of both income and disbursements of lawyers.

In the area of lawyer's income much has been developed in recent years in connection with minimum fee schedules and an advisory state-wide minimum fee schedule has been proposed.

Whether the answer is to be through minimum fee schedules or some other method, it is something that all of us should be giving consideration.

I was very much impressed by certain remarks of Mr. Don Hyndman, Director of Public Relations of the American Bar Association, who in this connection said that more than anything else among the public relations programs of the Bar is the vagueness on the part of the public as to what legal services are likely to cost. He pointed out that this uncertainty prevents many people in need of legal services from consulting lawyers before their situation becomes desperate.

He pointed out that better public relations necessarily involved the acquainting of the public with the merit of preventive law. Mr.

Hyndman stated that the irony of lawyer's shyness is that no other profession is as generous or goes out of its way so much as does the legal profession to see to it that its services are available to people, regardless of ability to pay.

Yet probably no other profession has a reputation for being of such a grasping nature, so that the public literally avoids the profession as long as possible. There is an area of Bar Association public relations, but it is an area of Bar Association public relations which has not, I believe, received proper emphasis. It is true that there is some inherent shyness on the part of lawyers to discuss fees freely and frankly at the commencement of services. There is certainly in many situations a complete lack of explanation to clients of the amount of time, overhead and work involved in any given legal service. The public seems better able to measure the value of the services of the architect or engineer when the house or building is built or the doctor when the surgical wound is healed and the stitches removed, but alas, the function of the lawyer is too often regarded by the client as involving employment of services which the client ought never have to have, and all too often the service of the lawyer becomes in the mind of the client a part of the unwarranted injustice to which the client has been subjected, as distinguished from the adorable house or the noble building built by the architect or engineer or the relief from pain or restoration to health provided by the doctor.

These considerations get down to some very fundamental thinking in the area of public relations, but I am convinced that no public relations program will come into the full bloom of its objective until the public comes to the true realization of the true cost and the true value of legal services.

And in this connection, and this, I believe, is equally important, we can not hope to have the confidence of the public in our profession unless we at all times intelligently protect the good name of the profession by strict enforcement of disciplinary procedures whenever warranted. Against a rather minute fractional percentage of our members, there may be occasions to bring those proceedings.

Very closely related to the need of the profession to have the respect of the public is the part which the profession can play in the respect of the public for the courts. A careful reading of the history of our country suggests that there may be something about our form of constitutional government which in cycles seems to bring about situations where there is a dangerous lack of respect for the courts. I think this past year has been such a term in the cycle. We can not expect the public generally to have respect for the

lawyers if the lawyers have no respect for the courts, nor can we expect the public to respect the courts which are subject to vehement attacks by lawyers.

We all know deep down in our hearts that the preservation of our form of government depends upon respect for the judiciary and our judicial system.

In matters of private civil litigation and even in individual criminal cases, we have all learned quite well to accept the results of a judicial determination of the issues, however much we may feel that a different determination, a different judgment or decision, would have been in furtherance of justice.

I believe that most practicing lawyers feel some sense of shame when they hear of a fellow lawyer ruthlessly condemning some member of the judiciary because of his holding in some private litigated matter. We instinctively recognize that the judiciary, as well as the other institutions of our government is not wholly beyond the reach of criticism, but we feel that attacks upon the integrity of the courts should not be heedless of the importance of the judicial system itself or, in cases of appeal, of the value of judicial review. But somehow when issues involved are of a public nature, and particularly when they involve potential political issues, there is a widespread tendency on the part of the public generally to repudiate all the merits of the judicial system, to cry for the impeachment of the courts, to accuse the courts of usurping authority, and of exercising naked and unconstitutional powers. The attacks lose the characteristics of a respectful disagreement and completely overlook the fact that the privilege of criticizing a court's decision carries with it an obligation to recognize the decision as the supreme law so long as it remains in force.

Unfortunately, there are some lawyers in some areas of the country who are willing to foment this public disrespect for the courts. A lawyer has no more right to expect that every judicial decision on a public issue will be in accord with his views than he has such a right in matters of private litigation. We are entitled to our own views as to the soundness of the judicial decision, but we are not entitled to foster disrespect for law and established judicial authority by unwarranted attacks upon the integrity of the courts, just because the court's view may not in every instance be in accord with our own. Until lawyers themselves are convinced that unwarranted, abusive and reckless attacks upon the judiciary and the judicial system will serve only as instruments of destruction of our government under the Constitution, we can not expect those of us who have not had the same legal background

of training to recognize the indispensable value of the cherished tradition of the intelligence of our judges and of the orderly progress under law.

Nor can we expect those who, through ignorance or otherwise, lack respect for the courts to have respect for us as members of the Bar, who are officers of the courts. It is, I believe, part of our professional duty to assume leadership in respectful recognition of the judicial processes, regardless of our position and agreement on any one or more particular decisions.

Thank you very much.

PRESIDENT KUHNS: The next item on the program is the report of the Secretary and Treasurer, George Turner.

SECRETARY TURNER: Mr. President, first two or three other announcements, if you will bear with me.

The Association luncheon will be held this noon in this room, shortly after the conclusion of this session.

We have as our guest today one of the most distinguished young lawyers of America, Charles Rhyne, the President of the American Bar Association.

From a very long and rather close friendship with Charley, I know that you are all going to enjoy meeting him, and hearing the message he will bring.

Tickets are available on the mezzanine floor at the registration desk.

In regard to the annual dinner which will be held in this room this evening, it is anticipated that we will have a heavy demand this year because we have an outstanding speaker in Henry R. Luce. The capacity of this room is limited. The girls at the registration desk are instructed that when they have sold tickets equal to the capacity of this room there shall be no further tickets sold until all of those having purchased tickets in advance are in the room and seated. After that time tickets will be available for extra tables, which will be placed on the mezzanine floor if the need arises.

But remember, if you do not purchase your tickets before we have sold the capacity of this room, there will be no opportunity to get into the room as, I am sorry to say, has occurred a time or two in former years. The tickets will be taken at the door.

One other thing: some of you, I know, like to combine your attendance at the annual meeting of the Bar Association with a trip to Lincoln for a home football game. The Homecoming game to be played in Lincoln on Saturday, I understand, is a sellout.

I do have however a few tickets available, which I reserved in advance for the Association. I believe there are sixteen or twenty left. They are available at the registration desk on a first-come, first-served basis.

Very frankly they are not the choicest seats in the stadium, but they are in the stadium and as most of you know any seat there is fairly good.

Now for the report as Secretary-Treasurer. I have to report to you that the books of the Association have been audited by Peat, Marwick and Mitchell, certified public accountants, of Lincoln. They make this report to the Association.

"We have examined the statement of cash receipts and disbursements of the Nebraska State Bar Association for the year ended September 30, 1957. Our examination was made in accordance with generally accepted auditing standards and accordingly included such tests of the accounting records and other auditing procedures as we considered necessary in the circumstances.

"The accounts of the Association reported on herein are maintained on the cash receipts and disbursements basis of accounting; that is, accounts are not maintained for assets other than cash or liability.

"In our opinion the accompanying statement of cash receipts and disbursements of the Nebraska State Bar Association represents fairly the recorded cash transactions for the year ended September 30, 1957, in conformity with generally accepted accounting principles applied on cash basis consistent with that of the preceding period."

They support that report with an itemized account of receipts and disbursements.

As you know, our principle source of income is from the dues of members. There have been in addition some small items of interest and a very small item resulting from the sale of some obsolete equipment, so the total receipts of the Association for the year just ended are \$43,429.64; disbursements consist, of course, of the larger items, salaries and payroll taxes, \$6,371.35; office equipment and postage, \$1,147; publication of our directory, \$938.20; expenses of the Executive Council, \$866.94; expenses of the Judicial Council, \$413.07; the publication of the Nebraska Law Review, which of course includes the publication of the proceedings of each annual meeting, \$5,268.05; publication of the Legislative Bill Digest, which you received during the legislative session, \$1,681.66.

The net cost of publishing the Nebraska State Bar Journal

after crediting receipts for advertising during the year, \$820.69. The entire public service program after a credit of the money received from the sale of pamphlets to individuals and associations was \$4,536.82. The expense of the representatives from Nebraska and the House of Delegates of the American Bar Association, \$2,253.48.

The net cost of last year's annual meeting after crediting revenue derived from the sale of tickets to the various functions and rental of exhibit space on the mezzanine floor was \$4,109.85. The President referred to several institutes held during the year. The Practice and Procedure Institute: the cost, \$1,154.36; the Business Law Institute: expenses paid so far amount to \$563.24, but I should tell you that that does not represent the entire cost of that Institute, because a statement of the expenses of the speakers supplied to us by the American Law Institute has not been received.

The Institute on Condemnation, which was held in Lincoln, had only a very small item of printing, \$39.90. The Annual Tax Institute, \$2,435.11, and the Institute on New Legislation, \$1,285.24.

During the course of the year by direction of the Executive Council and the House of Delegates, \$2,000.00 of Association funds were invested in United States government bonds. Most of you will recall that a similar investment was made during 1956. So the total cash on hand at the close of the audit period, \$3,293.52, and the \$4,000.00 in government bonds.

This audit was reported to the House of Delegates and the Executive Council yesterday, and has been approved, and there is no action required at this time. It is simply an informational report as to the financial condition of your Association.

PRESIDENT KUHN: Thank you very much, George, and we are all pleased with at least the average amount of activities this year. Perhaps a little more than in some previous years, but we have stayed in the black.

Next are the reports of the two delegates of our Nebraska State Bar Association to the American Bar Association. They are John Wilson and Clarence Davis. I will call on John Wilson first.

MR. WILSON: Mr. President, members of the Bar Association. This was my first year as a member of the House of Delegates of the American Bar Association, so everything seemed quite large and was hard to grasp. And then I was told that because of the split meeting, half of it being held in New York and the rest of it in London, that it was a hurried up meeting in New York.

There were a few things that transpired that should be reported.

The Uniform State Laws Conference, of which our own President was Chairman, made several recommendations to the House of Delegates, and it approved the Uniform Laws of Chemical Tests for Intoxication Act, Division of Income for Tax Purposes Act, Rendition of Prisoners as Witnesses in Criminal Proceedings Act, and the Statute of Limitations on Foreign Claims Act.

There was some debate, and those Acts were all adopted, and I am sure they were given careful consideration.

You will remember that two years ago the American Bar Association sponsored legislation on expert medical testimony. The Legislature did not go along with the Bar Association, and I guess some members of the Bar Association did not go along with the Executive Council. So consequently nothing was done, and so the bill was killed in the Legislature.

The Section on Judicial Administration asked the House of Delegates to adopt a resolution, and such a resolution was adopted, to implement at the local level the fostering of the creation and employment of panels of impartial medical experts under court rules in a pre-trial consideration, and sometimes in the actual trial.

That is work that has been carried out in some states, principally in New York and Maryland. They feel that by a court rule we can overcome some of the differences in expert testimony of doctors, such as has been the cause of concern.

Generally the House approved every report that was before them. They carried part of their meeting to London, and I understand they had a fine time. They discussed many problems both on our level and at the English level, but principally, I think, the matters that I discussed here, plus the fact that the House approved the report of the Section on Taxation, which has made twenty-two proposals for changes in the Income Tax Law to harmonize certain defects that have been brought about by amendments.

Clarence Davis, who has been a member of the House for several years, may have seen it differently, and I will let him report on what he saw, and if any of this conflicts with what he has to say, let us take his because he has more experience than I.

**PRESIDENT KUHNS:** Our other delegate to the House of Delegates to the American Bar Association is Clarence Davis.

Clarence, will you submit your report, please?

**MR. DAVIS:** Mr. President and gentlemen. There is a little problem about what I might say to you this morning. Jack and I discussed this little matter of a report, and we rather agreed that Jack should have discussed the things that actually affect the Ne-

braska Bar Association at the local level, and that I might talk about some of the more national things that are impending.

So far as concrete action is concerned, those are limited. So far as the thinking of the Bar Association of the United States with reference to many of these problems is concerned, it is very profound, it is extremely tense, and the subject of a great deal of discussion.

Bart, in his presidential address, has already said many of the things that I know Charley Rhyne as President of the American Bar Association will affirm with reference to the lawyer's obligations to the judicial system. Whatever we may think about some of these things, and some of us think plenty, nevertheless we must keep in mind that the judicial system is actually the repository of all constitutional liberty in the United States. And that we must not forget.

On the other hand, the decisions on integration, the decisions with reference to the broad immunities extended to many of these witnesses before Congressional committees, the decisions in some of the Communist cases, the decision opening up, or at least so interpreted by many, of the FBI files by examination by criminal defendants have represented a tremendous laying out of a new path with reference to some of these very, very important questions.

They seem a long ways away from us here in Nebraska, but they are not so far because they can easily extend and perhaps they do extend clear down to the state level and the local level in the local courts.

Now it seems to me that speaking from the national scene and not from any concrete or specific action of the House of Delegates, it is becoming more and more apparent that the underlying issue in a great many of these cases is the line of demarcation between federal and state authority. That line of demarcation is being slowly drawn. It goes through to the field of civil rights, it goes through this field of the doctrine of the pre-emption of a field of law by the Congress, and therefore the exclusion of any state jurisdiction in those fields of law.

It goes to this question of federal proprietary enterprises and their right to ignore and bypass all of the laws of the states. It goes to this question of jurisdiction on federal property, and perhaps complete immunity to all of the normal ordinances, police regulations and what-not of the states with reference to that property.

Now all of those things are actually headed in the direction of drawing a line between the federal government and the govern-



ment of the states. I need hardly point out that the present tendency has been to federalize and to federalize more and more; minimizing the jurisdiction of the courts of the states, minimizing the power of the legislatures and leaving as federal supremacy the rule in most of these cases.

Now I will not go into those further, but I think you all realize that that is, of course, a public question; but it is a question on which the Bar of the United States is much better equipped to come to a sensible conclusion than is the average layman. We, as lawyers, ought to understand the implications of the decisions that are to be made. Some of us, I am sure, are on one side of that question, some of us are on the other; but we do have, I think, an obligation to make ourselves aware of the very fundamental effects of some of these decisions upon the law of the United States, upon the laws of the state of Nebraska, upon all of the local regulatory legislation with which most of us have grown up.

Now, specifically, returning a little more directly to the House of Delegates, the regional meeting program is being continued with prospective meetings at Atlanta, Louisville and Portland within the next two years. Specific action has been taken to submit only for study a recommendation somewhat similar to that one proposed not so long ago in Nebraska with reference to maintaining a panel of qualified people with reference to appointment to the federal bench, a thing which has lent itself favorably to a great many people on the ground it tends to eliminate politics. Also action with reference to the federal judiciary taking another look at more appropriate meanings of the Canons of Ethics of the American Bar Association, and some of those are under specific fire from outside groups, as you know, especially Canon 35 with reference to the photography and television and what-have-you in the courtrooms. That one is being very carefully looked at by the American Bar Association, and likewise this business of Congressional witnesses and their rights is being looked into. I think that we have even made a recommendation on that, that the congressional committees be empowered to utilize the U. S. federal judicial machinery to compel some of the answers where they are appropriate instead of leaving the matter to a prosecution for contempt, which may not happen for several months or a year or two after the event has taken place, whereas by the utilization of proper machinery and a ruling in the first instance, the whole process can be very greatly expedited.

Now, as I said, these are gleanings from the feelings of the sentiment of the House of Delegates. They are not specific things,

but they are things which should cause us as lawyers, it seems to me, to realize that we are at another one of these great crossroads of American law, and that in the next few years the decisions on these things that I have mentioned are going to determine, not only the questions that we meet as practicing lawyers, but also in a large part the future pattern of the judicial system of the United States.

Thank you very much, gentlemen.

PRESIDENT KUHNS: Thank you, Clarence.

The next item on the program is a report of the Executive Council.

The Executive Council, as you know, as defined by our rules, is the executive organ of the Association. Actually the Council also has what is described as legislative powers during the interim between annual meetings.

The Council has reported quite fully to the House of Delegates, and the House of Delegates has in the main acted favorably upon recommendations made by the Council.

I might tell you very briefly in just a minute or two the sort of things that the Executive Council does, so that you will know.

We had four meetings since the last annual meeting. Most of those meetings lasted the entire day, all but one, I think, and that one extended to about the middle of the afternoon.

These items of accounts, receipts and disbursements, particularly the disbursements which George has referred to, are all gone over carefully, item by item, in the Executive Council, which has detailed quarterly reports from the Treasurer, in addition to monthly reports to the President.

Then the Council has approved and directed the arrangements, that is, approved the arrangements that authorized the institutes which we have held. The Council has handled the details of the program for this annual meeting, as it is charged to do under the rules.

One of the items this year, which, of course, received particular consideration by the Council was this matter of group insurance, because by action of the House of Delegates a year ago the Executive Council was authorized to proceed to provide such insurance, if possible, by this annual meeting in event that favorable legislation was attained.

The Council this year had quite a little to do with the legislative program of the Association, not to be confused with the bills of

the Judicial Council, but you will recall that last year there were certain items of legislation, the final determination of the position of the Bar Association with respect to which was left to the Executive Council.

Then I might tell you without overlapping, I trust, on the report from the House, that four new special committees were authorized, and I will just give you an idea of the thinking and some new matters that are under consideration.

One will be a committee on the desirability of an advisory statewide minimum fee schedule. One is the Committee on Atomic Energy Law, which is recommended by the American Bar Association, and several of our states already have such committees. I heard some of the reports of some such committees, and there are surprisingly large numbers of matters of state law which require careful consideration in the field of atomic energy, and the thought is that the Bar should be prepared to meet the demand for such legislation as soon as it arises.

Another is a Committee on Bar Examination Standards to work with corresponding committees in other states. And another committee is a somewhat baby of mine; I do not have in mind anything too particular, but I think it is high time that the Bar Association took another look at our corporation statutes. Now there has been authorized a committee to review our general corporation law, and in fact it is my understanding that both profit and non-profit corporations are to be considered.

Those are the matters which the Executive Council has acted upon or considered during the year, and that constitutes the report of the Executive Council.

Hale McCown is the Chairman of the House of Delegates. He will now submit to you the report of the House of Delegates.

MR. McCOWN: Mr. President. Without referring in full to the specific recommendations of the various committees and of the various agencies of the Association, which you will find for the most part in the printed program, for purposes of brevity I shall condense this report to the specific action taken by your House of Delegates yesterday.

Bart has already mentioned the authorization of the four new committees which were recommended to the President and the Executive Council.

The report of the Committee on Administrative Agencies was approved; the report of the Committee on American Citizenship was received and placed on file; the report of the Committee on

Budget and Finance was approved, with the recommendation to the Executive Council for the investment of surplus funds if any.

The report of the Committee on Cooperation with the American Law Institute was approved; the report of the Committee on County Law Libraries was approved; the report of the Committee on Crime and Delinquency Prevention was received, and the recommendation of the Committee that the Committee be continued was approved; the Committee's recommendation for endorsement of a proposed amendment to the State Constitution providing for authorization of separate juvenile courts, L.B. 124, was tabled.

The report of the Committee on the Judiciary was approved with specific provision that the House approved and recommended the adoption of the American Bar Association plan for the selection of judges as a preliminary portion, and in addition to recommendation number five of that Committee's report.

The report of the Committee on Legal Aid was approved; the report of the Committee on Legislation was approved plus an additional recommendation to the President and Executive Council that the Committee on Legislation be appointed in the fall of the year following the close of each legislative session to serve for a two-year term, or until the close of the next succeeding session of the Legislature, providing better continuity for the legislative program embodied in the Committee report.

The report of the Committee on Group Life Insurance was approved; the report of the Committee on Unauthorized Practice was approved; the report of the Advisory Committee was approved with the additional recommendation that advisory opinions of the Committee on questions of legal ethics be published in the Bar Journal from time to time, and that upon completion of the compilation of cumulative advisory opinions now in process, they be published either in the Bar Journal or in a separate pamphlet or brochure for distribution to the membership.

The report of the Committee on Legal Education and Continuing Legal Education was approved; the report of the Committee on Oil and Gas Law was approved; the report of the Committee on Public Service was approved; and the report of the Committee on Joint Conference of Lawyers and Accountants was approved.

Two resolutions were adopted as resolutions of the Nebraska State Bar Association upon unanimous recommendation of the Committee on Resolutions.

The first was an approval and recommendation of adoption of L.B. 292, with provision of the support of this Association in obtaining the adoption.

This Bill provides for submission of a constitutional amendment authorizing the Legislature to clear property titles by releasing real property from tax and assessment charges unpaid for a period of fifteen years or longer, as may be determined by the Legislature.

This amendment will be submitted at the general election in November, 1958.

The second resolution approved the resolution of increased pay and emoluments for professional lawyers serving in the Armed Forces commensurate with the treatment afforded other professions.

In view of the length of the complete resolutions, for the sake of brevity, I have merely summarized the subject of the resolutions.

PRESIDENT KUHNS: Thank you very much, Hale.

I told Hale last evening that in my opinion the successful conducting of the business of the House of Delegates was a most important part of the well-being of this whole Association, and I was complimenting Hale personally on the manner in which he conducted the meeting of the House yesterday.

I think all members of the House present will be in accord, but I want you all to know that for two years now Hale has served as Chairman of the House of Delegates, and he has done a fine job, and I think a good deal of the success of the House of Delegates system is attributable to the way in which Hale McCown and Jean Cain have conducted the meetings of the House since it has been established.

The next item on the program is the report of the Judicial Council by Judge Edward F. Carter of our Supreme Court. Judge Carter.

JUDGE EDWARD F. CARTER: The Judicial Council met many times during the past year. In fact, the work of the Council required more meetings than in any other year since its creation in 1939. Several procedural matters of great importance were recommended to and enacted by the Legislature at its last session. Briefly described, they are as follows:

1. Chapter 82, Session Laws 1957, providing the procedure on a counterclaim or cross-petition in the event a motion for a directed verdict or dismissal made by a defendant is sustained.

2. Chapter 76, Session Laws 1957, providing for a waiver of notice of hearings upon petitions of fiduciaries for approval of their accounts by known beneficiaries who are competent.

3. Chapter 85, Session Laws 1957, providing for making of ap-

plication for order to compel answers to written interrogatories and to provide sanctions for failure to answer.

4. Chapter 84, Session Laws 1957, providing the manner of service, allowance and settlement of bills of exceptions where there are multiple parties who are appellees.

5. Chapter 74, Session Laws 1957, providing for the destruction of the stenographic reports of court reporters which are more than ten years old upon written order of a district judge.

6. Chapter 75, Session Laws 1957, providing for the destruction or return of exhibits offered in evidence upon order of a district judge.

7. Chapter 111, Session Laws 1957, providing for a special statute of limitations in vacating or setting aside defective proceedings admitting a foreign will to probate or granting administration of the estate of a nonresident decedent.

8. Chapter 173, Session Laws 1957, providing for amendments to the reciprocal enforcement of support act.

During the 1957 session of the Legislature, the matter of the sufficiency of our statutes relating to notice by publication came before the Council. The decisions of the Supreme Court of the United States in the Mullane and City of Hutchinson cases, and related cases, made it imperative that our statutes on the subject be re-examined. We called upon interested members of the Bar to serve on subcommittees of the Council to participate in the work. As a result of this intensive investigation, the Council recommended the adoption of three acts dealing with notice by publication. These acts have been reviewed and explained in legal institutes conducted by the State Bar Association. We shall call them to your attention in this report but will make no attempt to review them. They are:

1. Chapter 80, Session Laws 1957, providing for service by mail as an additional and supplemental means to convey notice in any action or proceeding where notice by publication is authorized by law.

2. Chapter 81, Session Laws 1957, providing for a statute of limitations of one year for bringing an action where notice has been heretofore given solely by publication in a newspaper.

3. Chapter 332, Session Laws 1957, providing that cities may relevy special assessments declared void for want of adequate notice.

The Council has before it several matters of importance to the

Bar of this state. The Council welcomes assistance and advice on these matters. They are:

1. A proposal for a new statute providing the manner of service, allowance and settling of bills of exceptions. The general consensus of the Council to date is that the procurement of a bill of exceptions should be the official duty of the court reporter and that litigants and counsel be relieved of time hazards in the present statute. Any suggestions on the subject can properly be directed to L. R. Stiner of Hastings, chairman of the subcommittee doing the preliminary work.

2. A proposal for statutory amendments preparatory to the adoption of uniform orders and notices of publication in the district court by court rule in the Supreme Court. Suggestions as to this proposal can be directed to Flavel A. Wright, chairman of the subcommittee charged with the preliminary work on the subject.

3. A proposal to review 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 review of the statutes to determine if legislation is required 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.

We cannot here detail all the problems with which the Council is confronted. We can set out only those in which it would appear that the Bar would have the greatest interest.

We desire to point out that the Council is doing more work than ever before. We have found it necessary to call on nonmembers of the Council to assist in its work. The cooperation of the bar has been one hundred percent in this respect. We have a greater interest by the Bar generally in the work of the Council. More lawyers are submitting suggestions and proposals, a situation which the Council encourages.

We have had splendid cooperation by the Legislature and its Committee on Judiciary. Rarely has it been that proposals of the Council have not been approved by the Judiciary Committee and enacted into law by the Legislature. The evident confidence of the Legislature in the Judicial Council can be maintained only by careful study and preparation of the proposals sent to it. It is the aim of the Council, of course, to maintain its position by a continuance of the method of operation that has brought about this commendable situation.

The Judicial Council is an official agency seeking to improve

court procedures. Its work will necessarily be limited unless the members of the Bar interest themselves in improving the administration of justice. The Judicial Council can become an effective clearinghouse in this field only if apparent errors, needed changes or new situations not dealt with are called to its attention by the Bar.

PRESIDENT KUHNS: Thank you very much, Judge Carter.

Judge Carter, what did you tell me was the first year of our Judicial Council?

JUDGE CARTER: 1939.

PRESIDENT KUHNS: A good many states are just now in the process of establishing judicial councils. Some states have had them for a number of years.

I was visiting with Judge Carter about that this morning, and we have had our Judicial Council since 1939. I think it is an outstanding example of the service to the public and the Bar which can be rendered by an efficiently operated Judicial Council.

I think the Council is certainly to be commended upon the work which it does.

Now the next item on our program is the announcement of the new officers of the Association. The announcement will be made by our Secretary, George Turner.

SECRETARY TURNER: Mr. President and gentlemen. In conformity with the constitution, the Executive Council met ninety days prior to this annual meeting and made nominations for President, Chairman of the House of Delegates and a member-at-large of the Executive Council.

The constitution, as you know, provides that additional nominations may be made by petition. There were none made, and consequently the nominees of the Executive Council will become our officers at the close of this meeting.

For President, Paul L. Martin of Sidney; for Chairman of the House of Delegates, Richard E. Hunter of Hastings, and for Member-at-Large of the Executive Council, Alfred G. Ellick of Omaha.

PRESIDENT KUHNS: Our congratulations to the new officers. I might say this—later in the program we will formally introduce them and call upon the President-Elect for a few very brief remarks.

They will take office at the conclusion of the meeting.

Our time is somewhat limited, but it seems to me that we should have a report from the Committee on Group Life Insurance



so that all of the members of the Association will have an opportunity to hear the explanation of the policy by that Committee.

Mr. C. C. Fraizer was originally appointed as Chairman of that Committee but Cecil went to Europe just about the time this bill was being signed, and he turned a good portion of the work over to his son, Ted, who has really done yeoman service ever since the amendment to the group life insurance bill was signed, in order to have ready for us at the time of this meeting a group life insurance policy.

Ted, will you make a brief statement for that Committee, and I do want to limit your portion of it to ten to fifteen minutes at the most.

Theodore J. Fraizer of Lincoln.

MR. FRAIZER: Thank you, Mr. President. You may be interested in the results of the letter which was sent to all members of the Association in September when the final considerations for the group life plan were being considered.

Out of the letters sent out to all members of the Association, there was received in return approximately one thousand favorable replies for the plan as outlined in that letter.

There were a few who expressed no interest in the plan, but a greater portion of those who expressed a negative interest were those in an age category where that type of an expression would be expected.

So with that enthusiastic support of the plan, it was made much simpler for the Committee to go ahead and work on the details of the plan, and likewise for the Executive Council to outline the final details of it.

You may likewise be interested to know that since the mailing went out last weekend, as of this morning we had one hundred and two applications already received, and a few minutes ago as we were sitting, waiting to come up here, Judge Harry Spencer asked, "Where are those cards?"

I said, "Well, Judge, the application cards and booklets are on the table, right by the registration desk, but I do have an extra one in my pocket."

And I handed one to him, and Judge Spencer filled out the card, made out his check payable to the Nebraska Bar Association group insurance fund, and so we are happy to have Judge Spencer come into the group. We trust that there will be a quick enrollment in it, so that it can be put into effect at a very early date.

Ordinarily group insurance, that is, the organization of a plan, is the obligation of the employer, if it is an employer group. How-

ever, the Nebraska Bar Association has been relieved of many of these details of getting the enrollment completed by the representatives of the John Hancock Company, who have come here and are out at the table to answer your detailed questions.

Not only have they sent their regional people here, but they have sent one of their men from the home office in Boston, Mr. Louis E. Kune, Jr., Sales Executive, who will describe a few of the pertinent details of the plan.

Mr. Kune.

MR. KUNE: It is my pleasure this morning to welcome the Nebraska State Bar as a new member of the John Hancock Group Life Insurance Department policyholders. I know you are in a hurry, so I do not want to take much time, but I would like to outline for you very briefly the plan as it has been accepted by your Committee.

It provides ten thousand of group life insurance payable for death from any cause whatever. As lawyers, I think you appreciate that most life insurance has certain restrictions; there is no suicide clause, no private flying clauses or anything else. Once you are insured, you have ten thousand of insurance payable to your beneficiary, regardless of how death might be caused.

It is just that simple. We can not make it any more difficult, and that is one of the reasons it is so beautiful. The insurance can be paid to your beneficiary in a lump sum or you can elect any reasonable settlement option that you might so desire. Since we have ten thousand here, it is probable that many of you will request settlement options, and they are available.

They are not mentioned in the booklet that was sent out.

There is no medical examination at all for anyone who will sign an application card prior to the effective date of the plan. Now as to effective date, we plan to make it effective just as soon as we get the minimum number of applications that was set up in the law passed the other day. That is twenty-five percent of the eligible membership. We already have, you see, a hundred lives. I think there are a few more who have signed up at the booth this morning, so we need approximately five to six hundred members and we are going to get an accurate count on the over-all membership, but we need twenty-five percent. As soon as we get twenty-five percent the plan will be in full force for all who sign up.

I might mention that at a later date we will ask, if it is pointed up, for possible medical examinations for people who come in at

a later date, but right now anyone can come in by paying the premium shown in the booklet and be fully insured without any questions whatever.

That is a wonderful thing, and there are very few times in your life that you can have life insurance offered on that basis.

Cost, I think, is very important. The booklet outlines the cost of the plan. If you will notice the cost is broken down into five-year age groups. As you grow older your insurance is going to increase in cost. It was deliberately designed to make it attractive to the young man starting out, make a cost that he could easily bear at a time when he needs the greatest protection for the least amount of money. I think it is also most attractive to the older man who for one of many reasons might not be able to buy standard life insurance.

Here he can buy life insurance in standard amounts. The insurance does reduce at age sixty-six and on through seventy-five. In other words it is ten thousand through sixty-five, at age sixty-six it becomes nine, and reduces one thousand a year until the man is seventy-five, at which time it terminates.

His premium reduces along with the insurance at the older ages.

In other words he pays for the amount that he gets.

One other feature, I think, in line with the cost item is that we have a waiver of premium benefit included in this policy. That means that if a man is totally and completely disabled prior to age sixty, his insurance is marked paid up until death, and as long as he is totally and permanently disabled until death he pays no further premium. At death, of course, the proceeds are paid to the beneficiary he selected.

We have a booth out in the lobby. I think we have four men here ready and waiting to talk to each one of you and answer all of the questions if there is anything I have failed to cover. We would like to see each and every one of you there.

It is possible that we can get the enrollment we need just by contacting the people here at this meeting. If that is true, an effective date will be announced before you leave here.

Maybe you need protection on the way home. Somebody might be so unfortunate as to actually have use for this thing right away.

I think I have covered it.

VOICE: What do you mean by "make an announcement"? If you need five hundred and there are a thousand who want to

come in, will the effective date be far enough ahead so they can all come in?

MR. KUNE: We need five hundred. It is approximately that number. We intend to make the plan effective just as soon as we get the number, the minimum number, I mean. It might be the next day and that is why we would like to encourage each one of you to come into it as quick as you can. I think each one of you saw one of these booklets before you left to come here and the letter that went with it, or if you did not, it will be on your desk when you get home.

We have all the material necessary right here. Please take advantage of this while we are here, and while you are here. Come in and sign up. We will take care of you right now.

MR. FRAIZER: In order that there will be as full an enrollment, which will mean as healthy a group as we can have, Mr. Walter Black, who is a member of this Association, and has been for many years (also for many years his pursuits have been devoted to insurance), will very likely be calling on some of you gentlemen in your offices, so that the enrollment can be extended as widely as possible.

So, Walter, if you would please stand up so that people will know who you are, when you are called upon.

Thanks very much.

PRESIDENT KUHNS: Thank you very much, Ted.

If any of you do have any questions at all concerning this insurance, just how it operates and so on, the table is provided in the lobby and representatives of the company are there.

We who have studied it rather closely do believe that it is a real opportunity.

MR. TED FRAZIER: It has been asked if this insurance pays dividends. It does pay dividends, and with reasonably good expectancy, the dividends should start out at about twenty-five percent return to the members.

PRESIDENT KUHNS: The next item on the program is the report of the Committee on Memorials. Mr. W. W. Wenstrand of Omaha will present that report.

MR. WENSTRAND: Mr. President, members of the Nebraska Bar Association.

The Committee on Memorials is composed of Mr. Harry E. Gantz of Alliance and Mr. Lyle C. Holland of Lincoln and myself, as chairman.

The following are the names of those of our membership who have died since our last annual meeting:

Frank L. Barrett, San Francisco, California  
Clyde Barton, Pawnee City  
Maxwell V. Beghtol, Lincoln  
John A. Bennewitz, Omaha  
John W. Blezek, Plainview  
W. Halsey Bohlke, Hastings  
C. C. Cartney, Lincoln  
J. W. Cohen, Lincoln  
O. H. Doyle, Lincoln  
Harvey M. Duval, Omaha  
Ivan D. Evans, Broken Bow  
William H. Fitzpatrick, Omaha  
Leonard A. Flansburg, Lincoln  
Joseph A. Flynn, Omaha  
Edward F. Fogarty, Omaha  
Dale G. Follett, San Jose, California  
Donald Gallagher, Chicago, Illinois  
Michael J. Gardiner, Omaha  
Gilbert P. Hansen, Omaha  
Charles D. Hitch, Omaha  
Reinhold R. Hofferber, Omaha  
Lee Kelligar, Auburn  
P. J. Kerrigan, Kodiak, Alaska  
Ernest L. Kretsinger, Beatrice  
John S. Logan, Lincoln  
Henry C. Luckey, Richmond, California  
John R. McDermott, Omaha  
Richard C. Meissner, Omaha  
John P. Moore, Omaha  
Kelso A. Morgan, Omaha  
James G. Mothersead, Scottsbluff  
Grenville P. North, Omaha  
Gregory S. O'Neill, Milwaukee, Wisconsin  
C. G. Perry, Gering  
Frank A. Peterson, Lincoln  
J. E. Porter, Crawford  
Joseph C. Reavis, Falls City  
Arthur W. Richardson, Lincoln  
M. A. Shaw, David City  
O. E. Shelburn, Alma  
John H. Steuteville, Bridgeport  
Ralph E. Stover, Omaha

T. E. Sullivan, Des Moines, Iowa  
William M. Townsend, Columbus, Ohio  
R. C. Van Kirk, Washington, D. C.  
Floyd Vinson, Monterey Park, California  
Philip M. Wellman, Omaha  
Donald E. Williams, Alliance  
F. E. Williams, Bridgeport  
Moses H. Wittstruck, Lincoln  
Arthur B. Zimmerman, Los Angeles, California

It is with reverence and respect that we pause to pay tribute to those of our profession who during the year have passed into the valley of the shadow of death. Their contributions to the body of the law, their influence upon our jurisprudence and their labors in the field of legal thought will live forever and will, like the pronouncements of the lawyers and judges of the centuries, guide us, the living, in our pursuit of the truth. The decisions of the past are the laws of the present and the future.

As we reflect upon their accomplishments, as we recall their personalities, and as we mourn their passing, we write their virtues on the tablets of love and memory.

May we please stand as final tribute to their memory and be seated by the President?

PRESIDENT KUHNS: Thank you, Mr. Wenstrand.

We will now stand adjourned.

The luncheon meeting, at which President Rhyne will be the speaker, will be held in this room at 12:15.

## THURSDAY NOON

## NEBRASKA STATE BAR ASSOCIATION LUNCHEON

Presiding .....Barton H. Kuhns, Esq.  
 President, Nebraska State Bar Association

SPEAKER .....Hon. Charles S. Rhyne, Esq.  
 President of the American Bar Association

**“The Challenge of Technological Achievements  
 to Law and Lawyers”**

I am tremendously pleased to have this opportunity of speaking to the lawyers of Nebraska. My dear wife, Sue, was born in Silver Creek, Nebraska, and I have other close personal ties with your great state. Having known and worked with George H. Turner for some twenty years in American Bar Association activities, I also have acquired a rather intimate knowledge of your great Association and its tremendous achievements. During all that time, I have also worked with other great Nebraska lawyers like Clarence A. Davis, Laurens Williams, John J. Wilson and your able President, Barton H. Kuhns, who has also served with distinction as President of the Commissioners on Uniform State Laws. Those I have named, and others, have served your state well in the House of Delegates and in other capacities in the American Bar Association. The whole nation has benefited from their participation, leadership and sound judgment.

Sputnik has focused world-wide attention upon the tremendous technical and scientific achievements of the age in which we live. Our era has indeed witnessed such heretofore almost unbelievable developments as the splitting of the atom, flight faster than sound and other scientific, economic and social achievements of almost miraculous character.

The most fantastic article I have read with reference to outer space travel is one suggesting that such travel will actually make time stand still! The noted German scientist, Dr. Eugen Sanger, in an article published by *The Atlantic Monthly* this month—but written prior to Sputnik—claims that in the near future man can travel to the moon in 11 years and return in an equal length of time, but that those 22 “space years” will equal 2,000 years here on earth. He claims that the functioning of man’s body will slow down in space travel, so that the equivalent of 22 years out there will be 2,000 years here on earth!

His words in part are:

Landing the space vehicle on earth after 22 years of travel, the crew would find that earth had become about 2,000 years older.

Relativistic phenomena generally cause a lot of intellectual difficulties for the non-scientist. This is especially true of the concept of time on board a space vehicle that is traveling nearly at the speed of light—time that seems far longer to the observer on earth than to the traveler.

These intellectual difficulties are particularly due to the fact that here we are dealing with events far outside the range of our usual daily experience. We must get used to them in the same way that we have learned to accept other initially inconceivable things like radio, television, and human flight.

Ten years ago, men who talked like this were either fanatics or comic-strip writers. The *Atlantic* publishes along with the article by Dr. Sanger, an article by Dr. William R. Brewster, Jr., of Harvard, doubting the validity of some of Dr. Sanger's conclusions, and I think Dr. Brewster's reasoning sound. But such are the accomplishments of science today that making time stand still is not laughed off as it once would be. Too many of the wildest science-fiction stories have now become realities.

The velocity of change in our era is many times greater than that of any period in the history of mankind. Every phase of man's endeavor is being tremendously affected by this miraculous progress. For the scientists, there is the great opportunity to bring about the technical changes which will bring mankind to a new, higher civilization. But what is the duty of lawyers in this new and complex, ever-changing world in which we live? Clearly, the lawyer must keep the law abreast of the changing times or our government of laws may well become a government of men. For example, if any unprincipled dictator could corner atomic power, he could dictate to all the world. Clearly, therefore, atomic development must be under the rule of law. We undoubtedly will need many new laws for the development of peaceful uses of atomic energy domestically, and the "Atoms for Peace" Treaty probably does not contain everything that will be needed in the international field. I have read several times lately the statements of responsible scientists predicting that weather control is just around the corner. If such control comes, it will necessarily intermesh the affairs of all peoples more than rapid communications have already done. Again, new law must be fashioned if this prediction becomes a reality.

Since law is in essence crystallized public opinion based upon experience, law oftentimes lags behind new economic, social and scientific changes. In an era of change, the law must change to meet



the needs of society, and most of the current needs in law are right here on earth, rather than in outer space.

As one who has spent much of his professional time in dealing with the problems of air space involving aviation, I am sorely tempted to indulge in a recitation of theories of air-space ownership, and guesses as to who would be the legal owner of the moon under what conditions of occupation.

But it seems to me that while Sputnik sputteringly zips around the earth every 96 minutes, as an ominous prelude of things to come, we of the legal profession can best serve our profession and the public by adapting law to the ever-growing problems of the world in which we now live—on earth.

Today, I believe I can be of most service to you by inventorying the organized Bar and its program of service to the public and to our profession. Naturally, my chief emphasis will be upon the work of the American Bar Association, since I appear here as its spokesman. I do wish to emphasize at the outset, however, that most state and local bar associations are keeping pace with the program and progress of the American Bar Association which I now outline for you. Our coordination of effort there is due in no small measure to George Turner, who headed a committee working on that subject for many years.

What is the American Bar Association today? It is nearly 90,000 member lawyers, the largest bar association in the world, and we hope to pass the 100,000 mark before the end of this Association year. Approximately 200,000 lawyers are represented in our House of Delegates, where state bar associations like yours send delegates to hammer out in vigorous debate the plans and programs of the organized Bar. Thirty-five thousand law students take part in our American Law Student Association. At our great American Bar Center in Chicago, we have 157 employees, and a budget for operations there of more than a million and a half dollars. The Association operates its programs for the public and our profession through 65 committees and 17 sections, with each section having an average of about 20 committees. In speaking of the Association's work, one can only illustrate by reference to the work of a few committees, as the whole story is so vast as to require a thick volume to detail.

From the brief review just given, it is clear that on the national level, the organized Bar has the strength—financial and manpower—to face up to the challenge to law and lawyers from the scientific and other developments of our era. In my travels around the United States, I find that state and local bar associations are

likewise in their strongest position in all history. Under these circumstances, I am certain that the organized Bar will accept the challenge that belongs to it, and that the plans and programs it has for the present and future will enable it to live up to its duties and responsibilities in adapting law to meet the needs created by the new changes and developments of our dynamic era.

Almost every economic report on our profession stresses the fact that we have fallen behind other professions and workers generally in earning power. The shocking plight of the English barrister—most of whom can no longer earn a decent living from the practice of their profession—is ample warning that this situation for our profession in our own country can not be allowed to continue. Our nation's greatness is due in large part to the freedom under law which exists here. Without that freedom our system of free enterprise could not function. From its inception to the present zenith of its power, our system of government has in large part been created and directed by lawyers. That system cannot continue to serve us as in the past if those who have tended the fires of freedom are now, themselves, to be destroyed by falling behind in an economic way. Lawyers cannot meet their duties and responsibilities if too weak economically to perform an outstanding job. We must give our best, and insure success in our effort, by so strengthening our profession as to leave no doubt whatever that we can and will live up to the challenge which is ours from the tremendous changes of our day.

With the facts about our profession and the plight of the English barrister before it, the American Bar Association's Board of Governors created a Committee on Law Practice Economics at its London meeting. That Committee will collect the full facts and arrive at concrete conclusions as to why our profession is falling behind in an economic way, then suggest essential cures. To use only one illustration, I cite a study by *Fortune magazine*, published in November, 1955, which indicates that from 1929 to 1951 the income of medical doctors increased 157 per cent, that of all wage earners 144 per cent, and that of lawyers only 58 per cent. *Fortune* cited "productivity" as the reason for its figures. It stated that doctors had increased their productivity through mechanization, but that lawyers were like "social workers" insofar as increasing their productivity is concerned, that there is not much hope that our profession can increase its income by increasing its productivity.

Without disagreement with *Fortune's* figures I am here to say the American Bar Association is out to disprove its conclusions as to our great profession insofar as our future is concerned. True

it is that lawyers are largely using "horse-and-buggy" methods in the age of the "jet," but it is untrue that those methods are unchangeable. In an age of change, we can and we will change, and this new Committee will point the way.

We can learn much from other professions, such as medicine, about client relationships, time management and office management. Our new Committee will investigate and report to you on everything in this whole field, to which other professions have given so much attention, but to which lawyers have given too little attention. You can expect early and concrete results.

Such novel ideas as feeding all of the more than 2,000,000 reported court decisions into an electronic machine like UNIVAC, in the hope of pushing a few buttons and having all cases in point disgorged in a matter of seconds, are fascinating in contemplation, and this idea has been seriously suggested. Others have harnessed the wonders of the electronic age—why not lawyers?

Large industry, through personnel records on IBM cards, can locate one employee with an unusual experience background in a matter of minutes. And the FBI, through electronic aids, can quickly find one out of millions of fingerprints. The Bible has now been indexed on electronic tape. This electronic indexing idea is therefore worth exploring, and it will be. No substitute can be found for the lawyers' judgment in evaluating the materials disgorged by such a machine, but time saved in finding the material would be a tremendous economic aid to lawyers, so all a lawyer has to sell is his time, and time saved in research means money in the lawyer's pocket. Novel ideas may perhaps never be productive but no helpful idea should go unexplored.

Other plans and programs are also being pushed to strengthen the legal profession. The American Bar Association, which was chiefly responsible for the present applicability of Social Security to lawyers, is currently vigorously sponsoring other Federal legislation of tremendous importance to our profession. These are: (1) the Jenkins-Keogh Bill, to put the self-employed on a basis of equality with those under industrial and governmental pension and retirement plans; (2) a bill to create a "legal career service," insuring independence and increased pay for Federal lawyers commensurate with the important functions they perform; and (3) legislation to end the existing discriminations against lawyers in uniform. This policy of fighting for the rightful status of our profession in the halls of Congress will soon be carried over to state and local legal positions. Pride in the prestige of our profession will no longer allow us to neglect our responsibility in this area by ignoring our plain duty here.

The group insurance plan available to all American Bar Association members up to age eighty is the cheapest life insurance any lawyer can buy. Our Bar Center Information Service answered more than 2,000 inquiries from members on legal matters, except substantive or procedural questions, last year. Aid in locating expert witnesses and law office procedure questions illustrate the type of service rendered.

In the belief that the illustrations given—and I could list many more such as the *Journal*, the *News*, regional and annual meetings, and the American Bar Association membership certificate (which the public is beginning to look for on every lawyer's wall)—demonstrate beyond question that the Association is serving lawyers, I move on to illustrations of our services to the public. Let me open that subject by saying that everything the Association does for the public increases the prestige of lawyers, and everything which increases lawyer prestige increases his economic status. People will entrust more of their problems to a well-respected legal profession and pay more for services rendered by such a profession.

The American Bar Association's public service program is local, state, national and international in scope, as it must be to meet the Association's duties and responsibilities in the complex world of today. On the local-state level, our traffic court program offers an excellent illustration. On a national level, our work on administrative law demonstrates our past work and present activity. On an international level, we are moving forward to do our part on the tremendous problems of our era in that dynamic field. In all of this work, we want to move forward hand in hand with you and your state or local bar association.

Automotive engineers are turning out automobiles with constantly increased power. Quite obviously, "horse-and-buggy" ordinances and laws are not adequate to cope with the traffic problem created by these current cars. Here the legal profession has been and is doing a job in modernizing traffic laws and traffic courts to meet the needs modern progress has created.

We have 62 million automobiles, 75 million drivers and a growing national emergency due to the runaway events in this field. There were 40,000 Americans killed in automobile accidents in 1956, more than 2,000,000 persons were injured, and the economic loss exceeded \$4,500,000,000. The unpremeditated savagery with which we modern Americans are destroying and maiming ourselves on the highway is in fact a most terrible waste of the human and material resources of our nation. Every person who walks or rides is a possible victim of traffic every minute he is upon a

public roadway or street. Traffic safety then is truly a universal problem.

Exhaustive studies have proved beyond question that there is a direct relation between traffic accidents and traffic courts. Most of the traffic accidents involve traffic law violations. Our traffic courts are not always what they should be. A traffic court appearance more often than not has left the alleged offender with a sense of bitter disappointment and a feeling of unjust treatment that in many cases has led to outright disrespect for all law, all courts and all judges. Such an impression of the administration of justice in our nation is not calculated to breed that respect for law and order which is the foundation of our system of government.

In this traffic court field the American Bar Association has had remarkable success with its reform program—a success which has witnessed a wiping out of the evils of the J. P. system in many states, improved physical facilities for traffic courts in many cities, nation-wide improvement in and increased uniformity of traffic regulations, ordinances and statutes, development of a model “fix-less” traffic violation ticket, and more traffic court judges who are trained in traffic safety — i. e., judges who instill in a violator the knowledge that traffic laws and their enforcement are essential not only for the safety of the community but for the violator’s own safety as well. These are improvements which mean much to the well-being of every person in our country. And we are continuing and expanding our program, as we realize that we have a long way to go to meet the need that exists. But here, on a local and state level, lawyers are spearheading a program to improve law to meet modern problems.

The many new Federal agencies which have been spawned to regulate new industries and new developments in industries created by the technological and scientific achievements of our day have brought with them tremendous problems for the law and lawyers. Radio and television, the great new natural gas industry, the almost miraculous advances in the transportation field and many other new things I could cite have brought with them knotty new problems of law. And old industries and problems have so grown in size and complexity that Federal controls have been adopted. This relatively new Federal field denominated administrative law has grown into almost fantastic size in recent years. Today, every lawyer and nearly every man and woman in our nation comes before or into contact or contest with some Federal agency or department. Farmers, businessmen, employees covered by the Social Security programs, income-tax payers—to give only a few

illustrations—are today affected by Federal law, rulings and regulations growing out of the alleged or actual needs of our ever-expanding, complex system of government. And the legal profession faces a real challenge here to insure by law that in their relations with the Federal government, our people are treated with equality and fairness. Because of its current importance, and the great legislative program the American Bar Association has planned to correct the evils and meet the new problems which exist, I shall give some details on our plans in this field.

The field of administrative law commands the respect of and demands study by every lawyer, if for no other reason than that in seventy short years it has mushroomed to gigantic proportions, affecting the daily lives of virtually every American. Mr. J. Smith Henley, Director of the Office of Administrative Procedure, has estimated that the amount of adjudicating and deciding done by the some 130 Federal agencies presently authorized exceeds the volume of civil litigation handled in all of our Federal courts. Compared to the traditionally slow development of most areas of the law, this growth is phenomenal.

For nearly fifty of its seventy years, administrative law was a field for specialization by relatively few lawyers. It had no great import in the majority of general practices, and the average American citizen had little personal contact with Federal agencies. However, beginning with the early thirties, the Federal octopus began to stretch its tentacles. Lawyers and laymen alike began to sit up and take notice of the rapid development in the field of administrative law. During the period from the passage of the first Walter-Logan Bill in 1935 until the McCarran Bill, which became the Administrative Procedure Act of 1946, the legal profession became greatly aroused, and Federal legislation in this area became a matter of general concern. The lawyers of America were a very active and potent force in the ultimate enactment of the APA, thought at the time to be a "Bill of Rights" for the citizen in all his dealings with Federal administrative agencies.

The primary instrument through which the power of our profession was mobilized during the bitter battle to secure passage of the Administrative Procedure Act was the American Bar Association. The Association was able to harness the tremendous power of public opinion behind the Bill, and to enlist the support of numerous lay organizations. And it was largely because of this grass-roots approach and the tremendous public support it created that the Administrative Procedure Act became law.

The passage of this Act was a great accomplishment, one of which all lawyers should be proud. Unfortunately, however, this

great "Bill of Rights" has been whittled away and eroded until today it stands as a worn monument on a mighty battlefield, pockmarked by the many skirmishes which have taken place since 1946.

This erosion is partly the fault of the agencies themselves, but an appreciable portion of the destruction is directly attributable to court interpretation and decisions, many of which I can not believe conform to the true intent of the Congress. Many sections of the Act have been limited or negated by judicial interpretations. Certainly two of the most important of these are the provisions for judicial review and the provisions to insure independent, impartial hearing examiners.

Under the 1946 Act, judicial review was provided "except so far as (1) statutes preclude judicial review, or (2) agency action is by law committed to agency discretion." With respect to the statutory preclusion of judicial review, it seems clear that Congress had in mind express preclusion, or at least the presence of such clear statements in Congressional reports as to leave no doubt that judicial review was not intended. Whenever a court, deciding a case under the Administrative Procedure Act, has followed the doctrine of implied preclusion, the intent of the Act has clearly been frustrated. Where the courts have ruled that review is precluded on the ground of statutory silence, again the spirit of the Act has been missed, and citizens are left unprotected by a restricted "Bill of Rights."

One of the most important objectives of the Administrative Procedure Act was to secure independent and qualified hearing examiners who could function without pressure from the administrative or prosecuting officers in their agencies. At the outset, the Civil Service Commission was dilatory in exercising its functions under the Act with respect to hearing examiners; and the Commission finally simply issued regulations which, in effect, left the examiners largely under the control of the individual agencies. The Trial Examiner's Conference challenged the validity of these regulations, and in two outstanding opinions by Chief Judge Bolitha Laws in the District Court and Judge Barrett Prettyman in the Court of Appeals of the District of Columbia, the Civil Service Commission's regulations were declared invalid as contrary to the Act. But in the spring of 1953, the United States Supreme Court overruled both lower court decisions and sustained the Commission's regulations. The net effect was virtually to destroy the independence and tenure of hearing examiners, and largely to nullify one of the most important purposes of the Administrative Procedure Act—assurance that a litigant would have

his case heard by a skilled, disinterested hearing examiner. Fortunately, most Federal agencies, spurred on by this litigation, have either before or after that decision largely given their hearing examiners the independence which the Civil Service Commission regulations denied.

Following the Supreme Court's decision, Senator McCarran, the author of the Act, declared on the floor of the Senate that the Court has "failed to give effect to the plain provisions of the statute." I agree with his opinion. I further feel that enhancing the standing of Federal hearing examiners is the keystone to solving a great many of the problems in this field of administrative law.

The net effect of these two examples—i.e., nullification of judicial review and hearing examiner independence—plus other decisions which have misconstrued the real intent of Congress, is that the basic rights and guarantees of fair treatment for everyone who comes before or into contact or contest with Federal administrative agencies have been virtually eliminated. Much of the protection for which so many fought so hard to have written into the 1946 Act has been completely negated by court interpretations.

Perhaps the extent to which the Administrative Procedure Act has been rendered ineffective may be blamed partially on us lawyers. Perhaps, in our pride of accomplishment subsequent to securing passage of the 1946 Act, we relaxed our efforts and thus slipped backward, rather than waging a continuing battle for additional needed reforms. But certainly this is no longer the position of the legal profession. For several years now, the great and growing weaknesses in the existing legislation have been readily apparent. The American Bar Association has launched another tremendous program directed at rectifying many of the pressing needs in the administration of justice by Federal agencies. And as in 1945 and 1946, our Association plans to take our program to the people at the grass roots of America. We feel assured that once the public whose daily activities are regulated by Federal agencies understand what the true issues are, they will support us. And in this great nation, where the will of the people is ultimately supreme, there is no power more forceful than public opinion.

Encouraged by the Hoover Commission Report, the House of Delegates of the American Bar Association has laid down certain basic principles which, if approved in Federal legislation, will insure fair treatment for all citizens in this important administrative law area. The program is as follows:

*First*, a new Administrative Code providing: (1) more effective



public information on the administrative process; (2) improvement in the administrative rule-making process through requiring formal hearings for virtually all rule-making hearings; (3) improvement in hearing and decision processes through tightening evidence rules in formal hearings, requiring an initial decision by the presiding hearing officer and providing that findings of fact in the initial decision may not be set aside unless contrary to the weight of evidence; and (4) more effective judicial review of agency proceedings.

*Second*, legislation to establish: (1) an Office of Administrative Practice to coordinate at the interagency level procedural rules and public information practices; (2) a Division of Hearing Commissioners to appoint and assign these Commissioners and to administer revised laws governing hearing commissioners; and (3) a Division of Legal Services to administer a simplified classification system for civilian attorney positions, giving full recognition to their important function and the professional independence that function requires. This legislation also covers appearances before Federal agencies in a representative capacity by both lawyers and non-lawyers.

*Third*, legislation to: (1) vest responsibility for the Defense Department legal staff in a General Counsel ranking as an Assistant Secretary of Defense; (2) vest responsibility of the legal staffs of each separate service branch in a General Counsel ranking as an Assistant Secretary; and (3) establish for each service branch a JAG Corps under a Judge Advocate General, ranked as a Lieutenant General or Vice Admiral.

*Fourth*, legislation to establish special courts, as a part of the judicial system, insuring independence in areas presently subject to administrative action. Special courts presently contemplated are a Federal Trade Court, a Labor Court, and a transfer of the present Tax Court from the executive to the judicial branch of government.

Such is our program to bring the Federal law up-to-date and meet the needs of technological, economic and social changes of our era. We believe it is a sound and beneficial program, and a necessary one in this important field.

My final illustration of the American Bar Association's service to the public is the Association's work for peace under law. With rapid transportation and communication, ours has become an almost physically indivisible world. Distance is almost meaningless. International events crowd the headlines of our papers and largely control domestic plans and programs. It seems to be conceded that the world can not survive a war in which the dread weapons of de-

struction which man has now fashioned are used. Here, too, lie tremendous challenges for lawyers. In fact, here lies the greatest challenge and the greatest opportunity for our profession, i.e., to fashion law to maintain peace.

Our recent London convention, and the disarmament talks taking place there at that time, focused attention on the fact that the need for law in the world community is the greatest gap in the legal structure of civilization. I sincerely believe that today the most essential need of the world is the application of the rule of law to the settlement of disputes between nations.

One of the greatest public services open to the American Bar Association is the opportunity to help mobilize the prestige and the power, the sanity and the skill, the judgment and the judicial temperament of the lawyers of the world in behalf of this goal of peace under law. That the lay public realizes that this responsibility is ours is clear from the great article in the May, 1957, issue of the American Bar Association *Journal* by Henry R. Luce, Editor-in-Chief of *Time*, *Life* and *Fortune* magazines, entitled, "Our Great Hope: Peace Is the Work of Justice." His plea for lawyer leadership to make this a "law-ful" world must not go unanswered. Read his moving words, and you will agree. Since you are to hear him speak tonight, I will not go further with his thesis, as I hope he will present it to you in his address. Likewise, in the October 13, 1957, issue of *This Week* magazine, the scientist most responsible for the H-Bomb, Dr. Edward Teller, makes a plea for a "system of world-wide law."

It is wonderful to have Mr. Luce's leadership, and that of Dr. Teller, because lawyers, to succeed in this area of service, must capture the support of more than the legal profession. Law is in essence crystallized public opinion. The legal rules we create can be enforced only so long as the law they set forth is willed by those it purports to govern. Universal public opinion must, therefore, be harnessed so firmly in support of the rule of law to settle international disputes that no tyrant will dare deny its application, and no revolutionary will upset it. It must be good law. The people must believe in it, and they must be correct and justified in doing so. An idea can be more powerful than any atom; and an idea whose time has come is too powerful to deny. Our job, as lawyers, is to see to it that the "time" of the rule of law arrives before atomic annihilation overtakes us.

The American Bar Association's new International Law Planning Committee was also created at our London convention to seek out ways to supplement our present work and suggest new work that should be done to achieve our goal in this all-important

field. Thomas E. Dewey, former Governor of New York, has accepted the chairmanship of this important Committee.

As lawyers, we should be proud that our profession is afforded this opportunity to render such a magnificent service to mankind. The obstacles are many; the task is great. But the rewards are too compelling to be denied. No greater challenge exists for any profession; no greater public service can be performed.

I conclude by saying that in this era of dynamic progress—of great scientific, economic and social changes—we of the organized Bar are endeavoring to live up to our duties and responsibilities—to keep pace with the times—through the plans and programs I have used as illustrations today, as well as through our other work for the public and our profession. At times, the law must act as a needed brake on the forward rush of civilization. In adapting law to the needs of our changing society, we lawyers must make sure that our society consists of more than a mere mass—we must make sure that it consists of man, the individual man and his rights and freedoms. We of the legal profession have a great heritage which we of our generation must keep ever before us. We must—as have our predecessors—maintain a careful balance between progress and time-tested methods.

I hope you will agree that the program of the American Bar Association which I have outlined for you is a sound program, a program for progress, and one which meets the needs of the world in which we live.

I am here to ask your support of that program, as we need your help to achieve its objectives. In our work out on the frontiers of the law, we must constantly adapt our plans and program to meet new problems and new developments. There, too, we need your assistance. No one is all-wise, and no one can know everything about all subjects in this complicated world of today. So when you have ideas or suggestions, please send them to us, as they will be most welcome. Our only desire is to render the best possible service to the public and to our great profession.

We have an obligation to our country, our profession and ourselves, to step out on the path of progress and accept the challenge of the present and the future to law and lawyers. We can do this by carrying out the important public-service programs I have used as illustrations, and by strengthening our profession so that it can render that service. I firmly believe that in a strong legal profession lies the liberty of the people of the United States, and in the liberty of our people lies the hope of the world.

SECTION PROCEEDINGS

THURSDAY, OCTOBER 31, 1957

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

Herman Ginsburg, Esq.  
Chairman

“Problems in Drafting Wills and Trusts” ..... William J. Bowe, Esq.  
Professor of Law, University of Colorado,  
School of Law

“Problems in Probate and Administration  
Procedure” ..... Hon. Robert R. Troyer  
County Judge of Douglas County

**PROBLEMS IN DRAFTING WILLS AND TRUSTS**

**William J. Bowe, Esq.**  
**Professor of Law, University of Colorado, School of Law**

Gentlemen, I have the good fortune, or misfortune, depending on how you want to look at it, of being asked to review a good many drafts of wills each year. I thought I might talk to you a little about what seems to me to be some of the more common types of tax errors, omissions or carelessly drawn clauses I have noted.

**COMMON DISASTER AND LIKE CLAUSES**

*Objectives of Survivorship Clauses*

Too often a standardized common disaster clause is used for all wills without adequate consideration of the objectives for which such clauses are designed.

**Objectives:**

1. Perhaps foremost in the minds of most estate owners is the fear of double death taxes.
2. To those who have had experience in the handling of estates, the avoidance of successive administration expenses, particularly lawyer's and executor's fees, measured as they generally are by the value of the estate, will loom large.
3. The thought that a legatee's widow may have her share of the legatee's estate enlarged at the expense of the legatee's children will trouble even those who highly regard the in-law but are not unmindful of the possibilities of remarriage.
4. A childless husband may not relish the thought of his wife's family enjoying his wealth shortly after his death.

5. Many legacies are purely personal in character. A testator may want his friend to benefit by the bequest but have no interest in the objects of the friend's bounty.

6. In many situations the marital deduction is desired only if the spouse is likely to outlive the testator by many years.

7. Perhaps more frequently the marital deduction is desired even if the spouse survives for but a moment.

#### *Typical Clauses*

Typical clauses designed to accomplish one or more of these objectives fall into three types.

1. Time Clause. "For the purpose of this will a legatee or devisee shall not be deemed to have survived me if such legatee or devisee dies within 90 days of my death."

2. Simultaneous Death Clause. "If any legatee or devisee dies simultaneously with me or under such circumstances as to render it difficult or impossible to determine who predeceased the other, I hereby declare that I shall be deemed to have survived such legatee or devisee and this will and all its provisions shall be construed upon that assumption and basis."

3. Common Disaster Clause. "If any legatee or devisee and I die as a result of a common disaster, the said legatee or devisee shall be deemed to have predeceased me and this will and all its provisions shall be construed upon that assumption and basis."

Not infrequently two types will be combined. Thus the clause may read, "If any legatee or devisee and I die in a common disaster or under such circumstances that it can not be determined who died first, such legatee or devisee shall be presumed to have predeceased me."

It should be noted that in the absence of any clause, both at common law and under the Simultaneous Death Act, if the order of deaths can not be established, the testator's property is distributed as if he had survived the legatee.

#### *Analysis of Each Type*

Apart from the marital deduction, most of the objectives may be better achieved through use of a trust or legal life estate. In cases that otherwise lend themselves to the use of these devices, the draftsman may be well advised to use one or the other in preference to a survivorship clause. A survivorship clause will be found satisfactory only where the objective is accomplished by delaying the gift for a relatively short time, or where, because of the amount involved or the type of property, a trust is not indicated and a legal life estate not a desirable solution.

**Simultaneous Death Clause:** This type of clause fixes the order of deaths only when there is insufficient evidence to establish who died first. Many variations of the clause merely substitute a new issue inviting litigation, i.e., were the circumstances such that it is "difficult to determine" who died first? It fails to accomplish any of the desired objectives, apart from a marital deduction objective, because the testator is really not concerned with whether he and his beneficiary die at or about the same time or under circumstances leaving the question doubtful. What he really wants to avoid is having his property pass through the estate of a legatee who will not live long to enjoy it.

This type is unsatisfactory in that:

1. It frequently fails to eliminate litigation.
2. It will bring about the very result the testator desired to avoid if his legatee survives him by five minutes.

**Common Disaster Clause:** This type may be even more unsatisfactory.

1. It frequently gives rise to litigation as to whether the accident or peril or disaster was the cause of both deaths.
2. It fails to cover the rather rare case where the deaths occur at about the same time from unrelated causes.
3. It may result in leaving titles unsettled for years. *H* and *W* are in a motor accident. *H* dies shortly thereafter. *W*, badly crippled, lives on for years without recovering. When, if ever during her life, may *H*'s executor safely pay over her bequest?

Note from the objectives mentioned earlier that the testator is never really concerned with deaths from a common cause but rather with deaths that occur within a relatively short time of each other.

**Time Clause:** The time clause will almost always avoid litigation except for the rare case where the bodies are found after a considerable period of time and hence the date of the testator's death can not be determined. It will solve all the simultaneous death cases and practically all the common disaster cases.

#### *Recommended Clause for a Nonmarital Deduction Bequest*

The time clause is the recommended clause for other than marital deduction bequests. Whether to use 60 days, six months or a year will depend on the circumstances of each case. Testators generally desire prompt distribution of their estates, particularly as to small legacies. Titles are left uncertain during the intervening period and executors may be in doubt as to some of their

duties. Generally 30 to 60 days should prove adequate, since deaths from common causes are most likely to occur within a relatively short time.

“For the purpose of this will a legatee or devisee (other than my spouse) shall not be deemed to have survived me if such legatee or devisee dies within 60 days after my death.”

#### *Marital Deduction*

To qualify a bequest for the marital deduction, the property must pass to a person who is the “surviving spouse.” Problems will arise where the deaths result from a common accident and it is not possible to establish the order of deaths. Under these circumstances the Regulations provide that if it is impossible to determine who died first, any presumption, whether established by local law or the decedent’s will, shall govern, to the extent that such presumption results in the inclusion of the bequest in the surviving spouse’s taxable estate. While the risk of deaths occurring under circumstances where there is no evidence as to the order of deaths may be slight, every will should contain a simultaneous death clause, wherever it is important to obtain the marital deduction. And it will be important to obtain it in all those cases where one of the spouses owns the bulk of the family wealth. Assume Husband has \$200,000.00 and Wife’s assets are nominal. If Husband predeceases Wife or if Husband is presumed to have predeceased Wife, the tax on his estate will be \$4,800.00. The tax on her estate will \$4,800.00. But if he survives her or is presumed to have survived her, the tax on his estate will be \$31,500.00, with no tax on her estate. Absent any reference to the matter of survivorship in the will, if the order of deaths can not be determined, both the common law rule and the rule under the Uniform Simultaneous Death Act distribute the estate of each as though he were the survivor. Thus, absent any clause in the will, the marital deduction will be lost at a cost, in the example above, of \$21,900.00.

Here the proper clause is the Simultaneous Death Clause:

“In the event my wife and I die under such circumstances that there is not sufficient evidence to establish who survived the other, I hereby declare that my wife shall be deemed to have survived me and this will and all its provisions shall be construed upon that assumption and basis.”

It should be noted that this clause should not be used indiscriminately, since in many circumstances the marital deduction is desired only on the assumption that the surviving spouse is likely to survive for a substantial number of years. This will be true

wherever both spouses have substantial estates.

If both spouses have, say, \$300,000.00 but are relatively young, it may be desired to provide in both wills for the marital deduction on the theory that it is better to delay the payment of estate taxes as long as possible. It would, however, be unfortunate in this case if both spouses were to die within a relatively short time of each other, since the delay in payment of the tax also increases the amount of the tax. Here again the time clause, which the statute requires to be limited to six months, is recommended.

### PRECATORY BEQUESTS

It is not uncommon to phrase bequests in absolute terms but to attach moral obligations thereto. This has long been a way of taking care of the erring son or vesting a discretionary power in a trusted legatee. Thus is Mississippi Valley Trust Company a testator left his estate to his sons and in a subsequent paragraph provided: "I have heretofore expressed my wishes as to certain charitable gifts, and I therefore make no such bequests, preferring that my sons shall make such donations within their sole discretion as shall seem to them to be best." The sons gave \$1,000,000.00 to the University of St. Louis. The estate was denied any charitable deduction since the gift to the sons was absolute. Undoubtedly the moral obligation was as real to the sons as if it had been legally imposed, but the tax cost of the moral obligation was well in excess of \$325,000.00. A bequest "of \$1,000,000.00 to such charities as my sons may select" or, indeed, "\$1,000,000.00 absolutely to my sons and if they disclaim, then to such charities as they may select" would have saved the tax money by obtaining the deduction for the gift actually made.

Sisters A and B each received \$500,000.00 from the estate of their father. Sister A had a worthless son whose family she had supported for years. Sister B was unmarried. A's will left her entire estate to B "with the confident expectation, but without imposing any legal obligation, that B will use it for the support of my son and his family." B did so use it for years until the youngest child reached 25. During this period heavy income taxes were incurred that were made higher because of her own income. She then distributed the fund equally among the son, his wife, and his children, fearful of the heavy estate shrinkage it would incur on her death. This cost better than \$100,000.00 in gift taxes. Then she spent three years worrying that the transfers might be taxed as gifts in contemplation of death.

The income and gift taxes could have been avoided by the omission of the words "without imposing any legal obligation."



Thus, "to B to be used by her for the education, support and maintenance of my son and his family, in such manner as she may determine" would have imposed a trust obligation on B. The income would not have been taxed to her and the corpus would not have been part of her estate. Since to her, as to most people, the moral obligation was as binding as a legal one, her factual powers of controlling the purse strings would have been the same, but the tax consequences would have been totally different.

### BEQUESTS AS COMPENSATION

A sole proprietor died intestate without any immediate family. His key employee alleged the existence of a contract under which the decedent had agreed to leave him the business in exchange for his promise to continue in the decedent's employ throughout his life. The business was worth about \$200,000.00. When the employee was told that the transfer of the business to him might well result in the receipt by him of \$200,000.00 of income taxable in the year received, he immediately dropped his claim. All he wanted was some assurance that he could continue to have his job. Where could he find the tax money, \$156,000.00?

Bequests are specifically excluded, as are gifts during life, from the concept of gross income. But the bequest, like the gift, must not be for services rendered and therefore classifiable as compensation. The books are full of cases which raise the problem of gift or compensation. Employees' bonuses are taxable even though no contractual rights to them exist. Tips constitute taxable compensation. A company gave its president a yacht as a wedding gift. Another gave a faithful employee \$6,000.00 on his retirement at age 65. Both of these were held compensation, as they were given in recognition of services rendered.

Whether a transfer is a gift or income depends on the motivation, not on the existence of a legal obligation. Was it designed to further compensate or was it motivated by love and affection? Gifts are made within the family. Rarely do transfers outside the family spring from gift motives.

The problem of the bequest is different in that gift motivation is more likely to be present in the Will cases from the very nature of the situation, but a legacy is not, *per se*, tax free. In *McDonald v. Commissioner*, the decedent left the residue of his estate to his nurse and companion: "In appreciation of many years of loyal service and faithful care rendered me . . . Miss McDonald has cheered, comforted and encouraged me through sickness, sorrows, disappointments and discouragements." The court held the bequest exempt but only because the evidence indicated that the legatee

was more an intimate friend than a hired employee. The decedent had been divorced. Miss McDonald had lived and travelled with him for many years. Hence the relationship had more family flavor than business. But what of bequests to faithful servants, loyal employees? Here the motivation is mixed and probably they should be tax free. Draftsmen, however, will be wise not to unduly emphasize the services aspect as the controlling motive. This only raises a red flag. Caution would suggest that the bequest be made and the motives left unmentioned, less a (generally) wrong impression be created.

### BEQUESTS OF INCOME ITEMS

Prior to 1934 much income earned but not collected prior to death escaped income tax. Thus if a cash-basis lawyer died with receivables of \$25,000.00, these items were included in his gross estate, received a cost basis of their fair market value and to the extent of this basis were received tax free as capital by his legatee. To close this loophole the law was changed to require the inclusion in the year of death of all items that had accrued at the time of death. This put the cash-basis taxpayer on an accrual basis for the last year of his life. But the Treasury gave this amendment a very broad interpretation, which the Supreme Court sustained, by requiring the inclusion of all payments that might later become due because of services performed by the taxpayer before his death, even though they could not be regarded as "accrued" in the usual meaning of that word. This proved ruinous to lawyers and other professional men by bunching several years' income into a single return and consequently pushing it into higher and higher brackets. Congress corrected this inequity by eliminating the accrual and making all income "in respect to a decedent" taxable to the actual recipient as and when received with a credit for any estate tax paid with respect to such item.

The estates of many persons will contain a substantial number of "income with respect to decedent" items. Thus a life insurance agent will have several years of renewal commissions coming due after death. Business executives may have a number of years of deferred compensation payments guaranteed. Professional men and others whose businesses consisted in large part of personal services will leave much "work in progress" that will later produce ordinary income. These items should receive particular attention. If \$10,000.00 or \$20,000.00 is to go to charity, these assets represent the cheapest source of payment, since the fact that they are taxable makes no difference to the tax-exempt organization. If there are no charitable bequests, then a number of accumulation

trusts or low-bracket taxpayers represent the ideal recipients of these items.

### GIFTS OF FRACTIONAL SHARES RATHER THAN STATED AMOUNTS

A left securities in trust to pay the income to *B* and when he reached 40 to pay him \$5,000,000.00 of corpus. The trustee, upon *B*'s attaining 40, discharged \$3,200,000.00 of this capital payment with stock that had a cost basis to the trust of \$1,200,000.00. It was held the trust realized a taxable gain of \$2,000,000.00 as a result of this transaction. The result seems sound and is in accord with the general capital gains law. The trustee was indebted to the beneficiary in the sum of \$5,000,000.00. He discharged this debt with property that cost him considerably less. It is well settled that if a rent obligation or other debt is paid in property that has appreciated in value, a taxable exchange has occurred. On the other hand, if the bequest is of a fractional share, no dollar amount is owed. No gain or loss is recognized on the distribution of the residue or the payment of a specific legacy. Here the tax could have been avoided by a direction that at 40, *B* would receive  $\frac{1}{4}$  or other fractional share of the corpus. Of course *B* would in this latter case take the trustee's low cost basis but this would affect him adversely only if and when he sold the stock during life. If he retained it until death, the entire gain would escape tax, since his legatees would acquire a new basis, either market value at date of death or one year from death, if the optional valuation date was selected.

### PROBLEMS IN PROBATE AND ADMINISTRATION PROCEDURE

**Robert R. Troyer**

You will note that my subject is apparently wide open and there are many, many things that could be discussed under the assigned title. I made an effort to try to find the most appropriate subjects by talking to various members of the Bar, and almost universally it was said, "Talk about L.B. 589," so we will start on that subject.

#### L.B. 589

The key sentence of the law seems to be the words, "where notice is given *by publication* as authorized by law." In spite of the clarity of this sentence many seem to be concerned as to whether or not they have to mail notice to persons interested where notice is given other than by publication. So first in determining whether you have any duties as a result of L.B. 589, read this first sentence.

Who gives the notice?

This also seems to be clearly spelled out, but the answer is not quite so simple. The notice is to be given by "a party instituting or maintaining the action or proceedings with respect to notice or his attorney." In case of a petition or application it is obvious that the petitioner or the applicant is the party instituting the action or proceedings.

But who is instituting or maintaining the action or proceedings so far as the notice to creditors, in an administration proceedings, is concerned? Section 30-601 R.R.S. 1943 provides that the Judge should give the published notice. Apparently on the theory that the executor or administrator is maintaining the proceedings, the Bars of both Lincoln and Omaha have put the duty of giving the mailed notice provided for, on the executor or administrator or his attorney.

As already stated, the notice by mail is to be given by the party or his attorney. Thus, it is obvious that in the case of a petition or application the attorney for the petitioner be given the same and, consistent with the stand we have taken as to notice to creditors, the attorney for the executor or administrator may mail the notice.

Mailing is to be done within five days. The Statute also requires that the affidavit of mailing be made within ten days after the mailing. The Real Estate Committee of the Lancaster County Bar Association has decided that the filing of the affidavit within ten days is "not jurisdictional." Omaha lawyers, who examine a lot of titles, express the opinion that they would be afraid of a title where the affidavit of mailing was not filed within the ten days. In fact, two or three careful lawyers have backed up and started their notice over merely because they failed to file their affidavit within ten days after they had mailed it.

I would like to ask the audience, what do you think about it? How many here would say that it is not necessary to file the affidavit within ten days after mailing if the copy of the notice was mailed in time? [On a showing of hands about two-thirds of the audience answered this question in the affirmative.] Now how many would say that it was jurisdictional or fatal if the affidavit was not filed within ten days? [Upon the showing of hands one-third of the audience answered this question in the affirmative.] I am indeed surprised. If it is not jurisdictional, is the title merchantable and would you pass it without question?

The last expression that I found on merchantable title is in the case of *Northhouse v. Torstenson*, 146 Neb. 187, 19 NW2d 34. On page 191 in the Nebraska Reports we find the following:

. . . This Court has said that a merchantable title need not be free from every technical defect. See *Campagna v. Home Owners Loan Corporation*, 141 Neb. 429, 3 N.W. 2d 750. And further we have said that it is not necessary that such a title be shown to be bad, if there be doubt or uncertainty about it sufficient to form the basis of litigation. See *Shonsey v. Clayton*, 107 Neb. 695, 187 N.W. 113.

A merchantable title is a title which a man of reasonable prudence, familiar with the facts and the questions of law involved, would accept as a title which could be sold to a reasonable purchaser. See *Bliss v. Schlund*, 123 Neb. 253, 242 N. W. 436.

The term "marketable title" is difficult of definition, but, accepting the prevailing rule that a good title is a marketable title, a "clear title," "merchantable" or "marketable title" generally means a title which consists of both the legal and equitable title, *and is free from reasonable doubt in law or in fact*; not merely a title valid in fact, but one which can be readily sold to a reasonably prudent purchaser, or mortgaged to a person of reasonable prudence as a security for the loan of money; a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear on such transactions, be willing and ought to accept . . . 66 C.J., sec. 534, p. 862. See, also, *Robinson v. Bressler*, 122 Neb. 461, 240 N.W. 564.

Note the words from the quotation that a marketable title is "free from reasonable doubt in law or in fact." My belief is that if a third of this group, as you have indicated, feel that it is necessary to file the affidavit within ten days of the mailing, that your title would not be "free from reasonable doubt in law or fact" if it was not so filed. So we conclude that proper practice dictates that the affidavit be filed within ten days of mailing.

Notice is to be mailed "to each and every party having a direct legal interest."

My conclusion on this subject is that anyone who can contest the prayer of the petition has a direct legal interest. First, let us consider a petition to probate a will. The heirs at law clearly have a direct legal interest. The legatees and devisees of course do, since they are interested in the success of probate, particularly if they would not be heirs otherwise. Thus, perhaps we should broaden our statement when we say that anyone who could contest has a direct legal interest to include anyone that was interested in the success of the proceedings. If the executor is not the petitioner he at least has the right to be notified so he may accept or decline the appointment. Also, he has the right to join in the proceedings for probate.

What about creditors? I do not believe that a creditor has a

right to contest a petition for probate of a will or would have any standing in Court if he attempted to and for that reason creditors need not be notified of the petition for probate. The Real Estate Committee of the Lancaster County Bar Association agree with this.

In the case of a petition for appointment of administrator, obviously the heirs do have "a direct legal interest." They have a right to contest the person as suggested as administrator; thus they should be notified. What has already been said about creditors applies to a petition for the appointment of an administrator.

What about determination of heirship under Sections 30-1701 to 1704 R.R.S. 1943?

Clearly the heirs should be notified by mail for the same reasons heretofore mentioned. Many lawyers have taken the position that the heirs, who have conveyed their interest in the property for which a decree of heirship as sought by the present title holder, are no longer interested. This would be true except for a title standard that I cannot agree with. Because of this title standard I am afraid that the matter is not "free from doubt" and that you had better notify the heirs of the deceased even though they have conveyed their interest.

I refer to Section 76-607 R.R.S. 1943 which is as follows:

Where a decree of heirship in a short form administration proceeding in which one parcel of real estate owned by the deceased at the time of his death is described in the petition and due notice has been given, the title examiner should treat *such proceeding as effective* to determine the descent of *all real estate owned by the deceased* at the time of his death.

I have always felt that this title standard is not sound. The short form decree of heirship provided for by Sections 30-1701 to 1704 only affects the real estate described in the proceedings. It was never designed to affect any other property. It is strictly a statutory proceeding applicable only to the real estate described and I am sure would not bar the heirs who are left out, as to any other real estate.

This Section could be of real service to the Bar and the public by seeking the repeal of 76-607. Until it is repealed, however, you had better give notice to heirs by mail who have conveyed their interest in the real estate involved in your proceeding.

Who should get notice to creditors? Obviously known creditors. This would usually include the county treasurer. Out of an abundance of caution I have heard of some attorneys giving notice to the county assessor and the county attorney. I see no reason for

this as any claim on behalf of the county would have to be made by the treasurer.

Should the heirs, devisees and legatees be given the mailed copy of the notice to creditors? A large number of Omaha lawyers feel that this is unnecessary. The Real Estate Committee of the Lancaster Bar Association feel that the heirs, legatees and devisees are interested in the claims of creditors and that a copy of a published notice should be mailed to them.

We have all had a case where a personal representative might feel that a claim is proper but one of the heirs desires to contest it, and I am sure that this is perfectly proper. Judge Whitford, in his recent book, *Nebraska Probate and Administration*, has this to say at page 718:

. . . Can anyone other than the personal representative contest a claim? There appear to be no direct holdings of our court on the question although our court has upheld the right of an heir to petition for vacation of an order allowing a claim, even though the administrator had consented to its allowance. It has held that where the heirs (or devisees or legatees) have objections on file no prejudice can result from the withdrawal of objections by the personal representative. There is an inference in another case that the heirs are "the real parties in interest." Our statute provides that appeals in probate matters may be taken "by any person against whom any such order, judgment or decree may be made or who may be affected thereby." It would seem that anyone who can appeal from an order allowing a claim ought to be able to contest its allowance in the first instance.

Who is "affected" by an order allowing a claim? It would seem that anyone whose interest in the estate would be reduced in value by the payment of the claim or any dividend thereon is "affected." In intestate estates of course the heirs are. The priority of the various kinds of legacies and devisees in testate estates from the standpoint of applicability to payment of debts is discussed at pages 813 to 815 of this work. If an estate is insolvent it would seem that other creditors are "affected" unless their own claims are unaffected because secured or preferred.

Thus, it is my conclusion that the copy of the published notice to creditors should be mailed to the heirs, devisees and legatees.

In order to save some work, in Douglas County, we have included a waiver in the creditor's claim blanks. By having the known creditors sign a claim blank containing a waiver, you eliminate the necessity of mailing them a notice and listing them in the affidavit.

Now we come to the petition for final settlement of an estate. Where there is a will it does not seem necessary to notify the legatees who have been paid or the devisees to whom the real estate devised to them has been assigned. However, notice should be given

to those who have not received the share provided for in the will. This statement is particularly applicable to legacies which may have lapsed or in cases where there is liable to be an abatement. In these cases I have always felt that it was good practice to draw the issue in the petition for final settlement and send a copy of the petition to the persons affected anyway.

Clearly creditors who have been paid do not need any further notice, but creditors who have not been paid, of course, are still interested in the proceedings.

It has not been customary to give notice to heirs of the final settlement of an estate in which all of the property passes by the will. The Real Estate Committee of the Lancaster Bar agree with this and it is generally accepted in Omaha. However, we must not overlook afterborn children because they are interested and have a right to assert their rights to take their intestate share.

As to final settlement in intestate estates, it seems that the heirs should have notice and what has already been said about creditors is applicable to intestate estates.

There is no special provision as to the notice to minors and incompetents. I believe you will all agree that they cannot waive the notice.

In the case of minors I suggest that the mailed notice be given as is provided for the service of summons upon minors. You will find this in Section 25-513 R.R.S. 1943.

25-513. SUMMONS: personal service; upon minors. When the defendant is a minor under the age of fourteen years, the service must be upon him, and upon his guardian or father; or, if neither of these can be found, then upon his mother, or the person having the care or control of the minor or with whom he lives. If none of these can be found, or if the minor be more than fourteen years of age, service on him alone shall be sufficient. The manner of service may be the same as in the case of adults.

In the annotations to this Section we find the following:

. . . Service of summons on infant under 14 years of age by leaving copy at his usual place of residence, and without service upon mother, father, guardian or person having his care and custody is void. *Jordan v. Evans*, 99 Neb. 666, 157 N.W. 620.

Of course, the same as summons or any other notice, the mailed notice may be waived, and the statute expressly provides for such waiver by any "competent person, by any fiduciary, or by any partnership or corporation." Waiver by the fiduciary might take care of the case of minors or incompetents who are under guardianship. To determine who is the proper person to waive for a partnership or corporation you will have to look to the general law.



The question has been asked me several times as to when the waiver may be made. My personal conclusion is that any time. In other words, the waiver might be filed long after you have failed to give a mailed notice or filed your affidavit. I see no reason to put a strained construction on the Statute just because it is new with us.

We in Douglas County have determined that it is necessary to file an affidavit as to each published notice even though everyone has appeared or waived notice. This is because of the provision of the Statute which says that the affidavit of mailing "shall further be required to state that such party and his attorney, after diligent investigation and inquiry, were unable to ascertain and do not know the postoffice address of any other party appearing to have a direct legal interest in such action or proceeding other than those to whom notice has been mailed in writing." Thus, the negative affidavit excludes those whom you might have missed and not mailed to and might not have waived. For consistency, we have added the following words to our form affidavit: "or who have waived in writing a copy of the notice as evidenced by the files in this proceeding."

Almost everything that I have said has applied to what you must do to comply with the law. I do hope that there will not be too much of abundance of caution and for that reason many unnecessary notices given and affidavits filed. For example, we have had an affidavit filed showing that notice was given to the petitioner. The fellow that filed this really didn't think. Would he have a summons issued against his own plaintiff?

Remember that everything filed has to become a part of the probate record. Recording is an expensive task in the administration of your county courts. Furthermore, it will cost your client money in addition for abstracting.

May I conclude by saying — let's know first what L.B. 589 says and comply with it as lawyers who are willing to make a decision.

### INHERITANCE TAX PROCEDURE

Your Committee has also asked me to discuss procedure for determination of inheritance tax or non-liability therefor. As you all know, we have separate procedures, one applicable if it is within the administration proceedings and another set of rules to go by if it is termed an independent proceedings. Section 77-2018.01 R.S. Supp. tells us who may institute the proceedings "in the probate of the estate." Clearly it is intended that the word "probate" is used

in its broad sense to include intestate administration. The Statute expressly provides that the proceedings "may be initiated either (1) by order of the county judge before whom probate is pending, (2) by application of the administrator or executor, (3) by application of the county attorney, or (4) by application of any person having a direct legal interest in the property involved in determination of the tax."

For some reason the Legislature has seen fit to set up different requirements for the independent proceedings or they term it "in the absence of probate of the estate in this State." They also say that the proceedings in the case is "instituted" instead of "initiated" by the petition of the county attorney or any person having a legal interest in the property involved in determination of the tax.

In the independent proceedings you get into two different procedures under Section 77-2018.02 R.S. Supp. because of the exception set out in Subdivision (4) which says "if it appears to the county judge, upon the filing of the petition, by any person other than the county attorney, that no assessment of inheritance tax could result, he shall forthwith enter thereon an order directing the county attorney to show cause."

In the absence of the foregoing, provision (Subdivision [2]) of the same Section provides that the county judge shall order the petition set for hearing not less than two or more than four weeks after the date of the filing of the petition. Notice is to be given by publication. I have always doubted whether you can assess a tax against a person in an independent proceedings in which he has no notice other than by publication. We have tried to cure this deficiency in Douglas County by getting the voluntary appearance of every person liable for a tax or giving him a personal or mailed notice. The occasion does not arise very often where there are other joint tenants, for example, other than the petitioner, who would be liable for a tax. When this occasion does arise, however, remember that all of these persons against whom you intend to assess tax are entitled to a notice that they might reasonably be expected to receive. Perhaps L.B. 589 will cure the deficiency in the foregoing Statute which was passed in 1953. At least L.B. 589 is back with us in this discussion of independent proceedings for a termination of inheritance tax. Thus, if there is a tax and there are persons interested to whom the publication is addressed, they should have a copy mailed to them, and it looks as if you are going to have to file at least a negative affidavit in every case because "notice is given by publication as authorized by law."

In addition to published notice, there must be at least one week's notice on the county attorney of each county in which the property described in the petition is located.

We have taken the position in Douglas County that there is no authority to appoint an appraiser under Section 77-2019, in the absence of the probate of the estate. My reasoning is that in the proceedings in the absence of probate, Section 77-2018.02 provides that the county judge shall order the petition set for hearing. The petition referred to is the petition to determine the tax. Thus, the petitioner and the parties interested are going to have to hire their own appraisers where there is any question about values and present the evidence before the judge. If our position is correct, of course any order of the judge allowing the appraiser's fee payable out of the inheritance tax fund would be unauthorized.

In the proceedings in absence of probate, as already alluded to, if it appears to the judge from the petition that no assessment of inheritance tax could result, the county attorney is ordered to show cause within one week why a determination should not be made of non-liability for inheritance tax. This being the case no other notice is necessary.

The form that we use provides for the seven days to show cause and orders the matter set for hearing on the eighth day or subsequent thereto. We will discuss the question presently as to whether or not the seven days may be waived.

Section 77-2018.03 R.S. Supp. sets out duties and powers of the county attorney regarding inheritance tax determinations. He is expressly given the power to stipulate the facts. I emphasize the word "facts" because I do not believe that this means that he can stipulate to a conclusion that there is no tax due. The express provision is that he may stipulate to facts "which could be presented by evidence to either the inheritance tax appraiser or the county court."

The section also makes certain provisions as to waiver of service. The express words are "waive service of notices upon him to show cause or of the time and place of hearing, and to enter a voluntary appearance." Note that he is given the authority to waive service of the show cause order and of the time and place of hearing and to enter a voluntary appearance. Note, however, that he is not given the authority to waive the time within which he may show cause. As already stated, Section 77-2018.02 Subdivision (4) provides that the order to show cause directed to the county attorney is that he is directed to show cause within one week. Since the county attorney is given express powers as to the

provisions mentioned, I believe it is logical to conclude that he is not given the power to waive the one week. We must remember that the county attorney generally, in the absence of express authority, has no authority to enter a voluntary appearance or to confess judgment against the county. See *Custer County v. C. B. & Q. R. Co.*, 62 Neb. 657, 87 N.W. 341 and *C. B. & Q. R. Co. v. Hitchcock Co.*, 60 Neb. 722, 84 NW 97.

Now for the question of notice when the tax is to be determined within the probate proceedings. If the court has appointed an appraiser under Section 77-2019 R.R.S., Section 77-2020 R.S. Supp. provides for "notice by mail or personally to all interested persons as the county judge may by order direct." Query: Does the county judge by order direct whether notice be given by mail or personally, or does he by order direct who the interested persons are who are to receive the notice?

In Douglas County we have tried to cover both possible answers. Thus, our order appointing the appraiser directs that he notify the county attorney or county attorneys involved and names who the court believes are interested persons to be notified. It also directs whether notice be given by mail or personally.

Where the judge acts as appraiser, pursuant to Section 77-2021 R.R.S. 1943, the judge is to "give notice to all interested parties." There is no specific provision as to type of notice but we usually feel that notice by mail is sufficient.

However, in most instances that the attorney for the executor or administrator has authority to appear for all of the beneficiaries. When he does, of course notice is not necessary and we show the attorney's appearance in the Decree.

In determining who the interested parties are, in the case of a will, it is usually necessary to examine the will. If the tax is to be paid by the residuary, that is, comes out of the residuary, clearly the residuary beneficiaries are interested parties because it will be coming out of them. If the tax is to be paid by the individual legatees or devisees they, of course, are interested parties. On the other hand, if the bequest is below the exemption of the particular party I see no reason to notify those parties of the hearing. It is not going to cost them anything. In other words, we do not believe that they are interested.

In conclusion, because of the various provisions of the Statute, the first thing to determine is: Is it within the probate proceedings or in the absence of the probate proceedings? The notice to be given is that required by the specific statute involved. If it is the question

of determination in non-liability of the tax, of course the show-cause order on the county attorney or county attorneys is the only notice required.

IN RE. L.B. 147

L.B. 147 deals with what has been called "pour-over wills" and the administration of testamentary trusts where a will "pours over" property into existing trust. Several lawyers have suggested that there was not a great deal of practice on this subject, but on the other hand it is a growing field and a will device which "estate planners" suggest as the solution to the proper disposition of certain estates.

Section 2 of the Bill will appear in the 1957 Cumulative Supplement as an Amendment to Section 30-1801; Section I of the Bill will be Section 30-1806 and Section 3, 30-1807.

This Bill, *as introduced*, was approved by the Executive Council of your Association.

The object of the Bill was to modernize the substantive law to eliminate doubt as to the validity of a bequest to a trustee of a trust that was subject to amendment, modification, revocation or termination. This portion of the Bill, appearing in the first two and fourth sentences of Section I was passed as approved.

While not strictly within my assigned title may I call your attention to an American Bar Association Report on the subject. The Committee on "Draftsmanship: Wills and Trusts" of the Probate and Trust Law Divisions in its 1957 report contains the following:

(4) A few states have recently adopted statutes intended to validate testamentary bequests to a revocable trust and to permit the trust, unless otherwise directed, to be administered according to its provisions on the date of death, notwithstanding the trust was amended after execution of the will. It is too soon to recommend that such statutes be relied upon for the purposes of estate planning, if the trust is amended after the date of the will. It is not necessary that the planner or his client accept a risk of this type. . . . In a state where a statute validates pour-overs to revocable and amendable trusts, conservative draftsmanship dictates that, even with the protection of such a statute, a new will or a codicil be made after any amendment of such a trust. This avoids the most troublesome feature of bequests to revocable and amendable trusts. If the bequest is to a revocable and amendable trust, then the will should provide for an alternative bequest if the inter-vivos trust is revoked subsequent to the date of the will. In addition, the draftsman should impress the client with the importance of executing a new will or codicil if the trust is revoked. We suggest that a memorandum to this effect be filed with each original and copy of the trust.

*It was hoped* that L.B. 147 would also clarify the jurisdictional and procedural questions that arise from this type of bequest. I am sorry to say that it appears that this purpose has entirely failed. In fact, the questions are now much more numerous than we had before this legislation was passed.

*Let us attempt to determine* what trusts are to be administered under Chapter 30, Article 18 as amended. First, let us examine the third sentence of Section I which is as follows: "Unless the will provides otherwise, property so devised and bequeathed [referring to bequests to the trustee of an existing trust] shall not be deemed held under a testamentary trust if the designated trustee is a corporate trustee authorized to act as an executor or an administrator."

In spite of these words it is doubtful that all bequests to a trustee of valid inter-vivos trust bring the county court's jurisdiction into the picture. Prior to the amendment of Section 30-1801 the following words were contained in that Section, requiring and determining what trustees were to qualify with the county court "a trustee to whom any estate, real or personal, shall be devised or bequeathed in trust." These words have been eliminated by Section 2 of the Bill. As Section 30-1801 now reads, those trustees who must qualify in the county court are "every person in whom as trustee any trust shall be created . . . by the will of any deceased person." In other words, if the county court is to have any jurisdiction, the trust must have been created by the will. The object of the Bill was to remove any question of the validity of "pour-over wills," where assets are poured over by the will into an existing trust. My present conclusion is that if the trust is not created by the will the county court has no jurisdiction no matter who the trustee may be.

Let's be confused further by Section 3 of the Bill in our search to determine what trusts are to be administered in the county court. Section 3 says that "the provisions of Sections 30-1801 to 1805 shall not apply intervivos trusts when the designated trustee is a corporate trustee authorized by law to act as an executor or administrator."

Does this mean that all other inter-vivos trusts are now subject to the jurisdiction of the county court? I would say no. I am sure that all here agree that our Supreme Court has properly construed the jurisdiction of the county court over trusts as one of granted or limited jurisdiction. In other words, the decisions have held the county court's jurisdiction to the strict powers granted by the statute. If you do not agree with this statement it is suggested that

you consult *In re Trust Est. of Myers*, 151 Neb. 255, 37 NW2d 228 and cases therein cited. Surely this negative statement that the county court shall not have jurisdiction over inter-vivos trusts when the trustee is such corporate trustee cannot be construed as a new grant of jurisdiction to the county courts.

The answer to the next question is not quite so easy. Section 3 also says that Chapter 30, Article 18, does not apply "by reason of any testamentary devise or bequest to him as such corporate trustee unless such compliance is expressly required by the will."

Let us assume that the will is silent or expressly negative compliance with the provisions of Chapter 30, Article 18. What about the bequest to the individual trustee of an existing, irrevocable trust containing no provision for amendment or modification? As already pointed out, the words making such a bequest subject to the jurisdiction of the county court have been eliminated from Section 30-1801. The only other way to conclude that the county court would have any jurisdiction over such a trustee would be by implication or indirection. Such implication might be made from some words in Sections 1 and 3 of the Bill.

This third sentence of Section I already referred I will repeat. "Unless the will provides otherwise, the property so devised and bequeathed shall not be deemed held under a testamentary trust if the designated trustee is a corporate trustee authorized by law to act as an executor or administrator." Can it be said that because if property is left to a corporate trustee it "shall not be deemed held under a testamentary trust" that additional jurisdiction is conferred on the county court over a trust created before death? The trust we are talking about was created by the trust instrument and transfer of assets to the trustee. The will merely adds additional property to the existing trust.

The other negative words are found in Section 3. They say that such corporate trustee does not have to comply with 30-1801 to 1805 by reason of a bequest to him as such corporate trustee. Does that sentence give any new jurisdiction to the county court particularly in view of the amendment to Section 30-1801?

Does Section I change the Nebraska law that an existing instrument may be incorporated by reference into a will and become part of a will? In *In re Estate of Dimmitt*, 141 Neb. 413, 3 NW (2d) 752 an undelivered warranty deed was admitted to probate as a part of the will. This case followed *In re Est. of Hopper*, 90 Neb. 22, 134 NW 237.

My conclusion is that these cases are still the law in Nebraska. Therefore it is possible to create a trust by a will by incorporating

a *trust instrument* into a will. (See Scott on Trusts §54.1.) In such a situation Sections 30-1801 to 1805 would no doubt apply, with or without a corporate trustee. If there was other property in the possession of the trustee, the question is still open as to whether the county court has any jurisdiction over the property not passing under the will. That is one that is going to have to be decided on the particular facts. (See Scott on Trusts, §54.3.)

Several lawyers have suggested the matter even gets into the field of domestic relations. There are many instances where a testator has named his wife as a co-trustee with a qualified corporate trustee. By the express terms of the Act, a corporate trustee acting alone would be exempted from Article 18, Chapter 30. The new problem is that if one of the trustees is not within the exception, what do we do? I hope that some wives do not feel that their husbands are losing confidence in them because some lawyer advises that a wife be relieved of her duties as co-trustee. We will leave that one to the Domestic Relations Court.

The questions raised become serious because you lawyers handling administration of trusts are going to have to determine whether or not the trust is one which requires qualification with the county court under Chapter 30, Article 18. If it does not, then the county court would have no power to appoint a substitute trustee or a successor trustee under Section 30-1803, to accept a resignation under Section 1804 or remove a trustee under Section 1805. If the trust involved is not one which is required to qualify under Section 30-1801, then the county court, I am sure, would have no jurisdiction to do anything and all such matters would have to be handled in the chancery side of the District Court.

I am sure I haven't been of much help in solving some of the problems created by this Bill. I hope I have awakened you to the realization that there is a real challenge to this Section to get this legislation straightened out. Herman Ginsburg, your Section Chairman, has also done a magnificent job during the past year as Chairman of the Committee on Legislation. The report of that Committee to this Convention has made very constructive recommendations as to the future procedure on legislative matters. As I see it, if their report is approved, then the new Committee on Legislation should immediately call on this Section to study and prepare a suitable corrective bill. This should be done in plenty of time, in co-operation with other agencies, so that the matter be approved by the Association prior to the next legislative session. The Legislative Committee should then be authorized to take the appropriate action.



Had L.B. 147 been passed in its original form as approved by the Executive Council of the Association, it would definitely have served to clarify the procedure. As it is, it has created many doubts. Let's do something about it before the next session of the Legislature.

**SECTION ON PRACTICE AND PROCEDURE**

George Healey, Esq.  
Chairman

A Panel Discussion on

“Problems of Direct and Cross-Examination”

Moderator

Hon. E. B. Chappell

Judge of the Supreme Court of Nebraska

Panel Members

James Dempsey, Esq., White Plains, New York

Fellow of the American College of Trial Lawyers  
Member of the International Academy of Trial Lawyers  
Past President of the Federation of Insurance Counsel  
Lecturer of Practicing Law Institute

Isidore Halpern, Brooklyn, New York

Fellow of the American College of Trial Lawyers  
Member of the International Academy of Trial Lawyers  
Member of the Federation of Insurance Counsel  
Author of Medical-Legal Texts  
Lecturer of Practicing Law Institute

MR. GEORGE HEALEY: Will the meeting come to order, please.

The first thing on the program until the panel arrives will be the election of new members of the Section. You have ballots, or will have ballots, and the following have been nominated by the Executive Council of the Bar Association for membership or election to membership in this Section: Dave Dow, John Dougherty, George Mecham, William A. Scheurich, Sr.

These men will be elected this afternoon for a three-year term. Will John Dougherty and his Committee please distribute the ballots.

Following this program, if the members of the Committee of the Section, that is, the officers of the Section as well as the newly elected officers of the Section, will meet up here, we will have some business to do with reference to naming officers for the next year.

I might explain to you that the panel coming here from New York had some plane difficulty and just arrived at 2:00 o'clock at the airport, but they are at the hotel now and will be here in just a minute or two.

Now, as you have voted, pass your ballots to the center aisle and they will be collected.

Now we will come to order.

Inasmuch as we have been delayed, I will eliminate any preliminaries on my part and introduce to you the moderator of the afternoon, who in turn will introduce the members of the panel.

The Honorable E. B. Chappell, Justice of the Supreme Court.

JUDGE CHAPPELL: Mr. Chairman, distinguished guests, ladies and gentlemen. We are delighted to see so many of you at this meeting this afternoon. I shall simply introduce the speakers, and after they finish, we will be permitted to have questions and answers; but these gentlemen will speak first.

Our first speaker this afternoon, a Fellow of the American College of Trial Lawyers, member of the International Academy of Trial Lawyers, Past President of the Federation of Insurance Counsel, Lecturer of Practicing Law Institute, has honored us with his presence here, delayed by airplane failure of connections, but we are delighted he is here.

It is my honor to present James Dempsey, Esquire, of White Plains, New York, who will speak to you.

JAMES DEMPSEY: May it please Your Honor and ladies and gentlemen of the Nebraska Bar: I, of course, regret that the connections by air were such as to cause delay, but all in all they moved as fast as they could, and we made the very best connections that we possibly could make to be here to join you this afternoon.

I regret, however, that one of our colleagues from New York who is on your program, Bill Geoghan, found himself in the midst of a trial, and as a result he could not possibly be here today.

He asked me to express his apologies, but he had no choice about it at all, and you gentlemen who are trial attorneys know just what that means.

Some years ago when I was a lot younger, I had the pleasure of coming to your state and working, back at the time when the wages were absolutely tremendous, shocking wheat, back in the days when we got as much as eight or ten dollars a day; and I spent the best part of the summer in the vicinity of Holdrege, Nebraska, and I have very happy, happy memories going back more years than I am willing to admit to the days when I literally broke my back trying to fulfill the obligations of a farm hand and to hold down the rigors of the header barge. I do not suppose any of you fellows know what that is, but I had quite an ordeal of it many, many years ago.

Today I understand we are to discuss with you something

with which we all are most familiar, and that is direct examination on the one hand and cross-examination on the other. Anybody, of course, who has ever started out from the earliest days of law school, right down to the very zenith of their career to the most eminent of trial lawyers, has had the problem of direct and cross-examination, and all of its ramifications and vicissitudes.

So anyone who attempts in the short few minutes allotted to us to endeavor to bring anything to a meeting of this kind which would do any more than scratch the surface does approach the problem, as I do, with a great deal of temerity. I think that perhaps I might be somewhat like the judge who was assigned to the Bench in the rural area. He had no legal education, but somebody had given him a few words that he should deliver as his charge to the jury. So finally he said in the most deliberate and judicial manner, "Now, gentlemen of the jury, I want you to know this is a *Res ipsa loquitur* case, this is a *Res ipsa loquitur* case, let the Bar beware."

I do not know whether it was that same judge or not who finally got to the point where the motions had been made in the court at the trial to strike and to conform the pleadings to the proof, and finally when the time came for him to rule, he had reserved as long as he thought he could, and, with a great deal of austerity, he said, "Now I would like to rule upon the objections made. I now admit everything which is admissible, and I exclude everything which is excludable."

And perhaps too the analysis of direct and cross-examination, when I say that we can only briefly and sketchily touch upon the high spots, might be something like the Irishman who came in from the hills, and his friend was showing him the ocean.

This Irishman from the back country had never been to the coast before, and he stood there with his eyes opened to their maximum expanse, and his friend with great pride was showing the water as far as the visitor's eye could reach, and he said, "Pat, what do you think of it?"

Pat said, "Denny, it's wonderful; it is grand; I have never in my life seen anything as great as this."

His friend said, "Don't forget, Paddy, you are only seeing the top of it, too."

So here in the very brief time allotted, believe me, we can only endeavor to touch the top of it. We hope that there may be some things that are thought-provoking, and if there are any questions at the conclusion of the remarks that we can in any way help with, please do not hesitate to ask them.

Some of you who have been abroad—I know that some of you were there at the American Convention in London this summer—had occasion to get to the Courts in London. Today, as you know, in civil actions, except in very rare occasions, they do not have jury trials. And they come into Old Bailey with all pomp and grandeur at the opening, with the Sheriff with his long robes and wigs, and the Lord Mayor with his long robes and wig, and the Judges with the long robes and wigs, and I have always wondered how those eminent jurists over there can ever hear a thing with the long wigs that they have down over their ears; and the barristers have their shorter wigs and their black robes—at least the ears of the barristers are not covered. But what impressed me more than the wigs and the long robes, as the judges came in they have bouquets of flowers in their hands and have flowers strewn along the aisle. This is only at the opening of the court, and that harkens back to the tradition—and everything, as you know, in England is traditional—that harkens back to the situation years ago when the stench in Old Bailey was so great it used to offend the nostrils of the judge, and so he would not get the odor, he would bury his judicial nose in a bouquet of flowers while he listened to the proof.

But what impressed me more than all of that was the dock, of which we have, of course, all heard. The dock rises from the center of the floor and goes up to the height of, oh, I should say, twelve or fifteen feet above the level of the courtroom floor, and they have the witnesses stand there during all of their testimony. The witness stands at a height far above the courtroom, above the place where the barristers are, even far above the level of the Bench. As he is examined or cross-examined, his testimony is given from that eminence, that prominence in the courtroom.

And I could not help but feel, as I witnessed the direct and cross-examination, of the tremendous disadvantage under which they place their witness in that position, with no opportunity really to relax. He is the center of all eyes, he is the focal point of all ears, and no matter how long he may be examined or cross-examined, unless he is ill or infirm or unless he asks for the relaxation of being seated, he remains standing until the barristers have completed their respective examinations.

Well, they have some things in England that we might emulate, and we have some things that they might well follow, and one of the things we do, at least, is to endeavor in our courtroom atmosphere to try to make the jurors, the witnesses and anyone else who comes into court feel as much at ease as possible. Certainly they can not feel at home. The judges will preside, the lawyers who

are officers of the court realize that this is their particular forum, their particular arena, as the case may be, but the witness who is projected into that unfamiliar atmosphere is entitled to certain rights and privileges and prerogatives, and he is not or should not be the prey of any lawyer in direct or cross-examination, no matter how zealous the lawyer may be to advocate or expound the cause of his client. In our preparation for the examination of a witness, whether it be in direct examination or in cross-examination, we of the legal profession can not ever overlook nor forget the element of human fallibility, the difference and divergence in honest minds, and the inability that many people have to express themselves adequately.

Some years ago Hugo Munsterberg, who was then a professor in the Department of Psychology at Harvard, wrote a book which I am sure that many of you have read, and the title of the book was *On the Witness Stand*. Professor Munsterberg endeavored in his experiments there at Harvard to show that no matter how perceptive a witness might be, nevertheless he was subject to the frailty, the uncertainty, the unreliability of his senses, and in particular in his sense of perception.

Among other tests that I recall he mentioned in his book was this. He went in to test the human eye, and he asked these different subjects in the course of his experiments, "What is the size of a full moon?"

Well, now, what is the size of a full moon? How big would you say that the size of a full moon was if somebody asked you, "How big is a full moon?"

You have seen the full moon, and you are called to the witness stand to testify. Is it as big as an apple? Is it as big as a grapefruit? Is it as big as a silver dollar? Is it as big as a bass drum? How big is a full moon?

Well, you can well imagine the different answers that Professor Hugo Munsterberg got to that question. And it might be interesting if we asked different people here how big a full moon is. How would you describe it? How would you compare it? The answer—don't take it from me—the answer according to Professor Munsterberg is that the size of a full moon is about the size of a round end of a lead pencil held at arm's length from your body.

But that, he said, was the best analogy as to the size of a full moon.

Then he had tests with respect to your sense of hearing. All of these people who were subjected to the test were there knowing

they were to be tested, and you can not overlook the fact that the average witness does not know he is going to be a witness, and never realizes he is going to be in court, put to an examination and cross-examined. But these students, these people did.

So among other tests to test the sense of hearing he had, for instance, a shot fired, with these people who were working on the experiment with him blindfolded. Well, now, with the position of your ears just about centrally located on both sides of your head, it is a very difficult thing when your eyes are closed to tell what direction a sound comes from, and many people, hearing a cry, hearing a noise, hearing a sound, unless their attention may be directed to that particular place from which the sound originated, have difficulty in finding the site of the origin of the sound.

Then he went further than that. I am sure you are all familiar with the test he then performed. He had someone rush in before a class of forty or fifty, take a gun out and say, "I am going to kill you," and fire the gun at somebody. The victim fell, and that party with the gun ran out. Then he called upon the different people in the class, saying, "Now what did you see? Tell what you saw."

Well, he had just as many different versions as to what had happened as there were people in the class. Of fifty people in that class, no two were alike on any important detail as to the number of shots fired, as to what was said, as to what was done, as to what the people wore, as to other important elements. There was very little unanimity with respect to the observations of people who were alerted, of people who were asked to watch the witness and subsequently to try to chronicle what they had observed before their very eyes.

So we of the legal profession must appreciate and do appreciate that when we go into direct examination and cross-examination, dealing now with people who wish to be as helpful as they can, as forthright as they can, be as honest as they can be, you are dealing with people who are like all other people, people of intelligence, dealing with people who can not, and can not be expected to, relate with great accuracy what their eyes have seen, what their ears have heard, and their senses have felt in one form or another.

That is why when we go into the courtroom, whether it is direct or cross-examination, we should have two things uppermost in our minds.

First of all it seems to me we should have a sense of understanding, an understanding of the witness, an understanding of ourselves; and, secondly, we should go into the question of direct

and cross-examination with a sense of fairness, and by that I mean a sense of fairness to the witness and a sense of fairness to our great profession.

Last summer I had a lad of mine who went to camp in the Adirondacks in New York, and when they gave the report back, the camp counsellor said, "You know, we think it was a good summer for your boy because he learned some things, but principally we think he learned some rudimentary elements of sportsmanship."

When a boy goes to camp, you might think he would learn how to swim or how to row a boat or how to fish or learn how to do archery or a lot of things, but it never occurred to me until I got that report that one of the things that we have to know, we have to understand, we have to appreciate from our earliest days for the balance of our lives is sportsmanship.

Well, I recall one time in the trial of a lawsuit when a man had exhausted his challenges, and he said to the foreman of the jury, "I challenge you."

And the clerk said, "I am sorry, you have exhausted your challenges."

Well, the lawyer was on the spot, was he not? He had already mentioned that he wanted this juror to go, and he had this restriction because he had no pre-emptories. Well, it was then his adversary said, "Well, if my opponent here wishes that juror to be excused, I will consent."

And he consented, and the next juror that went in that seat was also not satisfactory to the lawyer, and so he turned to his opponent and he said, "Would you consent to excuse this juror?"

And he said, "I certainly will."

And that was done on six or eight times until finally the lawyer who was gracious enough to consent said, "I want to get a jury. I do not want to exhaust the panel, and I am not going to consent forever."

And then the lawyer said, "I appreciate that."

Finally there came to that box a stolid, square-headed German with a handlebar mustache, and the lawyer said, "This man is satisfactory."

Then it was his opponent said to the juror in the box, "Do you know my adversary?"

Answer was "No."

"Do you know any of the parties of this lawsuit?"



"No."

"Were you in court and witnessed what went on?"

"I was."

"Do you realize that my opponent has exhausted his preemptive challenges and excused with my consent eight or ten different jurors until he finally found you acceptable?"

He said, "Yes."

And he said, "I am going to take you as a juror upon your assurance to me that you will be perfectly fair and impartial in this lawsuit."

And the stolid old German said, "You bet I do."

And sure enough, he was sworn in, and that case was won before it was ever tried, before any evidence had been heard, because one lawyer had leaned over backwards to practice sportsmanship in the selection of a jury.

Today I have intended to discuss with you a question of direct examination and am just going to touch on cross-examination for a few minutes, and my cousin Izzy Halpern—incidentally, Izzy was over in Ireland this summer and he kissed the Blarney Stone. Now his name is Isidore Timothy O'Halpern.

But he is a great lawyer, and you are in for a marvelous treat in hearing him, one of the greatest lawyers in our section of the country.

Izzy Halpern was to conclude with his observations with respect to direct and cross-examination, so let me just for a few minutes discuss with you what I think Bill Geoghan would have, had he been here.

Aside from the selection of the jury, in my humble judgment, there is nothing more important in the trial of a lawsuit than direct examination. Personally I feel that most of us lawyers put too much stock in cross-examination and our ability as cross-examiners, hoping we can by some very devastating and brilliant cross-examination show the jury that we are in the right in the lawsuit. Direct examination is really the cornerstone of every successful lawsuit. Every trial lawyer thinks without any question that he can ask whatever needs to be asked in the inquiry on direct examination, and all too frequently do we put witnesses on the stand on direct examination without ever giving the witnesses any idea as to what may be expected of them in the questions that we intend to ask.

It is not a question only of having your client, with whom you

have conferred, one with whom you have discussed at length the different issues in the lawsuit, it is not only a question of having your client before you, but it is a question of having your witnesses in. They may be making a tremendous sacrifice. They are there under subpoena or not as the case may be, and they do not know what you do, namely, that there are some things that are material in a lawsuit, and there are some things that are immaterial. We know, as we do so often, the immaterial, the incompetent, the irrelevant. We do not realize, although we understand what is meant by that trilogy, that the average witness does not. Suppose you have this kind of situation, and this happens every day in the trial of accident cases:

You put the man on the stand, and you have asked him, "Now did you see the two cars on such and such occasion at the intersection of Third Street and Oak Avenue at 3:00 o'clock in the afternoon?"

Answer: "Yes."

Question: "When did you see them?"

"Well, I saw them at the time of the accident."

Well, now, how many occasions have you had that come out in which the witness saw the cars or the pedestrian at the time of the accident? Or the question may be asked, "Did you ever see John Jones before the accident?"

And of course the witness thinks that you are talking about that individual. He thinks you are talking about the day of the accident. It does not occur to him that this is the split second when the accident occurred. And then it may be that you might decide upon the direct examination to say, "Well now, did you see this car around this bend before the two cars collided?"

And your astute opponent will be on his feet, and he will object. "What is the basis of the objection?" the Court will ask, perhaps. "Why, the basis of the objection is that he said he did not see the cars until the time of the accident, and now counsellor is trying to get his own witness to say he saw the cars before the accident."

You can really find yourself so far out on a limb in direct examination that you can never get back. Here is a witness who is honest, who wishes to tell what he has seen, and due to the fact that you have not prepared him for direct examination, you can not get in evidence that testimony of the witness who has seen an occurrence before it occurred, at the time it occurred.

I know a good many lawyers who do this. I do not say it is

anything which is the subject of criticism. Well, after he has gone through the preliminaries of identification—I am talking now about direct examination—your name, address, who you are and how you happened to get here, he has said, “Well now, Mr. So-and-so, tell in your own words and in your own way what happened.”

Well, you are giving that witness a great deal of rope, and chances are more likely than not that he either will tell some things which should not be injected, such as what he heard or something that is hearsay, or he will not tell the story sufficiently in detail so that you get before the jury the proof that you should have. So on direct examination I suggest first of all that you sit down with your witnesses in their offices or their homes and say, “Now in court I am going to ask you questions along this line. Do not write them out. Do not memorize them. Now you are in court. What is your name? Where do you work? How old are you? Where were you such and such a day, such and such a time? Do you recall the streets?” Show them the photographs, if you have photographs. Do not for the first time get a witness on the stand and bring photographs out of your briefcase and have him explain to you what you are expecting him to explain to the jury when the case is in court.

Then if you have the time he might say to you, “Well now, what do you think the opponent will ask me in cross-examination?” And you might discuss that with him and ask him questions, put him in court, the way you are going to frame the questions so that he might to that extent be prepared for the courtroom experience.

In your direct examination it is sometimes advisable—bear in mind that anything that Mr. Halpern says, anything that I may say, is not dogma. I think it was Mark Twain who said that German is a language of exceptions, and the exceptions to the exception are the rule.

And so when we talk about direct and cross-examination, there are exceptions to every theory advanced by everyone who has ever had a discourse upon the subject; but when you come down to the question of your questioning on direct examination, if you can possibly leave unasked in your direct examination a very, very vital question, you may find that your adversary will ask it in cross-examination, and it is ever so much more telling if he brings it out than if you do. If he does not ask it in cross-examination, you invariably have an opportunity in redirect examination to ask this really telling question effectively.

I know of a very able lawyer in New York who makes a practice of this. He will even go so far as to let the witness go

down from the witness stand, and almost as if as an afterthought he will say, "Mr. Jones, come back here. I just want to ask you this one more question," and it is something that you think he just managed to think about, a second thought. It goes back and he asks the most telling, effective question at that point.

So you can have something in reserve, even on your direct examination, some little lure that you put out for your adversary and still have the saving grace of bringing out yourself, if he does not take the lure.

If possible, do not let the witness talk too much. I recall in New York I tried cases for Hearst, libel cases. And you can well understand that the New York *Mirror* and the New York *Journal* and some of the other Hearst papers are being sued for libel every now and then. They work on the principle, I am happy to report, that they pay a great deal for defense but very little for tribute.

I had an occasion one time where the *Mirror* came out with screaming headlines that marijuana vice places had been raided. Then they named half a dozen places where marijuana had been found, but also named the place where the police had gone in. They had made the raid, but no marijuana was there. This place had been called—the circulation of the papers ran into some hundreds of thousands—had been called a marijuana vice den. I am sure you will agree on the face of it, it comes pretty close to being libel *per se*, so when we had the case in preparation and we found that there was no marijuana there, we wanted to find out what they did have, and we learned that they had night-club hostesses.

So we thought we should get some hostesses to come in to show the kind of place it was, if it didn't have marijuana.

We were only able to get one hostess who had worked there at the time. She was subpoenaed in the court. She did not understand her role at all because she came in looking like a Salvation Army lass. She had a bonnet around her head with a bow tied under her chin and had tortoise-shell glasses and looked very demure. The effect was not being created, as you can appreciate.

After the direct examination was over, in cross-examination the lawyer asked a lot of questions, and he asked one and this poor little girl gave such a foolish answer.

The question he asked was this, "How many times have you been married?"

Well, now that was a very simple question, and the poor little unfortunate girl answered this way: she said, "Twice—legally."

Well, of course the next question is obvious, and before that little girl got off the witness stand, they had taken her through

a scarlet career. I doubt whether any such career has ever been unfolded in the course of a trial, and she was there just as a witness. It was not her lawsuit at all.

Now I mention that because there is the little girl who spoke too much; she said too much; she said that extra word, "legally."

And whether it is one word or whether it is a dozen words, a talkative witness on the stand, whether it is direct or cross-examination, is prey for any clever cross-examiner, and a talkative witness will invariably talk himself out of the firm environment of credibility.

Then you come, of course, in your direct examination, and I am just trying to do it briefly, you come down to the question of your expert witness and your hypothetical question. I have seen lawyers on their hypothetical question assume this and assume that and assume and assume and assume. It seems to me when he asks a hypothetical question if you ask the assumption once that you have asked it enough. There are several schools of thought as to just what you should include in your hypothetical question. Should you include it all, should you cover everything, or should you just include certain parts of the testimony?

I know lawyers who write out their hypothetical question. Certainly a lawyer should prepare them; a lawyer should sit down with his expert so that the expert knows what is to be included in the hypothesis, because it is a very easy thing for a cross-examiner to have asked the doctor to repeat the hypothetical question. "Doctor, a question was asked of you and you gave an opinion. What was the question that was asked of you?"

And if the doctor repeats the hypothetical question more or less verbatim or even substantially, there is an inference which the jury may well obtain that the doctor had a hand in the preparation of that hypothetical question. If the doctor omits from the hypothetical question important parts of the hypothesis, then of course you to that extent detract from the doctor's answer in direct examination. So it is advisable, I say, to have your hypothetical question prepared in advance and to discuss it with your doctor or your other expert witness, whether he is a doctor or not, so that your expert knows what you are going to prove. You can have in your hypothetical question—should have there—any facts from the proof which are helpful to your side of the controversy, which would assist your expert in answering the question.

At least in my jurisdiction you do not have to include all of the evidence. You must have in your hypothesis your accurate assumption based on evidence, but you can assume from the evi-

dence that which is favorable to your side of the controversy, sufficient for the doctor to give his answer.

Now what should you do in your order of proof? Should you put your best witness on first or start off with a poor witness? I have heard it discussed from all angles—put your best witness on first, put your worst witness on first, put some nonessential witness on. What strategy do you employ getting your case in the court to the best advantage of your client? That is something that seems to me you leave to the exigencies of the courtroom or the mood you might be in.

I recall a case that I had some years ago with one of the greatest trial lawyers in America. He was a partner during his lifetime of John W. Davis, and he still is a member of that firm. He said the night before to the Judge, "Your Honor, tomorrow at 9:30 I am going to have to have a tooth pulled, and I would like to be a little bit late."

So I said to this very eminent lawyer, "Why don't you take the day off? You can never tell what may happen when you have a tooth pulled; you never can tell."

He thought awhile and he said that if he had the morning that would be time enough.

So the morning recess was granted to him and we started in the afternoon session. To my great surprise he was cross-examining from a loose-leaf notebook, and he was cross-examining very effectively, turning the papers over from a loose-leaf notebook. Finally when the recess came I got ahold of him and I said, "You are a fine one. Instead of your taking the morning off and having your tooth pulled, you were staying in your office figuring out your cross-examination."

He said, "No, Jim, that is not so. I have been practicing law for over thirty years, and this is the first time in my life that I have ever taken a minute off for any reason of my health. I regret even that I asked the court for a morning. I had my cross-examination figured out long before this morning."

Then I asked him whether he invoked the loose-leaf method, and he said that, mind you, he did not have his questions there, but he had this thought out as to what he was going to do in cross-examination. And there is one of the greatest trial lawyers in America. I think if you put the great trial lawyers in America on the fingers of two hands, you would have to include his name, who planned in advance an orderly cross-examination. He did it most effectively.

It reminds me, just as an interlude, about the man who walked

into the psychiatrist's office. He was snapping his fingers, and the psychiatrist said to him, "What are you snapping your fingers for?"

And the man said, "Why, that is to keep the elephants away."

The psychiatrist said, "Why, don't you know there are no elephants within five thousand miles of here?"

And the fellow said, "Effective, isn't it?"

The question comes about the order of the proof. I think in a tort case or in any other case where you have a jury trial, your order of proof should be planned so that before you get to the question of your damages, you have established your right to damages. In other words, if you have a case where you have injuries, before you start putting your doctors on and your proof about it, you have a concrete case where you have damages that you have to prove, before the jury gets to thinking in terms of dollars and cents you should first establish that you are entitled to that consideration at their minds. I think that if you start out, you should get over that element of the case first, if possible. This is a very difficult thing to do, as you well appreciate, and possibly if you could work your case up to a climax so that your last witness more or less is a zenith in your proof, then you can turn the case over to your adversary. That is a difficult thing to do, but I would not advise starting with your best foot forward if you have some questionable proof to follow, because in doing that you are applying inverse psychology to your own great disadvantage.

Now I have not discussed with you that which I wished, but I am going to take just a minute or two of your time with your permission on the question of cross-examination.

Cross-examination—the greatest lie detector in the world is cross-examination, and I know that every lawyer feels that he can rise to the spirit of the occasion and be so overwhelming that he is going to have a crushing defeat for his adversary and a great victory for himself; but very, very seldom it occurs.

Sometimes you can sway them with one question; more often than not you can do better if you do not ask any questions. So in cross-examination may I suggest to you that there are only three objectives. One is to destroy the witness, another is to destroy his testimony, and a third is to elicit from the witness in cross-examination something which may prove helpful to your case.

Now how do you destroy the witness? Well, I recall a case a few years ago in the city of New York where we had a very eminent psychiatrist who was head of Bellevue Hospital. He was

an eminent doctor who died in the past few years, but his name was Dr. Menus Gregory, an outstanding psychiatrist. He was on the stand testifying that some man was mentally incompetent, and the lawyer cross-examining him pursued this line of cross-examination, and this is all he said:

"Doctor," he said, "last summer you went abroad?"

"I did."

"How many countries did you visit?"

"Well, I went here and I went there, and I went to England and I went to Holland and I went to Germany."

"Doctor, you left your apartment in the Buckingham Hotel?"

"Yes."

"And who lives there with you?"

"Bruce."

Well, it just happens that Dr. Gregory was a bachelor, but he lived there with a collie dog named Bruce.

And, "When you went abroad, Doctor, did you take Bruce with you?"

"No, Bruce stayed at the Buckingham."

"Doctor, did you get to Lucerne, Switzerland?"

"I did, and I was there four days."

"Doctor, isn't it a fact that while you were at Lucerne, Switzerland, that you sent a postcard to your dog Bruce?"

"Yes, I did."

Now that actually happened, and you can just imagine the effect of that. It will, as you know, destroy a witness completely. Or you can destroy his testimony, show that the witness could not possibly have seen what he claimed he saw occurred, and there are ever so many ways that you can do that. But far better than going into cross-examination without preparation is the very important answer, "No questions."

And unless you have something to be gained, do not cross-examine. Now I have heard this said: Never ask a question in cross-examination unless you know the answer. Well, you would have to be an adult oracle to know the answers to all questions. I do not subscribe to that theory at all. I think that you should never ask a question in cross-examination unless you know what to your way of thinking the answer should be. Never just go out just asking questions to kill time. I have seen judges say to lawyers, "How long are you going to cross-examine?" I know



one case where a lawyer said he was going to cross-examine three hours. At the end of the half-hour he had completely discredited the witness, and at the end of an hour the witness was getting back his self-assurance, at the end of two hours the lawyer was groping, and at the end of three hours the lawyer lost his case. So you can not time cross-examination.

It seems to me you get to a good point and it is about recess. My friend Isadore is going to wear out his watch. If he looks at it once, he has looked at it a half-dozen times. But just before I sit down, may I tell you one incident that happened in my career that made such an impression on me that I will never forget it if I live to be a hundred.

I had difficulty with a doctor one time. He was very much concerned because he had not been paid, and he had a right to be concerned, and he was unhappy about the way he had been neglected by my clients. So when the case came to court, he had expressed great reluctance to appear. He was a man of Spanish extraction who had been practicing in this country, and I had to do what I never like to do: I had to subpoena my own doctor.

He came to court this morning and I saw him in the corridor, and he said, "Don't worry, Mr. Dempsey. I will fix you."

So I tried my best to mollify him, pacify him. When I opened up I said, "Now, Doctor, I'm going to put you on out of order. I realize your time is very valuable. I am here, and you don't have to put yourself out."

So when I opened to the jury I said my client had the good fortune, in spite of this terrible tragedy of the accident, he had one of the greatest orthopedists of our section, and this was Dr. Lopez, who was going to testify.

I thought that was going to help, but it did not.

When the doctor took the stand you just sensed the chill in the air, and it was electric. The questions that I tried to bring out in direct examination were coming back to me faster than I gave them. I was very unhappy about it, as you can understand. Anyway, my adversary, realizing there was not good rapport between the doctor and myself, started then to cross-examine, and if the doctor was mad at me, he was more furious at my opponent. Finally in cross-examination he brought out that my client had fractures of the patella. I had been trying to bring it out in direct examination and was unsuccessful.

I was not content to let that go. After the cross-examination was over, I got up and I said, "Doctor, you did testify that my

client had fractures of the patella. You testified to that in cross-examination, didn't you, Doctor?"

"Fractures, fractures, did I say fractures? Little chips, that is all."

I am not going to trespass any more on your time. It will be a great pleasure for all of you to hear my cousin, Isidore Timothy O'Halpern.

JUDGE CHAPPELL: Mr. Dempsey, we are very grateful for that interesting and helpful address.

I was reminded as I sat here of something I have remembered through the years. Briefly, a great old persistent litigant in our county sued the insurance company on a policy, because the wind blew his barn down, and the company defended upon the ground that he had never paid the premium, and that he did not have any insurance. So the old gentleman got on the witness stand and testified positively that he wrote the check, as he always did before, and that he put it in an envelope and that he addressed it to the company, and he sealed it up and he put a stamp on it, he put it in the post office five or six days before his barn blew down.

They had always accepted his check before, but this time they sent it back. Blessed old Claude Wilson took him for cross-examination, and he said, "Mister, you wrote this check yourself, didn't you?"

"Yes, sir."

"Every word on it?"

"Yes, sir."

"And you signed it, didn't you?"

"Yes, sir."

"I see down in the corner, it says, 'insurance on barn.' Did you write that?"

He said, "Yes, sir."

He said, "The policy covered the house and the barn both, didn't you?"

"Yes, sir."

"Well, how did it happen you wrote 'insurance on barn,' but didn't say anything about the house?"

And like a flash his reply was, "Well, I hadn't had any loss on the house yet."

And Shorty Requartte, whom all of you know, looked up at me and said, "Judge, shall I quit or shall I go on?"

Our next speaker I am delighted to present. I will not repeat all these things that are in your program. He is a great lawyer, a law writer, teacher. I am proud to present Isidore Halpern of Brooklyn, New York, who will now speak to you on a similar subject.

ISIDORE HALPERN: Your Honor, learned members of the Bar, beloved cousin Jim, co-worker in the field of the Hearst vineyard, ladies and gentlemen. I am not at all conceited because of the introduction. There was a time when I did have conceit, but one thing removed all conceit from me, and it was my acquaintance with a certain gentleman who made me realize how humble, how low, how small in the scale of humanity I was, and if I were to ask you to guess who the individual was you might say Albert Schweitzer, you might say Santyana, and you might say Bach. I say these things just to show you my general cultural level.

But it wasn't even Elvis Presley. You would be wrong. It was a man by the name of Ginsburg, and let me tell you why Ginsburg taught me the modesty that I now possess.

Ginsburg was in partnership with a man by the name of Murphy, and that is always an ideal partnership. The Hibernian generally does the trial work, and the Hebrew citizen generally worries about the books and fees. And they loved each other. They had been in partnership for a great many years, but one thing offended Murphy, and that was Ginsburg's habit of boasting about all the people he knew.

He knew everyone in the field of art, in the field of literature, the field of commerce, and this annoyed his partner.

One day they were walking down the street, and Murphy said, "I want to ask you about Marilyn Monroe. Do you know her?"

"Do I know Marilyn!" he said. "Like a daughter to me."

He said, "You faking bum, are you willing to bet five thousand dollars that you know her?"

He said, "I certainly am."

He said, "I'll tell you why I made this bet. Look where we are. We are in front of a theatre." And there was a sign, "Marilyn Monroe in person," and he said, "All right, you have got a bet." They walked backstage and Ginsburg said, "Tell Marilyn that her old friend Ginsburg is outside."

And out came LaBelle Monroe, and Friend Ginsburg said, "Marilyn, darling, I am glad to see you have become cultural. I am glad to see you have married a philosopher. Keep up the good work, darling."

She kissed him and Ginsburg collected the five thousand dollars.

Murphy smarted under this, and they were in Washington one day, buying silks. Murphy was reading the newspaper, and there was an article, "Churchill Visits Eisenhower."

He turned to Ginsburg and he said, "Churchill and Eisenhower, I suppose you know them too."

"What a question! Does Damon know Pythias? Does ham know eggs? Do I know Winnie and do I know Ike?"

And Murphy says, "For ten thousand dollars?"

And Ginsburg said, "You're on."

So down to the Capitol they went. The FBI people stopped them, and Ginsburg said, "I want to see the President and Winnie."

They said, "Hold this lunatic."

They went inside and sure enough came back with awe in their faces and said, "Go right in."

And in walked Ike and he said, "Ike, you look wonderful. Ike, it is a pleasure to see you. Don't try to get a job as a strongman in the circus yet, despite what Dudley White tells you, showing you a portrait of a dirty Democrat. Don't try to get that job yet." He said, "Ike, you look fine, keep on playing golf and improve your game."

And all of a sudden in the corner where he was smoking a cigar, a man said, "My old friend Ginsburg."

"Winnie, I'm glad to see you," he said. "You look fine."

And Murphy was out ten thousand dollars.

Five months later they're in Rome on Easter, and you know the faithful go down to the Square to get the papal blessing, those of you who have been there. Those of you who have not know the great mobs by the hundreds of thousands that collect in the Square before the Vatican to get the blessing from His Holiness. People would jam one against the other, scarcely room to move. Murphy turned to Ginsburg and he said, "The Pope, you know him, maybe?"

And Ginsburg said, "What a question, Murph." He says, "I know him as well as I know you."

And Murph said to him, "For twenty-five thousand?"

And Ginsburg said, "A bet."

Ginsburg elbowed his way, crashed his way through the crowd. Fifteen minutes passed, the door of the Vatican leading to the balcony opened, and out on the balcony there stepped His Holiness, dressed in white raiment, gorgeous, beautiful robes, and who do you

think went out on the balcony with him, and who do you think had his arm around the gentleman? Who stepped out on the balcony with him?

Sure enough, our old friend Ginsburg, and there was His Holiness with his arm around our old friend Ginsburg.

An Italian gentleman who was jostled up against Murphy said, "Hi, I want to ask you a question. Who is the man in white robes with Ginsburg?"

And now you begin to see why I am modest.

As far as this watch is concerned, this present bachelor does not know the reason. He told you about the connection we made on the airplane, and he was right, and he made those connections, not I. He promised to call the connection in the form of a lovely stewardess at a certain hour, and I just had the watch out, wanting my dear friend to fulfill every obligation that he ever makes.

Now what can I teach you about direct and cross-examination? I can give you general platitudes, because there is no lecture, there is no speech that can ever teach you how to conduct a cross- or direct examination.

This you must learn by bitter and vigorous experience in a court of law. But after thirty-four years of active trial practice, and when I say active trial practice, I mean day in and day out, there are certain things that I have learned, and believe me, I have learned them the hard way. Number one is this—let me touch briefly on direct—put the witness at his ease. That was what my cousin Jim was trying to tell you. Put the witness at his ease.

How do you do that? Too often have I heard lawyers put a witness on the stand and immediately plunge right into the dive and say to him, "Did you see an accident? Tell us what happened."

Have any of you ever been on the witness stand? I tell you, my colleagues at the Bar, you have not the slightest concept of what you feel like if you have not. If you put your witnesses on as we do in New York, the entire room swims around you, and things seem to be sort of strange. You are not composed, and when you put your witness on the stand and immediately start to question him, you have a confused witness.

How do you then put a witness at his ease? The answer is simple. Let me give you a hypothetical case. Plaintiff is Mr. Jones. He had the bones of his leg fractured. Put Jones on the stand and say:

"Your name is Jones?"

"Yes, sir."

"How old a man are you?"

"I am forty-four years of age."

"Mr. Jones, what do you do for a living?"

"I am a pretzel maker."

"Now, Mr. Jones, how many years have you been making pretzels?"

"I have been making them for the last fifteen years."

You see, Brother Jones is familiar with all of these things, and these things he can answer in his sleep, and even when he is suffering from a violent hangover.

"Now, Mr. Jones, will you describe to the gentlemen of the jury the process of making pretzels."

"Well, you stand there at a machine, and as each pretzel comes out of a machine, you sort of grab a strangle hold on it, and you twist it to the left and you twist it to the right, then you step down on a lever; et cetera, et cetera."

And after fifteen or twenty minutes you then say to Mr. Jones, "Mr. Jones, you were in an accident?"

In other words, when you put the witness on the stand, always start with the trivial questions that are unimportant, and the trivial questions that your witness is familiar with, because then after ten or fifteen minutes, if he has not come up for air, believe me, he never will.

I am opposed to the school, and I think it is a dangerous school, that says ask your witness, "Tell us what occurred," and then you sit down.

Jim spoke about his farm work, and you gentlemen know unquestionably what it is to run a horse, and you know what reins are for. Let me digress and say this, that although in all my trips throughout the United States and outside the borders of the United States as a lecturer, this is my first trip here. I knew you were fine men, and I didn't have to work in Nebraska to know that you were fine men, and you say that this is unquestionably fulsome flattery, and I assure you it is not and I will prove it to you as a trial lawyer.

You do not put up a house of worship, do you, in a jungle where there are heathens? You do not put up, do you, an opera house where people do not love music? As the testimonial to your fineness, the fact was that as I walked into the hotel an hour or so ago, what do you think greeted me? On my right a liquor store,

and on my left a cocktail bar, so I certainly know that you are fine men.

Knowing the use of reins, when you conduct a direct examination, you have got to hold those reins on a witness as you would on a horse that you are guiding when you are trying to plow a field. How do you do that? Here is what I mean, and I always want these talks of mine to be practical, because I will tell you frankly, I am not interested in you gentlemen who are older. My great interest and the reason for my lectures are the younger men who are here at the Bar. Those of you who are my age, if anyone is old enough in this audience to be of my age, I know share my interests in their welfare to carry on what we consider a wonderful, remarkable and great profession.

Well, how do you do that? The answer is simple. Let me give you the ordinary knock-down case, as we call it back in that big city from whence this New York city slicker comes. Here is how you do it in a knock-down case.

Jones was in an accident. He is a pretzel maker. You put him at his ease.

Question: "Mr. Jones, were you in an accident?"

Answer: "Yes, sir."

"What time did the accident happen?"

Answer: "About 3:30."

Question: "Where did you come from?"

Answer: "I came from my house."

Question: "After you came from your house, Mr. Jones, what did you do?"

Answer: "I walked to the corner."

Question: "And, Mr. Jones, when you got to the corner, what did you do then?"

Answer: "I stopped."

"And after you stopped, was there anything else that you did, Mr. Jones?"

"Yes, sir."

"What was that, Mr. Jones?"

"I looked to the right and I looked to my left."

"And when you looked to your right and left, did you see anything to your right?"

"No, sir."

"Did you see anything to your left?"

"Yes, sir."

"What did you see?"

Answer: "I saw a traffic light."

"Will you tell us what the color of the traffic light was?"

Answer: "Green."

Question: "Green for whom?"

Answer: "Green for me."

"Did you see anything else, Mr. Jones?"

"Yes, I saw an automobile."

Question: "What was that automobile doing? Was it moving or standing still?"

Answer: "It was moving."

With respect to speed, after you qualify him as a man who has driven an automobile and watched speedometers: "Was it going fast or slow?"

Answer: "It was going at a moderate rate of speed when I first saw it."

Question: "And when you say moderate rate of speed, what do you mean?"

"So many miles an hour."

"What did you do, Mr. Jones?"

"When I saw that, I stepped off the curb."

"What did you do then?"

"Well, I walked about fifteen feet."

"How far was the car away from you?"

"About one hundred fifty feet when I first saw it."

"What was the next thing you know, Mr. Jones?"

"I heard a noise."

"And when you heard the noise, where was it coming from?"

"It was coming from my left."

"What did you do when you heard the noise?"

"I looked to my left."

"And what did you see?"

"I saw that automobile."

"Was it moving or standing still?"

"It was moving."

"And then what happened, Mr. Jones?"



"It hit me."

"From the time you saw it until the time it hit you, how much time did that take?"

"Seconds."

Now there is a simple knock-down case which accomplishes two purposes. One, dramatic interest. In musical comedy, boy meets girl, and they fall in love; you can tell the story in twenty seconds flat. Why, because whether your style is quiet and whether you address your jury you may be different from the juries we have in New York or the juries in other states, the trial of a case is never stagnant. It is always a dynamic thing, and you are accomplishing two things. You are giving them the narration of this witness in quiet, dramatic style and you are also holding your witness in a checkrein lest he blurt out in his confusion some misstatement that he doesn't intend.

Now let me tell you another thing. Avoid the unnecessary statement. You know I violate this advice from time to time because, although I know the rules, in the heat and in the tension and in the emotional upheaval of a trial, at times the emotions guide us, and our brain unfortunately is unguarded. I will tell you what I mean by the unnecessary statement.

I put the husband of a lady on the stand and I said to him, "This lady is your wife," in a loss of services action, and he said, "Yes, sir."

"How many years have you been married to her?"

He said, "Some twenty years."

And I said the unnecessary, "And you have been working hard at it from the day that you married her?"

And he said, "Yes, sir."

And up got my adversary and he proved, the dirty bum, that after two months of marriage he left her for five or six months, and then returned to her, all of which would not have been material if I had not said, "You have been working hard at it all the time that you have married her."

So avoid the unnecessary statement.

What would I tell you about cross-examination? Anthony Trott who wrote *Barchester Towers* and *Olney Farms*, said that the cross-examining lawyer was a rooster crowing from a dung hill; but Trout was sour at everything, sour at the ministry, sour at medicine. There was not one thing that he did not rap. But I like to think of cross-examination in the following manner. The

witness shows one side of his face in the direct cross-examination. Cross-examination turns the other side so you can see this man full face, with all his blemishes, with all its virtues. Jim illustrated an important point apropos of Menus Gregory when he wrote to his dog Bruce when his answer was that you cannot cross-examine except on a collateral issue. You cannot cross-examine except on a collateral issue. Remember that; never forget it.

If a witness said the light was green, do you think that if you get up and cross-examine him for hours or even for days he is going to change his mind and say it was red? If he says the light was red, do you think there is any trick of species of hypnosis that you are going to make him say the light was green? You are not, because he is not going to change his mind on a vital fact, nor is that necessary. It is on the collateral issues that you can expose this man as to whether or not this man is truthful. Now you know what is wonderful about the law. It is like a horse race. We disagree, and this great lawyer in New York and America's greatest, this great lawyer talks to you about a notebook, and this humble citizen says, "I don't believe in notebooks." I do not believe in notebooks. I have never once had to have an index book except in a Hearst case, where they called a man a Communist, and they called organizations Communistic, and they called universities Communistic, and I had the job of proving this was true, and because I decided that the defense was going to be that this was true, and the many organizations and cross-organizations and interlocking memberships, I had to have an index book. But in thirty-odd years at the trial bar I never went to court with a notebook except when I cross-examined on medical issues. And even then I have scraps of paper and not a notebook.

I will tell you what is more important to me than a notebook: you have got to, brother, know your case. It has got to ooze through your pores. That is how you have to know it. I will tell you why. You are sitting there at the counsel table, and your sitter-in says to you, "Boss, this guy is a liar." And you think someone gave him a tip from Mount Sinai, and you say, "How?"

And he says, "Boss, I don't know. You are going to murder the bum."

And one ear is listening unconsciously to what the man is saying, and then suddenly, you do not know why, like a musician detects a false note, there is something about this man's testimony some place, some phase of it that does not sound right, and you get up on your feet, and you do not know what in heaven's name you are going to ask him, at least if you are like me, and you spar around in the beginning and you probe and you make a

little incision, and then you go deeper and deeper and then you open it, and little by little, thank heavens, most of the time you get the break.

There is only one way that you can do that, and that is if you know the case. So you cross-examine on collateral issues. What do I mean by collateral issues? Let me give you an illustration. I am not trying to tell you, ladies and gentlemen, that I have succeeded in every cross-examination. My head is bloody. I have been rocked on my heels more often than I have remaining hairs in my head. Cross-examination is not an atomic disintegrator that the kids read about in the comic books. You will have your failures, so when I give you these successful illustrations, I give them to you to illustrate my points and for no other reason.

Here is a case where one of New York's greatest defense lawyers had a plaintiff's case, and something the profession refers to with great glee as a "leg-off" case. The lawyers who came to me said, "Mr. Halpern, we have a beautiful case for you, a leg-off case."

There was one witness, and this man was dead set against me. My lad was some twenty-odd years old, and my adversary put this witness on and said, "Sit back. I understand you are a shell-shocked war veteran."

And I got up before Judge Naughton and I said, "Just a minute, Judge Naughton. May I respectfully object to this statement? Millions of us made a sacrifice. Many of us saw lost children in the war." ( I lost none in the war; I have no children.) "Many of us lost children in the war, and I submit, Your Honor, that this question never should have been asked. Certainly this man is the last one who wants this jury to judge him by any flag-waving appeals."

And Judge Naughton said, "You are right, but the question has been asked."

Looking at the brother, he looked to me as if he was rum-shocked, not shell-shocked; and I turned to him most politely and said, "First question. Please tell me where were you wounded, what theatre of action. How long were you treated? What hospital were you in?" And don't you tell me that is many questions in one; I know it.

I was afraid to ask him where he was. He was liable to say, "In France." Having lied once he would lie again and say, "I can't pronounce the names of them French hospitals."

So I wanted to warn this brother of what was to follow, and to my great happiness, the thrill in my heart that ensued, gentle-

men, I will never forget, he said, "I'm not exactly shell-shocked, I'm just a little nervous."

I am sure that the shaking of the earth that you heard here in Nebraska some years ago was not any earthquake; it was my yell when I let out a "Nervous!"

"Nervous," luckily he said, "just a little bit nervous." There you had him. What do you do with him? I knew he was primed on the question of liability. He knew feet and inches. I knew he was aching for me to ask him questions about the occurrence of the accident, which I would have been compelled to ask him, if this lucky break had not happened. I will tell you how I did it, no great feat; I said this: "Now when you were told by my fine adversary, this fine gentleman sitting over here who said, 'Sit back. You are a shell-shocked war veteran,' you are not going to tell the judge and jury that he told you to lie and say you were a shell-shocked war veteran?"

I didn't give a tinker's darn which way he answered that, whether he said "yes" or "no" to that one. And he said, "No, I didn't."

"You must have told someone you were a shell-shocked war veteran," to which he said, "Yes."

I said, "Did you tell it to one of my adversaries?" We will call him Mr. Jones. "Or to one of Mr. Jones' assistants?"

He said, "Yes."

Well I said, "Will Mr. Jones' assistants please stand up?"

And I will swear half of the courtroom stood up. Maybe the jury figured there was an insurance company in this particular case now, I do not know, because we are not allowed to tell them that in our jurisdiction.

I said, "Will you point out to me the gentleman whom you told?"

He pointed out some lad and I said, "Will you step up here?"

Then I said, "What is your name?"

"Mac Bloke."

"Mr. Jones, will you concede this fine young man is connected with your law office?"

Yes, he did, and with my arm around Mac Bloke, I said, "You are not going to tell this jury that this fine young man told you to lie and say you are a shell-shocked war veteran?"

To which his answer was, "No, sir."

The next question: "Did you expect more money for coming

down in this courtroom if you said you were a shell-shocked war veteran?"

Answer: "No, sir, I didn't."

"No one asked you to lie and say it?"

Answer: "No, sir."

"In other words, voluntarily and without any conceivable reason you lied?"

"Yes, sir, I did."

And then I asked something that they tell you never to ask, which proves that there are no platitudes in cross-examination, and that question was, "Tell the learned Court and the gentlemen of the jury why, if you had no reason, please tell us, why did you lie?"

And his answer was he was not under oath.

"In other words you are the kind of a bum who lies when you are not under oath?" And the answer was, "Yes, sir."

"And the only reason you don't lie when you are under oath is you are afraid His Honor will commit you to durance vile or into the clink?"

Answer: "Yes, sir."

"Well, as a matter of fact, you did lie in this case and say you were a shell-shocked war veteran, when you weren't?"

"Yes, sir."

And I sat down without asking him a word about how the accident happened. Illustrating what? Illustrating my cross-examination must be on collateral issues. Further illustrating the effective dramatic use of material, which brings me to another thing. What is the trouble with most lawyers?

You must do it in style. You dissipate remarkable material, you dissipate and make it pointless. Let me give you an illustration of a case I tried just a week ago. It is not dramatic, but it points up the things that I am trying to illustrate.

Here is a case where an ulna nerve had been severed. The ulna nerve is the nerve that governs the fine movements of the hand. The party was a watchmaker. The ulna nerve had been atrophied. The lad had a bad hand and I was defending this. I am primarily a plaintiff's lawyer; occasionally when defendants owe people a lot of money and the lawyer wants more than a lot of money, they call me in at a ridiculous sum per day, to heckle and harass the plaintiff's lawyer until he pays the reasonable amount he should get. Mind you, I have no objection to being a defendant's lawyer.

There is only one reason why I am a plaintiff's lawyer. There is more gold in them there hills.

Well, I noted a notation on an eminent orthopedist's card and it says as follows: "Can touch all his fingers with his thumb."

Well, what is the big deal? "Can touch all his fingers."

"Doctor, he can touch all his fingers with his thumb, can't he?"

So the jury said, "So what?"

All right. Simple material, but here is what you do with it. See what I mean by doing it in style.

"Now, doctor," said I, "one of the greatest things in medicine are the tests that you gentlemen have devised."

Answer: "Yes, sir."

"And every specialty, sir, devises its tests?"

"That is true."

"The neurologists have theirs, the psychiatrists have theirs, and you learned orthopedists have yours."

Answer: "Yes, sir."

"And these tests were not evolved overnight? They were evolved as a result of experimentation?"

"Yes, sir."

"At first the chance discovery, and then years, and countless hours of scientific research?"

Answer: "Yes, sir."

"And in orthopedics you have one very fine remarkable test."

Answer: "Yes, sir."

"And is that touching the fingers with the thumb?"

Answer: "Yes, sir."

"And will you tell this jury why that test is so important?"

"Oh, well, the reason is simple," and the doctor beamed at me. This gave him a chance to talk, which they so dearly love.

"Why, don't you see," with a smile, "because the 'ziguous' ligament and the 'hapadack' ligament and the other hand, and it goes round and round, and the music . . ."

After twenty minutes of this, "Well, doctor, and the nerves are also involved?"

"Oh, lord, yes."

"Peripheral or sensory?"

Twenty more minutes, and it shows these things.

"Now, doctor, when you gave him this most important touching of the fingers with the thumb, did you find any defect?"

"No, sir, I did not."

Now there is your simple question which can be dissipated. "Did you give him the test to touch his fingers?"

"Yes."

It can be done the other way too by the plaintiff, if he failed this test, the importance of this test can be shown, so when I say you do it in style, that is just what I mean.

Another thing. As brutal as this may sound to you, a good cross-examination is like a prize fight. Here is what I mean. In a prize ring when one of the pugilists bloodies a man's nose, as grim and horrible as this may sound, what does he aim for? Does he aim for his ear, his foot, his abdomen? When he blackens his eye and the blood is running down, what does he aim for? He aims for that sore eye, doesn't he?

When he sees distress results from a blow in the stomach, he keeps on aiming at the point where he is wounded. And similarly I say unto you, my children, where you have damaged a witness in one respect, keep on poking, keep on poking, keep on poking at the thing that you have already damaged.

And another thing, save your best point for the last. Do not dissipate your best point. This I follow religiously. If you are going to use your most telling point first, this must be a very short cross-examination. That one point, and that is all.

"You were convicted of a crime?"

"Yes, sir."

"You were convicted of the crime of perjury, weren't you?"

Then you sit down; but few cross-examinations are that way, and rarely do we have such material. So if you have one point that you are going to make, start with your other things. Let me give you another illustration. The longest cross-examination that I ever conducted was eight and a half days, and that was for Brother Hearst, and three million dollars depended on the results. It was a commercial libel, and it was tried with this eminent gentleman that Jim talks about, who in my book is a sucker for a discreet left hook. Sometimes he is important, and sometimes this very fine, personable, gifted, wonderful, outstanding member of the Bar knows it. For example, for a week he kept telling me to sit down, and I very humbly sat down for a whole week, until finally the eighth day I said, "Don't tell me to sit down just because you wear three-hundred-dollar suits and I got a thirty-dollar suit. If you

had a case, do you think you would have me here defending it?"

So once in a while he is sucker for a left hook.

Now his client was the magazine that claimed Hearst ruined and the court of appeals held he had so ruined, so there was the question of damages, whipping money. The article was published without an investigation, was published recklessly, so they held. The president of the corporation took the stand, a literate, articulate gentleman. If your grammar was improper he would say "no" where he should say "yes." And I will never forget my feeling. This was the answer to my case, and I was in cross-examination of this man, and I give you my word, ladies and gentlemen, as I got up with my trivial questions in my mind, there occurred this: "They spar in the center of the ring, they trade light lefts and light rights," because that is what it was, he waiting for his opening like a panther, and I waiting to sink the legal knife into this gentleman. But one thing I had, and after seven or eight days I ended with it.

"As a matter of fact, Mr. X, didn't you desert your wife and three little children, and didn't a judge order you to pay fifteen dollars a week for their support?"

Now I doubt very much if that question legally should be asked; however, the other guy always has the benefit of objection, and the judge can always strike it out and tell the jury to disregard it, which I am of course sure that the jury implicitly obeys in every case. That was the last question that I asked this gentleman after a seven-or eight-day cross-examination.

There were four ladies on this jury who loved that man. They loved him; he was such a sweet gentleman, he spoke so nicely; but I tell you when I asked that last question, there was consternation in their faces, and I looked at them and it all changed. The loving looks they gave him had been dissipated. Sure, the temptation was great to fling it at him the first day, but, control, control. I knew that if everything else missed, I still had this point to make, so I say to you, the last question last, the most important question that you have got on cross last.

I will tell you why. When you courted a girl with, of course, honorable intent, because one thing is known about the male members of the Bar, they never courted a girl except with honorable intent, dear Lord forgive me for that, and if you had a box of candy, if you were like me, you either gave it to her at the beginning of the evening or the end, you did not give it to her in between. And the same with the telling point—save it for the last. Always remember that.



I don't know how much accident work you do out here, but down in New York it is the great place where you shake the tree.

Well, they do not just shake the trees, and they do not just shove you down with money, and you do not just collect fifty percent on a hundred thousand or two hundred thousand dollars. In the first place, you are trial counsel, and you do not get more than a third, because every litigant knows that the public in New York is educated that they can get lawyers for one-third and twenty-five percent.

I tell you that in a jurisdiction where we try ninety percent accident cases, and I have no doubt that that is the situation here, I say to you it is willful, and every one of you is guilty of malpractice on any side of the fence if you try a case without reading a medical book. This has been my great mission for fifteen or twenty years. These are the things I have done for the PLI, these are the things that I have wasted my time on all over the country, because I feel then that the men at the Bar should know medicine and can know medicine. I have illustrated this twice a year down at PLI with lawyers where I have shared an advanced medical course, where a dozen doctors lecture, and I heckle in order to get them down to the practical stuff we lawyers need.

And the men have proven that they know medicine.

You people amaze me. You are better lawyers than we are back in New York, and this is not a compliment, and I will tell you why. You take me. If you would ask me what an estoppel certificate is, I give you my word of honor I could not tell you. To me it is like a dish of spinach. If you ask me to transfer a house from Jones to Smith, a ten-thousand-dollar house without a mortgage, I could not draw up a deed. If you would ask me to write a will and leave it all to Mary, I would have to go to the phone book. Lord help me if you came to me to draw up a will containing trusts. You men in these other states, you do it every day of the week. You are a practicing real estate lawyer, criminal law, you practice divorce law, you practice contract law, you try a criminal case, and you men can certainly master enough medicine, but you will not work. How do you cross-examine a doctor without knowing medicine? How do you do it? I do not know how. You are guilty of malpractice if you do not do it, and you can do it. Just with a brief reading you know the amount of medicine you must know.

I am going to read you a devastating cross-examination that I conducted in a very serious case. The plaintiff had been so seriously injured that only death or a substantial verdict could cure

him. That old sacroiliac had bit him, and when I talk about the sacroiliac, I speak of it with great respect. Pal of my cradle days, dear old rent-payer, good old sacroiliac.

Sometimes in trivial cases you conduct a good cross-examination, and sometimes in big cases or important cases the cross-examination is not so good. Sometimes you try a case beautifully, and you lose; and sometimes you try a case poorly and you win. Here is this trivial case in which the doctor said he found nothing. And I read you verbatim from the record.

“You stated you were connected with the X Hospital. What is your title and what department are you associated with?”

Answer: “I’m an assistant attending surgeon.”

Question: “When was the last time, Doctor, that you performed an operation in X Hospital?”

Before I went in to try this lawsuit, I checked him up with the medical blue book we have in New York that lists the names of the doctors and their qualifications. I do not know if you have it here; I would not be surprised if you have, and if you do not you can always check up on the doctor through other sources.

Answer: “We are not on service at the present time.”

Question: “I’m not talking about we. When did you personally wield the knife as a surgeon?”

Answer: “It is performed by groups. We all take part in the operation.”

Now never let the sucker get away—another principle in force.

Question: “Surely, doctor, you don’t mean that all of you stand poised with knives in your hand when surgery is performed.”

Answer: “Holding the knife is only part of the operation.”

Now I am sure in Nevada I would have been held in contempt by the judge, because I said next, “I know, doctor. I presume that bringing the bed pan is likewise part of the treatment. Well, I mean, Doctor, when did you make an incision with a surgical knife?”

Answer: “I think it was in the spring.”

Question: “Was it for a major condition?”

Note how simple these questions are. You don’t need any great talent.

Answer: “I don’t remember that.”

Question: “Since then have you performed a single operation?”

Answer: "No."

Question: "When before that?"

Answer: "I don't recall."

Now let us get down to the medical cross-examination in a garden-variety sacroiliac where a man says, "My back hurts me, and the doctor says I faked it," defendant's doctor says, "There ain't a thing the matter with this man. He can walk; he can be an acrobat."

Question: "In this case you examined the plaintiff for a condition he claimed in his back?"

Answer: "Yes."

"In order to do so, Doctor, one must know the anatomy of the human body?"

A simple question.

Answer: "Of course."

Question: "And of course you know it?"

Answer: "I certainly do."

"Doctor, are there muscles attached to the sacrum?"

Answer: "Yes."

Question: "How many?"

Answer: "Is this a course in anatomy?"

Question: "It is. Do you know it?"

Answer: "I believe there are twenty."

Question: "Aren't you supplying forty more to the human body than there actually are?"

Answer: "No answer."

Question: "There are nerve branches from the sacral and coccygeal nerves which supply or enervate the muscles?"

Answer: "Yes."

Question: "How many muscles do these nerve branches supply?"

Answer: "I can't give it to you."

Question: "Isn't it in the anatomy book?"

Answer: "It depends on what book."

Question: "Let us take Cunningham's *Anatomy*."

Answer: "I don't know what he said about it."

Question: "Isn't Cunningham's a standard textbook used in the medical schools?"

Answer: "Not by every medical school."

Question: "Isn't it in use at the X College from which you graduated?"

Answer: "Not when I graduated."

Question: "You used Gray's *Anatomy*?"

Answer: "Yes."

Question: "Please give us the answer from Gray's."

Answer: "No answer."

Question: "By the way, Doctor, anatomy hasn't changed any since the days of Gray, has it?"

"True."

Question: "We haven't grown any extra bones, muscles and nerves in the last fifty years, have we, sir?"

Answer: "No."

Question: "All right then, give me the names of the muscles which are enervated by the coccygeal nerve."

Answer: "I can't answer that offhand."

Question: "Could you venture a guess?"

Answer: "No, because I don't know what you have in mind."

Question: "I have in mind the answer to my simple anatomical question. Would you care to venture a guess?"

Answer: "No, because I don't know what you have in mind."

Question: "I have in mind the anatomy of the human body. Would you care to answer with that explanation?"

Answer: "Do you know all of the law?"

Question: "Are you ready to concede that you know as little about medicine as I, a trial lawyer, know about the law?"

Answer: "No."

Question: "As a matter of fact, don't you know that there are approximately forty?"

Answer: "That is exactly what I had in mind."

Question: "If you had it in mind, why were you so reluctant to answer until I told you?" Et cetera, et cetera, et cetera.

Now let me tell you the important thing. I give you my word, gentlemen, do you know how long it took me to prepare for that gifted medical cross-examination? Everyone sitting in the courtroom says, "That Halpern, he knows his medicine." Twenty-five minutes at home. All you do is open an anatomy book, you see the

numbers of the muscles, and you say, "Heck, this guy won't know that." And then you proceed to ask him the questions. Now, I say to you, I never sued a lawyer in my life. I have never taken a malpractice case and I never will, I do not care what the lawyer did. Let some other brother do that, because I can not sue a brother lawyer. I am peculiar that way; but I will tell you about one case where a lawyer tried a case without looking at the hospital record. He was going to cross-examine—or are we going to conduct direct? It pertains to both direct and cross-examination.

The plaintiff comes into your office and he says to you, "Was I in agony, brother, oh, was I in agony, and by the way, counselor, how much are you suing for?"

And you say, "Fifty thousand."

And he says, "If I was to get all of it for myself it wouldn't be enough."

And so you say to yourself, "Brother, I am going to have trouble with this one."

Then he says to you, "I couldn't sleep a wink, I couldn't eat, food couldn't pass through me, worse than Dante's Inferno," that is how he suffered.

And up gets your adversary. He has done what you have not; he has the nurse's notes. He says, "I suppose this business was terrible at the hospital," and he is so kind to your client. Look out for the guy who is so nice when he gets up.

And he says, "It was terrible."

And he says, "I don't suppose you got any sleep at all?"

"No."

"I don't suppose you got two hours sleep?"

"No."

"And eat? You couldn't eat at all?"

"No."

And then he reads the nurse's notes: "First day, snored so loud he had to be moved to another room, because other patients complained. Second day, finished lunch and called for seconds. Third day, 'goosed' beautiful blonde nurse as she passed."

What better indication of pain or its absence than the drug sheet? Every hospital in New York, and I am sure it is true here, has a sheet containing the drugs. So how can you prepare direct and cross without having this drug sheet?

I will tell you why. I will give it to you both ways. Incidentally, I am of the school of belief that if you have two witnesses, and one

is poor and one is good, you call the best one last. I have heard the great trial lawyers say call the best one first, because they say the jury's mind is most perceptive in the beginning. To me that is nonsense, and maybe they are right, but to me when you court your girl and she finally consents to be your wife, do you know when you have made your best impression, whether it was the first day or the eighth day or the tenth day? I do not know. To me it is as simple as this; I want to end up on a good note.

Well, of course if you have three, call a good one first, second, sandwich the poor one, and call the best one last. But I always like to call my best witness last.

In New York the drug sheets are admissible. If they are not here, you call someone and have them testify as to the drugs. And now read the case. Jones has been injured. January 1st, codein: 10:00 o'clock, codein; 12:00 o'clock, codein; 2:00 o'clock, morphine. January the 2nd, morphine, morphine, morphine. January the 3rd, morphine. January the 6th, codein.

You put the record down and you say, "Mr. Jones, take the stand."

Up comes Mr. Jones. He is the gentlemen about whom I have read. He is quiet now but how do you think he feels in a courtroom when that happens?

Or if you are for the defendant, as I have been, I get up and read as follows, "Man in the hospital for a week. I read three days later, two aspirins," and being a fine helpful lawyer, I turn to my adversary and say, "Did I overlook any of the aspirin that he got? Do you have a record of any other aspirin on any other day that he got? I want to be sure that I have a record of all the aspirins he got."

Do you see how important the drug sheet is? You tell me how you can prepare a medical case either direct or cross-examination in cases involving the head? You do not know the injustice you do yourself economically, and far more important than that, the injustice you do to your clients when you do not get every single note in the record, particularly in your head cases.

I am not impressed with a fracture of the skull. That does not mean anything to me. The skull is a bone, and the bone heals. I am not impressed if there is no fracture of the skull and some claim agent calls me up and says, "The skull ain't fractured."

I want to know, ladies and gentlemen, what are the neurological signs? Is the Babinski positive? Most of you, if you saw in the hospital record positive Babinski, you would wonder what in

the heck a Communist doctor was doing in an American hospital, and you would want to report him to some investigation.

All this test is the toe goes up instead of down, so what is so important about that? Brother Babinski broke a man's foot to tell that the toe went up when the toe was supposed to go down when you stroke it. So he started experimentation on apes, and they whittled away the brain. Years this went on, and then in a motor part of the brain they found the thing called the pyramidal tract. They removed that, and up went the toe.

And you do not read the hospital records, and you are not interested in these pluses and minuses. You see papilledema, you think it is something that you put on rye bread with a little mustard and lettuce and meat.

Pappilledemax, if I was defending for, means no fractured skull. These signs are meaningful, vital. So you tell me how you can conduct a direct or how you can direct a cross without the nurse's notes.

You like to hear about stories of cases of big money. Having been in these cases that have brought in as much as two hundred thousand dollars, I saw hospital records that said that the plaintiff petit mal and the nurse's records describe attack after attack of grand mal, not petit mal, not little mal but grand mal, epilepsy. You got a slipped disk. "You did not take a myelogram, did you?" says the defendant. Look up the literature and you will find that a myelogram should never be taken for the purpose of diagnosis. It never should be used as a clinical aid, and the only time that you use it and many surgeons operate without it when they are going to operate to find the level at which the extrusion has occurred, or if there is more than one. Can you fake it? No; because there are so many orthopedic and neurological signs that there is no way of faking it unless you find those rare doctors, and believe me they are as rare as the crooked lawyer, who will do it deliberately.

Am I trying to show you my erudition? No, I am not, believe me, but it is impossible to conduct a direct or a cross of a doctor unless you have a smattering of medicine.

Well, you tell me you are aware of your ignorance, and you didn't want this little old gentleman from New York to come down and shout and berate you and rail at you: "How do you do that? It is simple." Cunningham's and Gray's *Anatomy*, number one. If you are interested I will mail a list of these books, I will on general principles. One or two you may, Key and Conwell, *Fractures, Sprains*, Stedman's *Medical Dictionary*, Wechsler's book

on *Clinical Neurology*; Brock's book on *Injury to the Spine, the Brain and Spinal Cord*, and that is about the whole business. There you have it. You have a basic library, so that when these people are on the stand defending the plaintiff, at least you have a grasp, because without this grasp you can't succeed.

I have now a case where I charged that a device should have been protected and was radioactive, and a man as a result of it put his pipe in his pocket with this radioactive thing and developed cancer of the throat. Well, believe me, I almost flunked out of school on mathematics. I am putrid in science. I don't know the slightest thing about anatomy. I assure you, before this case is over, before I walk in the courtroom for this man I will know enough about it to question scientists. I will know it superficially but I will know it sufficiently for the purpose of my case.

That is the heart of the lawyer. You gentlemen must be masters superficially at least in every field. And you do have the advantage over the doctor. His knowledge must be broad and general, but you can pinpoint or hit the bull's eye in the target in yours.

Believe me, my friends, there is so much to talk about. It is so difficult to talk of the subjects; we could spend days together; the hour is getting late. I have tried to be practical; I have tried to give you specific points. Your eye must always be on the ball.

Let me tell you this now, and then I am going to close. If it is not on the ball, dire things may happen to you. The same thing has happened to Ginsburg.

Before he was in the silk business, he was in the pretzel business, and he thought up a modernistic pretzel like Brach and LaMink, you know the art they paint these days. It was shaped different. He was going to Chicago to sell it, and he had ten minutes' time and was wasting his time. He put a penny in the scale and out came a slip.

"Name, Ginsburg; American Hebrew, weight, one hundred seventy-five pounds, going to Chicago to sell a modernistic pretzel."

Ginsburg said, "Can not be, can not be, it just can't be. I must be sleeping." He rapped the porter and told him to tell him where he was. "Pennsylvania Station, boy," and he got to thinking, "Well, I will try again."

He put his penny in, still Ginsburg, still American Hebrew, still weight one hundred seventy-five pounds, still going to Chicago to sell modernistic pretzel. And he paused and sat down and he thought again and said, "This can not be. I'll just sneak up on it and I will see what happens."



He turned up his coat over his ears, pulled his hat down, put the penny in and out came the slip. Still Ginsburg, still American Hebrew, still going to Chicago to sell a modernistic pretzel, still weighs one hundred seventy-five pounds and just missed his train.

JUDGE CHAPPELL: One of my old friends was talking about the learned Judge, and it reminds me of a lawyer up at Wakefield who had a lawsuit before the Justice of the Peace.

The Justice said, "Please bring your statutes with you."

So the lawyer brought them over and laid them down on the Judge's desk, and the Judge said, "Thank you, Adolph. If my business keeps going, I will have to buy one of them damned books."

We are adjourned.

(Adjournment at 4:30 o'clock P.M.)

**THURSDAY EVENING**

**ASSOCIATION DINNER FOR MEMBERS AND THEIR LADIES**

Presiding.....Barton H. Kuhns, Esq.  
 President of the Nebraska State Bar Association

“1957—A Big Year for the Law”.....Hon. Henry R. Luce  
 New York, New York  
 Editor-in-Chief of Time, Life, Fortune,  
 Sports Illustrated, Architectural  
 Forum and House and Home

**1957—A BIG YEAR FOR THE LAW**

**Henry R. Luce**

Perhaps you will let me begin by reflecting a moment, out loud, on why I happen to be here, talking to lawyers in Omaha. First of all, I am indebted to your President, Mr. Kuhns, for inviting me—a calculated risk which was as flattering to me as it may prove risky to you. Second, I thank my esteemed colleague, Jim Keogh, for insisting that it was high time that I got back again to Nebraska.

And as I was flying out yesterday, it occurred to me that the real reason I am here is two other Nebraskans—General Al Gruenther and Herb Brownell.

For four years in Europe, off and on, I saw Al Gruenther riding herd on NATO. You know, Al likes to say that back home in Nebraska they think NATO is the name of a Japanese admiral. Well, I can tell you that four years ago plenty of Europeans didn't seem to know any different. Al Gruenther went round from country to country with that indomitable smile and somehow he made NATO a real military force. If there were no NATO, I wouldn't be here today—or if I was I'd be talking about bomb-shelters, not about Law.

Then there is Herb Brownell. I'll speak of him later but may I just say now that the Law has never had a finer master workman than Herb Brownell.

Thinking of these two men, I wonder if any state in the Union today, even California, can point to two men to whom the United States owes so much. Gruenther stands for the power of the sword, a power which we must solemnly accept and maintain. But the sword alone brings no peace. Brownell stands for the power of the Law, for the power which educates men and leads them into the path of peace.

So, I dedicate my remarks tonight to Gruenther and Brownell,

two great sons of Nebraska, and give to my remarks an alternative title: The Power of the Sword and of the Law.

These recent days have been days of portents in the skies—and elsewhere. Sputnik. Red blood on the moon. Little Rock. Syria. Wall Street. Murder in the barber's chair—and murder every day in Algeria and in plenty of other places.

When these things happen, the cry goes up for Leadership. I, too, will make that plea tonight. I will call upon the President of the United States for Leadership.

When a politician gives voice, or even an editor—when any citizen sets up the cry for leadership, if he has any respect for his audience or for himself, he will specify the area in which he thinks leadership should be exerted and the direction it should take.

For a number of years I have been one of those who have been asking for serious attention to a matter which is absolutely basic both to the Peace and to the Prosperity of mankind—and which has been almost totally neglected. My plea tonight, more urgently than ever, is for a massive effort to extend the rule of law throughout the world. And now, for the first time, I call upon the President of the United States to take the lead in this cause—to take the lead among civilized nations to create a system by which the many disputes which afflict mankind may be settled by due process of law.

I am willing to make this plea to the President now, as I have not before, because now in 1957, the lawyers of America have themselves come to see the vital importance of *their* role in bringing Peace to the world. President Rhyne has eloquently pledged the American Bar Association to this cause. Therefore I call upon the President and I make the same plea, the same call to the lawyers of America—to the 88,000 lawyers of the American Bar Association and particularly to the distinguished members of the State Bar Association of Nebraska before whom I have the high honor to stand at this moment.

Now some of you will be thinking that asking for an effective rule of law in the world sounds like crying for Utopia—or at any rate for some magic nostrum.

I am reminded of a famous story of World War I. There was a moment in that war when the greatest menace was the German submarine. Editors and others were wringing their hands—we would lose the war because there was no way to stop the havoc wrought by the submarines.

But in those days we had with us Will Rogers, the beloved people's philosopher, and one day Will Rogers got up on a stage,

whirled his lariat and drawled that he had been giving much thought to the submarine menace and happily he had found the answer. As a result of research he had ascertained that submarines can not operate in boiling water. Therefore, the thing to do is to heat up the Atlantic Ocean.

"There," said Will Rogers, "I've given you the general idea; now all you have to do is to work out the details."

Having set up the plea for the extension of the rule of law throughout the world, can I produce any useful "details"? Yes, I think I can. Like Will Rogers, I do not have the technical competence, nor would there be time tonight, to set forth the intricacies of legal development. But I will submit at least two or three specific proposals. And equally important, what I want to do as a reporter is to show that the time is now ripe for giving a *good hard shove* to these proposals. I want to paint for you an honest picture of how in the year 1957, the idea of the rule of law has begun to take hold.

The greatest single event for the advancement of the Law was the meeting of the American Bar Association in London in July. Hundreds of American lawyers felt that that was the most inspiring meeting they ever attended—or ever hope to. For one thing it marked the restoration of the Anglo-American alliance. The real basis of the Anglo-American alliance is our common reverence for the Law. We live by the Law. Our freedom is ours—to have and to hold under Law. When this self-evident truth was voiced by American and British lawyers, speaking each in their own accent and yet in perfect harmony—when that happened, the Anglo-American alliance was restored.

A week or so ago, millions in Washington and New York were happy to turn out to see and to cheer Queen Elizabeth II and her husband. That fortified the Anglo-American alliance but it had already been restored—by lawyers in London.

At a dinner for the Queen, I had the pleasure of sitting next to her lady-in-waiting, the Countess of Leicester. It turned out that her husband was named Edward Coke—a great-great-great-great grandson of the immortal Sir Edward Coke.

It was Sir Edward Coke, C. J., who, as every American lawyer knows, 150 years before the American Revolution said to a Stuart King, "Sir, the King is under God and the Law."

Well, I had just been reading the new fascinating biography of Chief Justice Coke written by an American lady, Mrs. Catherine Drinker Bowen. So we had a great subject in common and the Countess told me many stories about the family, including one about an 18th Century Coke who throughout the American Revolu-

tion had remained a firm and outspoken admirer of George Washington.

At this point, I asked the Countess if she knew about Chief Justice John Marshall. Alas, she didn't. Too bad they don't teach English girls a little more American history. However, it gave me a chance to talk about our hero, John Marshall, and I concluded with the statement that what Edward Coke was to Britain, John Marshall was to the United States of America—only more so.

It was Marshall who said: "There are principles of justice which the Creator of all things has impressed on the mind of his creature man and which are admitted to regulate the rights of civilized nations." Note well Marshall's words—the God-given principles of justice regulate not only the right of individuals but also the rights of nations.

To the Sovereign King, or in a democracy, to the Sovereign People, Coke and Marshall speak with a single voice: "Sir, or Sirs, you are, we all are under God and the Law."

That is the principle which we must now seek to share in larger context with the whole free world.

It was splendid that Queen Elizabeth should visit us, symbol not only of the "sceptered isle set in a silver sea," but symbol too of a vast Commonwealth of many nations. But, in my judgment, a more important event by far was the visit of American lawyers to London. For they—you—are the symbols and prime movers of the Anglo-American alliance. Stars and Stripes and Union Jack may divide us but Edward Coke and John Marshall unite us.

But there was more to the London meeting than the reaffirmation of our allegiance to Constitutional principles. The big moment came when the Attorney General of the United States, Herbert Brownell of Nebraska, called upon both Great Britain and the United States to extend the rule of law throughout the world. Attorney General Brownell said:

"Our greatest deficiency is that we have not yet applied our knowledge of how men may govern themselves by law to the determination of disputes between countries. We must perfect a machinery for settlement of international disputes under a tribunal or system of tribunals which will command general confidence."

Brownell's call became the watchword of the Conference. On the last day there rose up Sir Winston Churchill himself, and he said:

"We have now reached the point where nations *must* contrive a system and practice to resolve their disputes and settle them peacefully."

Thus the chief law officer of the United States and the ranking statesman of the West took the lead in saying that our chief business now must be to expand and vitalize the rule of law. Surely, this had been a big year for the Law.

But why did this happen only in 1957? Why has there been this amazing neglect of the law, ever since World War II? That is a baffling question to which no full answer can be given except the failure of leadership in the West—the failure of both political and intellectual leadership. There are, of course, some partial explanations. One is that during the whole of the 20th Century, there has been a serious deterioration in the world-wide sense of Law. Also, in the post-war decade, we suffered from a particular illusion—namely that the United Nations was competent to settle disputes and keep the peace.

In Sir Winston Churchill's speech, he politely but firmly expressed his dissatisfaction with the United Nations—a dissatisfaction which, as you know, has been prevalent in Western Europe ever since Suez. Well, I did not agree with Churchill or Eden on the Suez gambit, but there is this to be said. The United Nations was flawed from birth by an inadequate legal conception. The original framers of the Dumbarton Oaks proposals in 1944 in Washington, D. C., were almost cynically uninterested in Law or even in Justice. Dumbarton Oaks was the most shocking example of the deterioration of the idea of Law in the 20th Century. In San Francisco in 1945, the late great Senator Vandenberg and John Foster Dulles did their best to improve the charter in respect to Justice and Law. But the United Nations, even though approved 89 to 2 by the United States Senate, was largely an instrument of power politics rather than of law. One result was inevitable, namely, that the International Court is today the most unemployed court in the world.

Can the present members of the United Nations transform it into an instrument of justice as well as a focus of diplomacy? Can the World Court be rescued from its scandalous unemployment? Without wishing to prophesy, I will offer you a hopeful *portent* bearing on these questions.

At the last meeting of the Council of Europe, the representatives of thirteen nations pledged themselves to submit their legal disputes to the World Court and to abide by its decisions. In addition, repeat, in addition, they promised to submit their non-legal disputes to a Conciliation Commission and, if this fail, to an Arbitration Tribunal. This would be a tremendous step forward. This is the first specific "detail" to which I point with hope tonight.

Here is a clear sign that Europe wants a new birth of its oldest

and grandest achievement in the art of government, namely, the rule of law.

But what about the rest of the world? Is there any evidence that the newer nations will follow suit—those nations of Asia, Africa and Latin America who constitute a majority of the United Nations? There are two good reasons for counting on their doing so. The first is that the love of justice is not a regional concept but a universal instinct. To this point I shall return later. Here I stress a second fact: that the new nations of the world, however undeveloped their economies or however *primitive* their legal systems, are eager to establish self-government. Let us pause a moment to consider this idea of self-government. It is one of the oldest ideas in the world; but never, I venture to say, has it enjoyed such wide prestige as it does today. Outside the Communist world, self-government is the only generally accepted form of government in the whole world. In the minds of free men it has no serious rivals; it has only subverters. The Communists would subvert it by design. The new nations of Asia and Africa, trying it for the first time in their long history, will not subvert it by design, but may lose it through ignorance of how self-government can be made to work.

A few months ago I received a letter on this subject from Prime Minister Robert Menzies of Australia, who is certainly one of the greatest men in the world today. Menzies wrote:

“Perhaps we do not always understand that the ‘rule of Law’ and ‘the rule of Parliament’ can be separately stated in words but are not easily separated in fact. They are Siamese twins. Self-government is not only a political conception. It is a legal conception. In short, I don’t believe there can be any form of Parliamentary self-government without a recognition of the rule of Law.”

These words of Robert Menzies are words of wisdom. Self-government and rule of law *are* Siamese twins. Fortunately there are many new nations, inside and outside the British Commonwealth, who have had the benefit of British and of American precept and example in this basic truth of politics. Now, therefore, we must work together—Great Britain, the Commonwealth, the United States and other law-respecting nations, to establish self-government more firmly by making clear to younger nations that without the rule of law, self-government is a mockery and democracy is a delusion.

Once this truth is established, it will do more than strengthen self-government. By upholding the rule of law *within* nations, we also nourish it *among* nations. The same strong sense of law that means success in democratic self-government will inevitably bind its adherents in reverence for international law. What I have just

been saying is not exactly a specific—but it is Point No. 2 for the direction of our policy and, as in the case of Suez, I could give it very specific meaning.

So far I have spoken of the necessity of the rule of law in the maintenance of a political system. Now let me speak of its fundamental importance in the economic sphere. We recognize today the close relations between economics and politics. One of the great strengths of the West today is the economic results which flow from a system of freedom under law, so vastly superior to the peoples' poverty produced under the Communist or any tyrannical system. By the same token we recognize the importance to us of the economic future of poorer nations which are linked with us, or are at least neutral. Among these I would stress first of all the countries of South America—our fellow Americans. But the countries of Asia and Africa are similarly important.

Now what is the core of the problem of these so-called underdeveloped countries? The core of the problem is the need for capital investment. Only to a small extent can this need be filled by government grants. The need is for private capital. But private capital does not flow readily into these countries. Why? Because, as the saying is, the climate for investment is not good. And why is that? Because of uncertainty about the rules regulating capital and trade in general. Because of the fear, well-founded fear, of expropriation, extortion, and other arbitrary acts of local governments. That is the core of the problem.

This problem has baffled us—for too long. Strong leadership by the United States could go far to solve it.

A very particular blueprint for the solving of this problem was offered two weeks ago at the San Francisco Conference by the leading banker of prosperous Germany, Mr. Hermann Abs.

What Mr. Abs proposes is a Grand International Convention under which all honorable nations would agree to certain rules of business behavior, including respect for private property. Basically, it would be a covenant to be honest and to be fair. Such a covenant he called a "Magna Charta" for world business. Under it there would be set up a special Court of Arbitration which would "have the task to determine whether cases brought before it involved violations of the principles" of the Covenant.

Further to quote Mr. Abs:

"I could well imagine that, for instance, in case of particularly serious violations of the principles of the Magna Charta the Court of Arbitration will be entitled by the terms of the treaty to oblige the member countries to refuse new private or public loans and credits to be granted to the country in default, provided the latter



country is not prepared to restore the infringed interests within a specified period of time.”

Now what I say is this—the United States should take the lead in calling the law-abiding nations of the earth to join in such a Magna Charta. From the moment the call was made, and before a line of the Charter was written, you would see an upsurge of business confidence and business activity throughout the free world.

We need to continue a certain amount of so-called foreign aid for urgent reasons of strategy. But instead of exhausting ourselves in partisan bickering about whether foreign aid should be up or down a few hundred million, the United States would do much better to make this sort of grand proposal to the world.

That is the third specific “detail”—it is a colossal detail which I submit tonight—which great leadership could transform from blueprint to reality.

We Americans ought to do this simply because it is right. And surely no one will object to the fact that it will add billions of dollars to the net working capital of the free world. Billions now! And in a few years, tens of billions of dollars! Surely there has never been a more splendid opportunity to combine honor with profit.

I come now to what I would diagnose, without any doubt, as the most troublesome and dangerous problem in the world, next only to the Communist tyranny itself, namely the concept of national sovereignty. Indeed if we could solve for the modern age the problem of national sovereignty, the Communist menace would be reduced by half. For what does Communism feed on? It feeds on two things—on poverty and on the sense of inferiority. Or, to put it the other way round, Communism feeds on the desire of the poor to be better off and the desire of people who feel inferior to exhibit their superiority through the maximum display of national sovereignty. What are we going to do about this problem? Especially as no country is touchier about national sovereignty than the United States—a country which is certainly not poor and ought not to be suffering from inferiority complexes.

Before dealing more generally with this crucial topic, let me refer to an incident which happened this year in the history of the United States. I refer to the Girard case. You recall how the newspapers of the land reported what they chose to consider the shocking news that an American soldier in Japan was going to be tried in a Japanese court. Editors from coast to coast made the eagle scream. Well, eagle-screaming rarely does editors any harm. Fortunately, all the demagogic uproar quieted down when the Supreme Court spoke—unanimously. That in itself is a tribute to the innate American respect for the rule of law. But the consequences of the

Girard case were even greater. For it taught us what any high school boy should have known, that we cannot have soldiers and bases and other enterprises all over the world without accommodating ourselves in some degree to the law of other nations. You can say, of course, that we can bring all our forces home and go isolationist. That indeed is exactly what the eagle-screaming headlines were trying to say. They were appealing to the latent isolationism that lies in most of us—as it does in most men everywhere. Nearly all of us wish at times that the world would just go away and leave us alone. But the American people overwhelmingly know that that is childish nonsense. We are deeply resolved to do our part in the world. To do that means getting on with other people—by Law and through Law. In the Girard case, the American nation ended up by a splendid demonstration of its concern for law couched in its own example.

And what was the result of our national resolve to trust to due process of law in a foreign land? A great education. We learned that other people besides ourselves pride themselves on purity of legal process. All the American observers at Judge Kawachi's trial were impressed to the point of admiration. To quote only one observer, Mr. Alvin Owsley, famous as the head of the American Legion—he said:

“I was terribly impressed with that Japanese Court. I stood in awe. . . . I was amazed at the fairness of Judge Kawachi.”

And I think it is instructive to add that our Japanese friends were *not* entirely delighted by our good opinion. “What did they expect,” said one Japanese, “a sort of monkey trial conducted by illiterate savages?”

Put down the Girard case as making 1957 a Big Year for the Law.

I stress the importance of this case because it concerned the most troublesome problem in the free world today, namely, the problem of national sovereignty. The only way by which we can get any effective handle on this most troublesome problem is through the extension of the rule of law. One hundred nations or more now claim absolute sovereignty. Many of them can not even meet the first test of sovereignty—namely, self-defense. The claim is therefore not only immoral and idolatrous; it is also inherently absurd. This whole modern exaggeration of the idea of national sovereignty is a disease. It poisons world politics, it is the greatest bar to economic progress, and let me say this quite seriously, nationalism threatens the collapse of capitalism. But what are you going to do about it? The rule of law provides the answer. For civilized nations are willing to limit their sovereignty in one manner

—namely, through prior agreements, freely and lawfully negotiated and solemnly sworn to.

The agreements I have in mind are of all kinds—business agreements big and little, arbitration agreements concerning much or little but always more, and also, more generally, a continuous attempt to harmonize legal processes and legal principles. In working out all manner of agreements, it is natural and proper that one country should inquire into the state of law in another country. No offense can be taken from such efforts. On the contrary, the desire to make an agreement with another country is a compliment to that country.

This is the way—the only way, I think—to deal with the poisonous problem of national sovereignty—to seek the extensions of the rule of law both in general principles and in concrete agreements. To formulate general principles is the peculiar mark of high civilizations. To make honorable agreements dishonors no nation. This is the path of honor which the United States must open up through the jungle of pernicious nationalism.

Finally, the greatest advantage to the United States accruing from the active promotion of the rule of law will be that it will powerfully strengthen our foreign policy.

What is the great purpose of our policy? We answer: to prevent an atomic war and to win it if we can't prevent it. That makes sense to us and it should make sense to all other non-Communist nations. But, as you know, that simple purpose does not carry the wholehearted support of other peoples. For a variety of reasons. Other people may not feel the danger of atomic war as we do—or aren't much interested in *our* winning it if *they* get destroyed in the process—or they simply have other things on their minds. The duel—the cold or hot duel with Soviet Russia—is the great tragic fact of today's world, but it is not something which other people are as vitally interested in as we are. Nevertheless, if we say that notwithstanding the pall of atomic threat, our purpose is to proceed constructively—and even optimistically—in the world, and that while holding off the threat of war, our primary world policy is to advance the methods of Justice everywhere—then instantly all nations are equally interested with us. When the United States champions Law as the means to Justice, it champions that which finds response in the hearts of all men. For the desire for Justice and the sense of injustice are universal—probably even deeper-set in human nature than the desire for what we of the West call freedom. Justice is often sought by the sword. Justice, like Freedom, may be the inflammatory cry of dictator and demagogue. But Justice is rarely achieved except through the Law. And Freedom

never is. Our concern for Law is the supreme expression of our concern for Justice—and for Freedom. That is the image of America which must shine ever more brightly from day to day through all the clutter of human events.

Today the dividing line between civilization and barbarism is the line that distinguishes those nations which reverence the rule of law and wish to expand it and those that don't. We must advance that line—we must make even clearer where it is and behind the integrity of that line we must put all our power and all our military might and our hope and love of freedom.

## SECTION PROCEEDINGS

FRIDAY, NOVEMBER 1, 1957

## SECTION ON INSURANCE LAW

Floyd E. Wright, Esq.  
Chairman

- “Take a Look at Your Life Insurance Policy”.....  
.....Henry Warchall, Esq.  
American Life Convention, Chicago, Ill.
- “Cross-Examination of Witnesses in Casualty Cases”.....  
.....Joseph H. Hinshaw, Esq.  
Chicago, Ill.

## TAKE A LOOK AT YOUR LIFE INSURANCE POLICY

Henry Warchall

There were two thoughts in my mind when the title of this paper was selected. First, it was my understanding that the law imposed an elementary and fundamental obligation on everyone to read a contract before he signed it, and that he could not ordinarily claim (because of the parol evidence rule) that the writing did not reflect the agreement of the parties. Second, it was my impression that even among people as well versed with insurance contracts as attorneys, there might be a lack of appreciation, on the part of some, of the unique character of the life insurance contract as a whole.

As to the first point, there seems to be little difficulty. The terms of the policy itself generally cannot be varied unless the remedy of reformation is available. If there are controversies, they usually stem from the insured's alleged failure to read the application before signing it. Until 1943, the Nebraska Supreme Court followed the rule that parol evidence was admissible to prove that the answers in an application were not those of the insured, and that the insured made true answers which were incorrectly recorded without his knowledge.<sup>1</sup> However, in that year, in the *Gillan* case the court reverted to the ordinary contract rule preventing the introduction of such evidence.<sup>2</sup> The court stated:

<sup>1</sup> *German Ins. Co. v. Frederick*, 57 Neb. 538, 77 N. W. 1106 (1899); *Scott v. New England Mutual Life Ins. Co.*, 128 Neb. 867, 260 N. W. 377 (1935); *Farmers and Bankers Life Ins. Co. v. Mathers*, 135 Neb. 757, 284 N. W. 286 (1939).

<sup>2</sup> *Gillan v. Equitable Life Assur. Soc. of the U. S.*, 143 Neb. 647, 10 N. W. 2d 693 (1943).

The proper rule of law is that in an action at law on an insurance policy an assured may not, by parol evidence, impeach the written statements of the assured in the application in those cases where the application has become a part of the contract by stipulation and in accordance with statute and a copy thereof attached to the policy at the time of delivery.<sup>3</sup>

The court then clearly overruled the rule contained in its prior decisions. Such a reversal seems to be in keeping with the fundamental principles of general contract law. The return to enforcement of the parol evidence rule is not an isolated instance in situations of this character, and probably reflects some change in the practices of insurers and in statutory requirements in the field of life insurance.<sup>4</sup> It is apparent that the insured may no longer remain unmindful of what is contained in any part of the application.<sup>5</sup>

In regard to my second thought, it appeared to me that, too often, we attorneys, whether in the general practice of law or in corporate positions, were concerned with the specific. Undoubtedly, in approaching any particular problem we give attention to the broader considerations involved, place the picture in its proper setting, so to speak, but the pressures of other problems, other clients, other affairs, very rarely let us explore, in a more or less deliberate fashion, the over-all nature of the particular field of law with which we are confronted. It is our duty, of course, to know enough of the general law involved to represent adequately the interests of the parties involved. Nevertheless, we never seem to have quite enough time to further our own knowledge to the extent we would like.

The literature in the field of life insurance law is voluminous. There are excellent treatises, books and papers dealing with either the general subject or special parts thereof. It would be difficult indeed to be able to contribute anything novel. The most, perhaps, that can be done is to bring some prior paper up to date, or to approach a given subject from a somewhat new point of view.

With these thoughts in mind, some of the unique attributes of a life insurance policy shall be considered, as such are reflected in

<sup>3</sup> *Id.* at 660, 10 N. W. 2d at 700.

<sup>4</sup> For an excellent discussion of the reasons for, and the extent of, the return to the parol evidence rule in this field, see Spain, *The Effect of the Failure of the Insured to Read His Policy*, 1948 Proc. Legal Section American Life Convention 109.

<sup>5</sup> *George v. Guarantee Mutual Life Ins. Co.*, 144 Neb. 285, 13 N. W. 2d, 176 (1944).

some of the important provisions contained in the contract. Before considering specific provisions of the contract, some mention should be made of several factors which distinguish a life policy from other contracts of insurance.

Unlike other types of insurance, life insurance is not generally a contract of indemnity. A fire policy, for example, binds the insurer to make good a measurable monetary loss incurred by the insured upon the occurrence of an event which may take place but will not necessarily occur. In contrast, a life policy binds an insurer to pay a definite sum of money (which may be adjusted, at times, pursuant to the terms of the contract), and which does not generally purport to measure the loss. In addition, payment is conditioned upon an event which is certain to take place. Under contracts of indemnity the insured is generally not entitled to profit by reason of insurance and is required to subrogate the insurer to any rights which he might have against third parties with respect to the loss sustained. Under the life insurance contract the doctrine of subrogation is not applicable.<sup>6</sup>

Another factor which distinguishes the life policy is the matter of insurable interest. In contracts of indemnity, it is generally held that a loss shall be made good to the extent that the loss has actually occurred. By implication, an insurable interest must therefore be present in the beneficiary at the time of occurrence of the loss. In life insurance, however, the situation is different because the question of indemnity usually is not present. It is widely held that an insurable interest must exist at the time of inception of the life contract (such consideration probably being based on the desire to prevent wagering on a human life, and to minimize the development, or to prevent a set of circumstances which might contribute to or hasten the extinction of the insured life). But if the insurable interest exists at the inception of a life policy, it is established that a diminution, or even a termination, of the insurable interest prior to the maturity of the policy does not affect the right of recovery by the beneficiary.<sup>7</sup>

Another distinction is apparent from the cases. It is generally held, or provided by statute, that a person has an unlimited insurable interest in his own life. If the insured purchases the policy on his own life, there is nothing to prevent him designating as the bene-

<sup>6</sup> Vance on Insurance, Section 15 (3d ed. 1951); Horne and Mansfield, *The Life Insurance Contract*, 22-23 (2d ed. 1948).

<sup>7</sup> *Connecticut Mutual Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251 (1876); Vance on Insurance, *op. cit. supra*; Horne and Mansfield, *op. cit. supra* at 40.

ficiary a person who possesses no insurable interest whatsoever in his life.<sup>8</sup> Ordinarily, no question will arise when a party insures his own life and afterwards assigns the policy to another having no insurable interest in the life of the insured, if such assignment is done in good faith.<sup>9</sup> Because the statute in Nebraska generally prohibits the issuance of a life policy except upon the application of the person insured or with his written consent, save in certain specified areas,<sup>10</sup> the problem of insurable interest is of minor importance in this state.<sup>11</sup>

While in most other branches of insurance oral contracts have been and are widely used in binding the coverage so as to make it effective immediately, in life insurance such oral contracts are practically unknown. Probably the nearest situation is when a "binding agreement" or "binding receipt" is used in connection with life insurance application forms. Under the terms of such an agreement, the coverage may be made effective on some date prior to delivery of the formal policy.<sup>12</sup> This is not to say, of course, that there are no situations where an oral contract of life insurance might arise. Although the statutory provisions appear to contemplate only written contracts,<sup>13</sup> under certain situations an oral contract is valid and enforceable,<sup>14</sup> and may be partly oral and partly written.<sup>15</sup> One such situation exists when an application is rejected by an insurer, which makes a counter-offer, and the counter-offer is accepted by the applicant. The Nebraska court has held that a valid contract has been effected, even though no policy was issued or delivered.<sup>16</sup>

The last distinguishing factor that will be mentioned is concerned with a default in the payment of premiums once the contract

<sup>8</sup> Dawson, *A Few Simple Rules of Contract Law and Their Application to Life Insurance Contracts*, in *THE LIFE INSURANCE POLICY CONTRACT* 11, 21 (1953).

<sup>9</sup> *Chamberlain v. Butler*, 61 Neb. 730, 86 N. W. 481 (1901).

<sup>10</sup> Section 44-704, Nebraska Rev. Stat., Reissue 1952, as amended by L. B. No. 249, Regular Session, 1957.

<sup>11</sup> Kinsinger, *The Life Insurance Law of Nebraska*, 20 Neb. L. Rev. 93, 103 (1941).

<sup>12</sup> Anderson, *What Constitutes the Policy Contract*, in *THE LIFE INSURANCE POLICY CONTRACT* 3 (1953); Wilkinson, *Binding Receipts—Three Decades Later*, 1949 Proc. Legal Section American Life Convention 18.

<sup>13</sup> Section 44-701, Nebraska Rev. Stat., Reissue 1952.

<sup>14</sup> *Clark v. Bankers Accident Ins. Co.*, 96 Neb. 381, 147 N. W. 1118 (1914); *Whitehall v. Commonwealth Casualty Co.*, 125 Neb. 16, 248 N. W. 692 (1933).

<sup>15</sup> *Rankin v. Northern Assur. Co.*, 98 Neb. 172, 152 N. W. 324 (1915).

<sup>16</sup> *Carter v. Bankers Life Ins. Co.*, 83 Neb. 810, 120 N. W. 455 (1909).



is in force. Here, unlike many other contracts, the failure to pay a subsequent premium does not release the insurer from its entire obligation under the contract. While it may release the insurer from its eventual obligation to pay the full amount of the death benefits (except where extended term insurance enters the picture), nevertheless a large number of subsidiary promises remain. The most important of these is the promise, under certain conditions, to grant or pay the nonforfeiture values.<sup>17</sup> Another is the promise to permit reinstatement under specified conditions.<sup>18</sup>

Attention is now invited to the life policy itself. One of the first things appearing in a contract of life insurance is a date, usually the date of issue. Being well versed in the general principles of contract law, we temporarily assume that this date signifies the beginning of the contractual relationship, but this is not necessarily so. The determination of the "effective date" of a contract of life insurance may be a complicated undertaking.<sup>19</sup>

For the purpose of this discussion, the term "effective date" will be used to identify that particular moment of time when the status of insurer and insured first arises. Under general contract law, the contract comes into existence when the offer is accepted. Normally, in the life insurance field, the application by the prospective insured is the offer, and the issuance and the delivery of the policy by the insurer is the acceptance thereof. However, the matter is not quite so simple, since most applications contain conditions precedent which must be complied with before the policy becomes effective. These vary as between companies, but a typical or average application might provide that the insurer will incur no liability until: (a) the application has been approved by the insurer at its home office; (b) the policy is issued; (c) the policy is delivered; (d) the first premium is paid; and, (e) the insured is in good health at the time of the delivery.<sup>20</sup>

It therefore becomes obvious that an inspection of a policy will not necessarily disclose when it became effective. The policy normally shows only the date of issue or some other date representing the last action of the insurer at its home office.

<sup>17</sup> Sections 44-502(9), 44-406 to 44-407.7, Nebraska Rev. Stat., Reissue 1952; Dawson, *A Few Simple Rules of Contract Law and Their Application to Life Insurance Contracts*, in *THE LIFE INSURANCE POLICY CONTRACT* 11 (1953).

<sup>18</sup> Section 44-502 (11), Nebraska Rev. Stat., Reissue 1952.

<sup>19</sup> Hogg, *The Effective Date of the Contract*, in *THE LIFE INSURANCE POLICY CONTRACT* 39 (1953).

<sup>20</sup> *Id* at 41-42.

Frequently there is a relaxation of some of the aforementioned conditions when it is provided, in cases where the first premium is paid at the time of the application, that the insurance shall be in force from the time of approval by the insurer at the home office.<sup>21</sup>

Conditions precedent relating to delivery,<sup>22</sup> issuance or delivery in good health,<sup>23</sup> and payment of the first premium<sup>24</sup> have been established as valid beyond doubt,<sup>25</sup> since they are matters of agreement between the parties, in the absence of legislation directing otherwise.

Whether an insurance policy has been "delivered" within the meaning of the contract is dependent upon the expression of the parties and upon their acts. Whether an actual and manual delivery of the policy is required, or whether constructive delivery *only* is necessary, depends upon the language employed. There are cases both ways.<sup>26</sup> It would appear that the test whether a delivery is sufficient depends to a great extent on whether the insurer has intentionally and *unconditionally* relinquished control over the policy and has placed dominion or control in the hands of another party.<sup>27</sup>

Where payment of a premium is made a condition precedent, it may be made to an agent of the insurer authorized to receive it.<sup>28</sup> In this regard, the Nebraska required provisions section for life insurance contracts provides that the policy must contain a provision

<sup>21</sup> *Id* at 41-42.

<sup>22</sup> *Jensen v. New York Life Ins. Co.*, 59 F. 2d 957 (8th Cir. 1932), *cert. denied*, 287 U. S. 626, 53 S. Ct. 80 (1932).

<sup>23</sup> *Anders v. Life Ins. Clearing Co.*, 62 Neb. 585, 87 N.W. 331 (1901).

<sup>24</sup> *Anders v. Life Ins. Clearing Co.*, *supra*, note 12.

<sup>25</sup> *Coke, The Commencement of the Risk in the Case of a Life Insurance Policy*, 1 Assn. of Life Ins. Counsel Proc. 51 (1921); *Anderson, State of Health as a Condition Precedent*, 3 Life Ins. Counsel Proc. 425 (1936); *McGivney, When the Policy Acknowledges Receipt of the Premium*, 3 Life Ins. Counsel Proc. 521 (1927); *Atkinson, Premiums Paid by Checks*, 1926 Proc. Legal Section American Life Convention 164; *Carlton, Delivery of Life Insurance Policies as it Affects the Inception of Risk*, 1950 Proc. Legal Section American Life Convention 7.

<sup>26</sup> *Mutual Life Ins. Co. v. Otto*, 153 Md. 179, 138 Atl. 16 (1927); *Massachusetts Mutual Life Ins. Co. v. National Bank of Commerce*, 95 F. 2d 797 (4th Cir. 1938); *Ivie v. International Life Ins. Co.*, 217 Ala. 559, 117 So. 176 (1928); *Life and Casualty Ins. Co. v. McCrae*, 193 Ark. 890, 103 S.W. 2d 929 (1937); *Republic National Life Ins. Co. v. Merkle*, 59 Ariz. 125, 124 P. 2d 313 (1942); *Jefferson Standard Life Ins. Co. v. Munthe*, 78 F. 2d 53 (9th Cir. 1935).

<sup>27</sup> *Jefferson Standard Life Ins. Co. v. Munthe*, *supra*, note 26; *New York Life v. Ollich*, 42 F. 2d 399 (6th Cir. 1930).

<sup>28</sup> 1 *Couch on Insurance*, Section 106 (1930).

that "all premiums shall be payable in advance either at the home office . . . or to any agent . . . upon the delivery of a receipt signed by one or more officers who shall be named in the policy."<sup>29</sup> Delivery of the policy is prima facie evidence of the payment of the first premium as stated therein.<sup>30</sup>

The condition precedent of good health has been considered in many different lights by the courts. It has been held to mean anything from "actual good health"<sup>31</sup> to an absence of knowledge as to bad health.<sup>32</sup> In Nebraska it consists of the generally accepted definition that the insured has no important or serious disease, or no disease that seriously affects the general soundness and healthfulness of the system.<sup>33</sup> But good health is a valid condition precedent, and the fact that the insured did not know that he was afflicted with a serious impairment of his health is immaterial.<sup>34</sup>

The insurer, of course, may by its actions waive any condition precedent, and the courts have frequently so held.<sup>35</sup>

The effective date of a contract is not the only date to consider, however. In our policy we see references to various dates or times. An incontestable provision, a suicide clause, nonforfeiture provisions, all indicate that certain rights of the insurer or the insured shall begin or terminate within a stated time after the inception of the contract. It must be remembered that the effective date, i.e., the creation of the insurer-insured relationship, does not necessarily "start the clock" as far as all rights under the policy are concerned.<sup>36</sup>

The time element in reference to the aforementioned policy provisions is normally governed by statute, the incontestable clause being related, usually, to the "date of issue." The Nebraska Statute

<sup>29</sup> Section 44-502(1), Nebraska Rev. Stat., Reissue 1952.

<sup>30</sup> *Union Life Ins. Co. v. Parker*, 66 Neb. 395, 92 N.W. 604 (1902).

<sup>31</sup> *Perkins v. John Hancock Mutual Life Ins. Co.*, 100 N.H. 383, 128 A. 2d 207 (1956).

<sup>32</sup> *Baugh v. Life and Casualty Ins. Co. of Tenn.*, \_\_\_Mo.\_\_\_\_, 299 S.W. 2d 554 (1957).

<sup>33</sup> *Hinnenkamp v. Metropolitan Life Ins. Co.*, 134 Neb. 846, 279 N.W. 784 (1938); *Old Surety Life Ins. Co. v. Hill*, 189 Okla. 250, 251; 116 P 2d 910, 911 (1941).

<sup>34</sup> *Hinnenkamp v. Metropolitan Life Ins. Co.*, *supra*, note 33.

<sup>35</sup> *Union Life Ins. Co. v. Hamam*, 54 Neb. 599, 74 N.W. 1090 (1898); *Echols v. Mutual Life Ins. Co.*, 106 Neb. 409, 184 N.W. 58 (1921); *Michigan Mutual Life Ins. Co. v. Hall*, 60 Ill. App. 159 (1894), *affirmed*, 160 Ill. 488, 43 N.E. 609 (1896).

<sup>36</sup> Hogg, *The Effective Date of the Contract*, in *THE LIFE INSURANCE POLICY CONTRACT* 39, 55, 1953.

provides, *inter alia*, that the “. . . policy shall be incontestable after it shall have been in force during the lifetime of the insured for two years from its date . . .”<sup>37</sup>

If the clause used provides that the period of contestability starts from the date of the policy, and that date is the same as the date upon which the insurer goes on the risk, there should be no dispute as to when the period begins to run.<sup>38</sup> It will begin the date following the date of issue.<sup>39</sup> Where the policy has been interpreted to mean that the insurance protection covers a period prior to the actual date of the policy, the courts have, on occasion, started the running of the incontestable clause at the time the insurer went on the risk, regardless of the date of the policy.<sup>40</sup> The courts have been sympathetic to the policyholder or beneficiary, and where the date of the policy antedates the start of the insurance protection, the effective date has been disregarded and the incontestable clause has been considered as starting on the policy date.<sup>41</sup>

If the clause used does not contain the phrase “in force during the lifetime of the insured” and the insured dies within the stated period, the courts have generally said that the period of contestability runs for the benefit of the beneficiary even after the insured’s death.<sup>42</sup> And this is true even though the words “in force” appear in the clause.<sup>43</sup> However, when the phrase “in force during the lifetime of the insured” appears, the courts agree that if the death of the insured occurs during the contestable period, the policy never becomes incontestable.<sup>44</sup>

<sup>37</sup> Section 44-502(5), Nebraska Rev. Stat., Reissue 1952.

<sup>38</sup> Holland, *The Incontestable Clause*, in *THE LIFE INSURANCE POLICY CONTRACT* 57, 74, 1953.

<sup>39</sup> *Metropolitan Life Ins. Co. v. Schmidt*, 299 N.Y. 428, 87 N.E. 2d 442 (1949).

<sup>40</sup> *Jefferson Standard Life Ins. Co. v. Wilson*, 260 Fed. 593 (5th Cir. 1919); *Cavanaugh v. Prudential Ins. Co.*, 56 Ohio App. 393, 10 N.E. 2d 1010 (1937).

<sup>41</sup> *Mutual Life Ins. Co. of N. Y. v. Hurni Packing Co.*, 263 U.S. 167, 44 S. Ct. 90 (1923); *Great Southern Life Ins. Co. v. Russ*, 14 F. 2d 27 (8th Cir. 1926).

<sup>42</sup> Cases cited in the preceding footnote, and *Yates v. New England Mutual Life Ins. Co.*, 117 Neb. 265, 220 N.W. 285 (1928); *Monahan v. Metropolitan Life Ins. Co.*, 283 Ill. 136, 119 N.E. 68 (1918); and many other cases to the like effect; *contra*, *National Life and Accident Ins. Co. v. Preston*, 194 Ga. 583, 22 S.E. 2d 157 (1942).

<sup>43</sup> *Jefferson Standard Life Ins. Co. v. McIntyre*, 294 Fed. 886 (5th Cir. 1923); *Torrence v. American Home Mutual Life Ins. Co.*, 78 Ga. App. 648, 52 S.E. 2d 25 (1949).

<sup>44</sup> *Aetna Life Ins. Co. v. Kennedy*, 31 F. 2d 971 (8th Cir. 1929); *Chicago National Life Ins. Co. v. Carbaugh*, 337 Ill. 483, 169 N.E. 218 (1929); *Sun Life Assur. Co of Canada v. Allen*, 270 Mich. 272, 259 N. W. 281 (1935).

The time element in relation to the suicide clause has likewise been interpreted in favor of the insured. Where a policy excluded from the coverage suicide "during the period of one year after the issuance of this policy," and the policy was back dated before the application date, the court held that the back date governed since the policy indicated that date as the date of issue.<sup>45</sup> The Nebraska Court has indicated that a defense of suicide must be made within the contestable period of the policy.<sup>46</sup> Thus, where a new policy was issued for the purpose of reducing the amount of insurance, it was held that the circumstances indicated that the new policy was but a continuation of the old, and that the date of the old policy started the commencement of the contestable period in relation to the suicide clause.<sup>47</sup>

Upon lapse of a policy for nonpayment of premium it is frequently to the advantage of the beneficiary to have nonforfeiture values computed from the time of the creation of the insurer-insured relationship, i.e., the effective date, rather than from the generally earlier date of issue or date of application. Similarly, where there has been a lapse without forfeiture values, it sometimes is to the advantage of the claimant to allege that the premium paid gave coverage from the effective date rather than the application date, date of issue, or any other earlier date.

It is suggested that the life insurance contract is, indeed, an unusual and unique document. Where else, for the purpose of ascertaining the beginning of a contractual right or obligation or the start of the contractual relationship, does one have to be so careful as to what part of the instrument is being considered? It is recognized that the parties to a contract can agree to measure the time element from any starting point they choose, and also can make different starting times applicable to different matters. It can be argued that such must be deliberately done, so understood, and clearly expressed, and that in the absence of compelling reasons to the contrary, there is no reason to have various starting dates govern the different provisions, and that there be a presumption, in the absence of a clearly expressed contrary intention, that one date govern all of the various terms and conditions of a life policy. Despite this arguable point, this has not been the situation in the past, and the ingenuity of counsel on both sides will probably prevent such a situation in the future.

<sup>45</sup> *Harrington v. Mutual Life Ins. Co. of N. Y.*, 21 N.D. 447, 131 N.W. 246 (1911).

<sup>46</sup> *Yates v. New England Mutual Life Ins. Co.*, 117 Neb. 265, 220 N.W. 285 (1928).

<sup>47</sup> *Morse v. General American Life Ins. Co.*, 130 Neb. 37, 263 N.W. 676 (1935).

Another life policy provision that has always been of interest from the point of view of general contract law is the statutorily required reinstatement provision. The Nebraska statute requires that the policy contain a provision “. . . that if, in the event of default in premium payments, the value of the policy shall be applied to the purchase of other insurance, and if such insurance shall be in force and the original policy shall not have been surrendered to the company and canceled, the policy may be reinstated within three years from such default, upon evidence of insurability satisfactory to the company . . .” and upon compliance with certain other conditions.<sup>48</sup>

From the point of view of contract theory, is the reinstated policy the old contract revived, or a new contract of insurance? How is the contract reinstated? Is this process of reinstatement collateral to the contract of insurance? Or is it no contract or agreement at all, but only a waiver of a forfeiture, or a compliance with a condition of the original policy, or compliance with a statutory provision? As is to be expected, the courts cannot agree on the answers to the questions.

The answers to the questions are important, not only from the point of view of logic and theory, but because such considerations are useful in determining whether other provisions of the policy, such as the previously mentioned incontestable clause, again come into play.<sup>49</sup>

The courts consider the effect of reinstatement upon the incontestable clause in three different manners. A few say that there is no incontestable clause applicable to a reinstatement. Others say that a reinstatement is incontestable after the original period has passed, regardless of when the policy is reinstated. By far the majority of the courts say that the contestable period will start all over again from the time of reinstatement. In this last class of cases, the courts reason, even if they consider the reinstated policy the revival of an old contract, that the parties must have intended that the period run again.<sup>50</sup>

The Nebraska court would seem to consider the reinstated contract as a revival of the old policy, but infers that the parties

<sup>48</sup> Section 44-502 (11), Nebraska Rev. Stat., Reissue 1952.

<sup>49</sup> For a discussion of the problems concerning reinstatement, together with an appendix that contains many cases on the subject, see Brooke and Nourse, *Reinstatement*, in *THE LIFE INSURANCE POLICY CONTRACT* 201, 1953.

<sup>50</sup> Holland, *The Incontestable Clause*, Brooke and Nourse, *Reinstatement*, in *The Life Insurance Policy Contract*, 56, 77 and 201, 212, respectively, (1953).

intended that there should be a similar period to contest reinstatement.<sup>51</sup>

It is to be noticed that the Nebraska reinstatement clause provides for revival of the policy upon, among other things, the presentation of "evidence of insurability satisfactory to the company." The term "insurability" would seem to present no difficulty to anyone familiar with the basic concepts, legal or actuarial, of life insurance. Occupation, travel, financial condition and good health are among the factors considered by the insurers in this regard. Yet some courts, either because of the factual situation presented, or because of a misconception of the meaning of the word, seem to have limited it to the question of good health.<sup>52</sup> Fortunately there are very few cases holding in this fashion, and most courts realize the other factors involved in insurability.<sup>53</sup> In 1936, the Nebraska Court considered a question of reinstatement and stated that an admission by the company that the applicant for reinstatement had tendered satisfactory evidence of good health was a sufficient showing of insurability.<sup>54</sup> This statement cannot be considered as closing the matter, however, if the situation before the court is considered.<sup>55</sup> Besides, it would appear that the only factor of insurability at issue was that of good health.

The phrase "satisfactory to the company" has been variously interpreted by the courts. Without going into the various shades of meaning of that phrase as pronounced by the courts, it probably is most generally held to mean "that an agreement to reinstate an insurance policy upon 'satisfactory evidence' of insurability does not give the insurer the power to act arbitrarily or capriciously, but that evidence which would be satisfactory to a reasonable insurer is all that is required."<sup>56</sup>

It is beyond the intended scope of this paper to attempt to treat any particular clause of a life policy in a comprehensive or exhaus-

<sup>51</sup> *Wolski v. National Life and Accident Ins. Co.*, 135 Neb. 643, 283 N.W. 381 (1939).

<sup>52</sup> *Sussex v. Aetna Life Assurance Co.*, 38 Ont. L.R. 365 (1917); *Missouri State Life Ins. Co. v. Hearne*, 226 S.W. 789 (Tex. Civ. App. 1920), *rehearing denied without opinion*.

<sup>53</sup> *Greenberg v. Continental Casualty Co.*, 24 Cal. App. 2d 506, 75 P. 2d 644 (1938), (*hearing denied by Sup. Ct.*)

<sup>54</sup> *Smith v. Bankers National Life Ins. Co.*, 130 Neb. 552, 265 N.W. 546 (1936).

<sup>55</sup> Kinsinger, *The Life Insurance Law of Nebraska*, 20 Neb. L. Rev. 93, 105 (1941).

<sup>56</sup> *Kennedy v. Occidental Life Ins. Co.*, 18 Cal. 2d 627, 635, 117 P 2d 3, 7 (1941), *rehearing denied without opinion*; Brooke and Nourse. *Reinstatement in THE LIFE INSURANCE POLICY CONTRACT* 201, (1953).

tive manner, so no more will be said about the problems incident to reinstatement, except to make the observation that there appears to be no other field of contract law where a party to a private contract is more widely granted the right to make good a default, either by the terms of his contract or by the terms of statutory enactment, even though this right is to an extent conditional and limited.

The Nebraska Statutes provide that a life policy must contain a clause to the effect that after three full years' premiums have been paid, and while the policy is in force, the insurer will make a loan, upon proper assignment or pledge of the policy, and on the sole security thereof, at a rate of interest no greater than specified, and upon other conditions to the owner of the policy, in an amount calculated according to a prescribed formula.<sup>57</sup> Other state statutes provide substantially the same rights to policy holders.

Normally, under general contract law, when a person borrows money, a debtor-creditor relationship is established. The debtor is then personally liable to make repayment of the debt at a fixed time, or in fixed installments, or even on demand, and in the event of his death his estate is liable for any amounts unpaid. But a policy loan creates a different relationship between the insurer and the insured at the time it comes into existence. The policy loan is readily distinguishable from the ordinary type of loan because the policyowner generally does not commit himself to repay the loan at any specific time. The courts have recognized the distinction, and consider the loan made by the insurer as an advance of a part of the amount which someday will become payable under the policy contract.

Mr. Justice Holmes typified it as follows:

The so-called liability of the policyholder never exists as a personal liability, it is never a debt, but is merely a deduction in amount from the sum that the plaintiffs ultimately must pay. In settling that account, interest will be computed on the item for the reason that we have mentioned; but the item could never be sued for, any more than any other single item of a mutual account that always shows a balance against a would-be plaintiff. In form it subsists as an item until the settlement, because interest must be charged on it. In substance it is extinct from the beginning, because as was said by the judge below, it is a payment not a loan.<sup>58</sup>

<sup>57</sup> Section 44-502 (8), Nebraska Rev. Stat., Reissue 1952.

<sup>58</sup> *Board of Assessors v. New York Life Ins. Co.*, 216 U. S. 517, 522, 30 S. Ct. 385, 386, (1910).



There is a distinction between a loan made by the insurer to the insured on security of the policy and a loan made by a third party secured by an assignment of a life policy. The former "is not a loan in the strict technical sense, for there is no obligation of repayment on the insured, but rather an advancement on the cash value of the policy, the repayment of which will reinstate the depleted insurance without the issuance of a new policy and submission of evidence of insurability."<sup>59</sup> The insurer cannot maintain an action against the insured to recover the amount of the loan, nor can it succeed in an action against his estate as creditor, and likewise a beneficiary who, upon insured's death, receives the face amount less the outstanding loan cannot recover the amount of the loan so made from the insured's estate.<sup>60</sup>

The policy loan is an indebtedness to the insurer against the policy, and where, after a default occurs, the cash surrender value is used to pay up the loan, pursuant to the terms of the policy, and the balance is used to provide a paid-up policy, recovery is limited to the amount of the paid-up insurance.<sup>61</sup>

The subject of assignment is another factor which distinguishes a life contract from other insurance policies. Contracts of fire insurance are generally not assignable. In contrast, contracts of life insurance have generally been held to be assignable. It has been stated that the difference is the result of the concept of indemnity, the higher degree of personal confidence between the insurer and beneficiary in the property insurance field, and the historical development of the respective fields of insurance.<sup>62</sup> There are exceptions, of course, to the general statements made above, but they will not be considered here.<sup>63</sup>

In this field, as elsewhere, the assignor of a chose in action can only assign those rights which belong to him. He will not be permitted to defeat the vested interests of an irrevocable beneficiary, but where the insured or other owner reserves the right to revoke the beneficiary he generally may validly assign the benefits of the

<sup>59</sup> *Fidelity Union Trust Co. v. Phillips*, 5 N.J. Super. 529, 532, 68 A. 2d 574, 575 (Ch. 1949), *affirmed*, 4 N. J. 28, 71 A. 2d 352 (Sup. Ct. 1950).

<sup>60</sup> *Fidelity Union Trust Co. v. Phillips*, *supra* note 59.

<sup>61</sup> *Rustin v. Aetna Life Ins. Co.*, 98 Neb. 426, 153 N.W. 548 (1915).

<sup>62</sup> Vance, on Insurance, Section 13 (3d ed. 1951)

<sup>63</sup> E.g., an insurer may specifically provide the policy is not assignable and the assignment will be invalid as to the insurer, *Unity Mutual Life Assur. v. Dugan*, 118 Mass. 219 (1875).

policy whether or not the policy contains a permissive clause to this effect.<sup>64</sup>

This is recognized by the Nebraska Statutes which provide, "Any person holding a policy . . . may, without the consent of the beneficiary, unless the appointment of such beneficiary be irrevocable, either sell and surrender the same to the company or pledge or assign the same as a security for a debt . . ."<sup>65</sup>

The use of the life policy in this manner as a flexible asset of the owner is widely recognized by insurers, which have concerned themselves with the possible danger of double liability.

A provision designed to avoid double liability might provide (a) an assignment will not be binding on the insurer unless in writing, and until a copy thereof is filed at the home office, (b) an assignment shall be subject to the insurer's rights under the policy, such as any existing indebtedness to the insurer, or to the rights of any other assignee of record, and (c) the insurer will not assume any responsibility for the validity of assignments.

It has been held that, as between the parties to an assignment, a written transfer is not necessary, and that the interest under the policy may be transferred by unconditional delivery with intent to transfer a beneficial interest, as by gift *inter vivos*.<sup>66</sup> Also, as between the parties, a delivery and pledge of the policy is valid, and will establish their respective rights even though the policy contains a provision requiring an assignment to be in writing in order to be valid.<sup>67</sup>

The policy provision on assignment is for the benefit of the insurer, who may waive it, in which event failure to comply with its terms can not be raised by third parties.<sup>68</sup> The courts have likewise stated that one assignee is not entitled as against the other to assert or claim any noncompliance with the terms of the assignment clause.<sup>69</sup>

<sup>64</sup> Barker, *The Assignment Provision*, in *THE LIFE INSURANCE POLICY CONTRACT* 167 (1953).

<sup>65</sup> Section 44-370, Nebraska Rev. Stat., Reissue 1952.

<sup>66</sup> *Smith v. Pacific Mutual Life Ins. Co.*, 130 Neb. 501, 265 N. W. 534 (1936).

<sup>67</sup> *Dvorak v. Kucera*, 130 Neb. 341, 264 N. W. 737, (1936); *Brown v. Ehlers*, 130 Neb. 918, 267 N. W. 156 (1936).

<sup>68</sup> *Dvorak v. Kucera*; *supra* note 67; *Brown v. Ehlers*, *supra* note 67; *Smith v. Pacific Mutual Life Ins. Co.*, 130 Neb. 501, 265 N. W. 534 (1936).

<sup>69</sup> *Travelers Ins. Co. v. Mayo*, 103 Conn. 341, 130 Atl. 379 (1925); *Equitable Life Assur. Soc. v. Mitchell*, 248 Ill. App. 401 (1927); *Herman v. Connecticut Mutual Life Ins. Co.*, 218 Mass. 181, 105 N. E. 450 (1914).

The assignment provision will protect the insurer's interests in a policy loan as against an assignee even though the assignment was made before the policy loan occurred, if the assignment has not been filed at the insurer's home office.<sup>70</sup> It will also protect the insurer against defects in an assignment of which it has no knowledge.<sup>71</sup>

From the preceding comments, which indicate a few of the unique qualities of a life insurance contract, the conclusion might be drawn that the law of life insurance is a field *sui generis*. Such conclusions have, from time to time, been made.<sup>72</sup> It is doubtful, however, whether such a view would accurately state the present situation in the field. At an earlier date, when practices of agents and insurers were less adequately supervised, when policies occasionally contained the proverbial fine print, or when illiteracy was not an uncommon occurrence, the courts, in attempting to protect the beneficiary or the insured from what was considered inequitable conduct, at times pronounced judgments and arrived at rules of law which appeared to make the field a thing to itself.

The situation has changed. Insurers are very closely supervised as to their practices in the field, as well as in the type of contract which is issued. Small print, as a matter of fact, rarely appears in the policies. Certain states have prescribed, by statute, the size of policy print.<sup>73</sup> Other states, which do not have statutory regulation of the size of print, have achieved the same result by indirection. Under the policy form approval section of the statutes,<sup>74</sup> supervisory officials will not, as a matter of practice, approve a life insurance policy form where the print is too fine. Agents are now highly trained individuals adhering to lofty standards of conduct.

For these practical reasons, as well as for the sake of logic, the courts are recognizing that life insurance law is but a part of general contract law. Judge Lehman of the New York Court of Appeals, in 1935, conceded ". . . that the courts [in the past] have sustained obligations assumed by insurance companies under con-

<sup>70</sup> *Patten v. Mutual Benefit Life Ins. Co.*, 192 S. C. 189, 6 S. E. 2d 26 (1939).

<sup>71</sup> *New York Life Ins. Co. v. Federal National Bank*, 151 F. 2d 537 (10th Cir. 1945); *certiorari denied*, 327 U. S. 778 (1946), *rehearing denied*, 327 U. S. 816 (1946).

<sup>72</sup> *In re Brotherhood of Locomotive Firemen and Enginemen*, 91 La. App. 74, 119 So. 79 (1928).

<sup>73</sup> E.g., Section 38.1-343, Virginia Code Ann. Repl. 1953.

<sup>74</sup> The Nebraska requirement is contained in Section 44-348, Nebraska Rev. Stat., Reissue 1952.

ditions where the courts would have hesitated to sustain other kinds of obligations.”<sup>75</sup> He then rejected any further such activity, by stating:

Unless we introduce into the law of insurance distinctions without substance and rules applicable to no other class of contract, we are constrained to hold that both insured and insurer are alike subject to the obligations and entitled to the benefit of all the terms of contracts of insurance entered into voluntarily and with knowledge that a particular instrument contains those terms. When that is shown, there can be no room for divergent rules of public policy applicable to contracts embodied in a policy and contracts for reinstatement of a lapsed policy.<sup>76</sup>

Although the case before the New York Court of Appeals dealt with a problem of reinstatement, it is suggested that the thought contained in the above quotation is applicable in all life insurance situations. The life contract is a unique instrument only in those aspects which are concerned with the fulfillment of needs of the public traditionally not met by other legal instruments. Even in such aspects, however, the analysis will be guided by the principles of general contract law.

## CROSS-EXAMINATION

Joseph H. Hinshaw

Generally, lawyers agree that trial work is the hardest work in the profession of the Law, and cross-examination is the hardest work in the conduct of a trial.

The more I cross-examine witnesses, the more I am convinced that few brilliant cross-examinations are the result of inherent talent, blossoming forth on the spur of the moment to confound the witness. All of us who try cases have our inspirational moments and are downright lucky now and then, but those who depend for their success upon such brilliance and luck seldom have a consistent record of wins.

So far in our profession, no means has yet been found which is so effective in bringing out the truth as a searching cross-examination, but most successful cross-examinations are the result of thorough investigation before trial and a planned and carefully

<sup>75</sup> *Axelroad v. Metropolitan Life Ins. Co.*, 267 N. Y. 437, 443, 196 N. E. 388, 391 (1935).

<sup>76</sup> *Id.* at 451, 196 N. E. at 394.

executed method of attack. There is no substitute for careful preparation.

The general rule in the United States courts and in the courts of most of the states is, of course, that the right of cross-examination extends to those matters specifically testified to or covered on direct examination. I believe that in England and in some of the states of our Union the rule is much broader. Cross-examination is usually allowed on any subject relevant to the issues and may even include facts relating to the case later to be presented by the cross-examiner. Permitting further cross-examination is within the sound discretion of the Court, or is a matter of grace. It is within the discretion of the Court to allow one or more counsel to cross-examine, but usually no two lawyers on one witness, and certainly not at the same time.

Counsel for one defendant has the right to cross-examine witnesses of a co-defendant as to all matters where the interests of the two defendants are conflicting or antagonistic. The Court may, however, in his discretion, limit the cross-examination by one defendant of the witnesses of another where the examiner seeks to cover ground already covered by another examiner. Usually the Court will allow the same ground to be covered twice, because no two examiners have the same approach, and seldom do they have the same exact object in view. Almost always, an examination by a second cross-examiner over the same ground will bring out some new facts.

The Court may, upon his own initiative, question a witness, provided, in doing so, he does not show interest, friendship, or hostility. In the event the Court asks an improper question, an attorney should not hesitate to object to the Court's question. I have found it necessary on many occasions to do so, and on not a few occasions, the Court has sustained my objection to his question.

Several of the states of the Union have special statutes on the question of cross-examination, such as, that the adverse party shall have the right to cross-examine any witness examined by the opposite party, but generally the rules with reference to cross-examination are found in the decisions.

The four most useful qualities in a cross-examiner are fairness, coolness or self-control, courage, and an ability to remember facts. Should the jury conclude that the cross-examiner is unfair with the witness, the witness will have the sympathy of the jury, and answers so elicited will be discounted. If the witness does not understand the question or is confused, the examiner should be quick to see that he understands the question clearly and that

he knows what he is answering. The examiner who wins the confidence of the jury has the battle half won. Such confidence can be gained only by a show of fairness. Unless the Trial Court is obviously prejudiced or obstreperous, the attorney will improve his standing with the jury by showing absolute respect for the Trial Court.

Coolness on the part of counsel is necessary to proper thinking as well as a quality the jury is likely to admire. A friend once said to me, "If I could be as cool as you are when things go wrong in the courtroom, I would give anything." I told him that the fact is that I have always suffered from low blood pressure, and that when I am really excited, I am only up to normal. I really believe that this has often inured to my benefit.

Many occasions occur in trials when it takes courage to proceed with the questions. This is especially true in small communities where the Judge, jury, lawyers, and witnesses are well acquainted with one another. When the rights of the client are at stake, a proper cross-examination demands that the lawyer have the courage to ask the questions which he thinks are necessary, even though they may be unpopular, distasteful or even nauseating.

As a witness testifies, I try to remember the important parts of his testimony, but I do not dare trust wholly to my memory. My memory never has been that good. I make notes on a thin, stiff-backed, bound trial book, and refer to the notes when I cross-examine the witness. I try, through memory or the notes, to take up first on cross-examination those points of advantage to my client which I am convinced the witness must admit, or which will show an inconsistency in the testimony. It is usually a distinct advantage to go over again points favorable to an opponent. You merely are helping an opponent "rub it in."

The knowledge most useful in cross-examination is the knowledge of what not to ask. It must be remembered that wrong answers brought out on cross-examination are much more deadly than the same answers brought out on direct examination. The beginner is usually overanxious to cross-examine.

In a trial some time ago, the plaintiff was a colored mammy of the familiar "Aunt Jemima" type. She was standing on the sidewalk when a large beer sign fell, or was blown, from a building, striking her on the head, injuring her severely. We represented one of three defendants. One of them erected the sign many years before. One of them rented the building, and one, apparently, took charge of the sign and painted a beer advertisement on it. The attorney whose turn it was to conduct the initial examination questioned the colored woman for about an hour, in fact until the

jury were completely disgusted. He then turned the witness over to counsel for the other two defendants. I merely said, "I have no questions, thank you." The third attorney asked only one question of minor importance. This brought us to the close of the day, at which time the amounts which the several defendants were willing to pay to settle were completely reversed. On the following day, an experienced attorney appeared in place of the one who had cross-examined "Aunt Jemima." He told me in the corridor that he had asked the counsel for whom he had substituted what happened, and that the young man had said, "Well, I had to cross-examine." The young man had received his first lesson on the subject of when not to cross-examine. Very few incidents in a trial will prove more damaging than a long, tedious, pointless, fruitless cross-examination.

Winning a case by cross-examination is difficult, but losing a case by cross-examination is easy.

To be effective, cross-examination need not appear logical, and usually should not be chronological. All too frequently, certain concepts to the contrary, the witness is just as smart, if not smarter, than the lawyer. The witness has often given considerable thought to what his testimony is going to be, and if the examination consists of merely chronologically following from one event to another, then the witness has an opportunity to think ahead of the cross-examiner and will be ready with an answer which will make his testimony seem plausible. May I recommend that the examiner proceed from one subject matter to another and back again, so that the witness is at a loss to know what is coming next. The rabbit which runs straight ahead of the dog has a good chance to win the race, but if he dodges at right angles, the dog will cut across the corner and catch his quarry. Although at the close of such an examination an attorney may appear to have procured a jumble of unrelated facts, it is the attorney's duty, in his argument, to arrange these bits of testimony logically, and to convince the jury that these facts prove his point.

Where a witness is distrusted, it is usually better to proceed rapidly, with questions so quickly following the answers that the witness does not have time to think of a falsehood. A witness who is telling the truth will not have to think. He needs only to give expression to his memory.

Where the examiner has in his possession impeaching evidence on material points, evidence from which the witness cannot escape, then it is better to proceed very deliberately, giving the jury an opportunity to realize fully the import of each answer. Thus the evidence will proceed ponderously but convincingly and irresist-

ibly to its irrefutable conclusion. Most jurors think more slowly in legal matters than do the lawyers, and when evidence or argument is fed to them too fast, the jury is likely to fail to realize its full import.

Where a witness is distrusted and the examiner is aware that the witness must know facts which are favorable, then the examiner must proceed cautiously, with many short questions, in the hope that by this method sufficient admissions on small points may be extracted to prevent the witness from stating a falsehood on a major point. The examiner should nibble at the testimony, like a fish who wants the bait but must be wary lest he be caught on the hook.

Very frequently an attorney who calls a witness in the first instance will deliberately omit his questions, inquiry as to facts which his opponent may well believe are in the possession of the witness, in the hope that his opponent, on cross-examination, will take the bait, and bring out the important fact on cross-examination. When it seems obvious that a witness knows more than he is telling, the cross-examiner should consider carefully whether or not the witness has been trained for the part and may be lying in wait for him in order to bring out the information on cross-examination, when it will be most embarrassing to the cross-examiner and most valuable to his side of the case.

Human nature being what it is, the average witness, whether honest, careless, or downright dishonest, takes a certain natural pride in being a good witness for the side which calls him. He does not relish being called in behalf of a litigant and then proving to be a disadvantage to the one who called him. The very calling of a witness often causes him to take sides in behalf of the litigant who calls him, and for this reason frequently it may be better to call a witness of doubtful value than to omit him and allow him to be called by the other side.

Where vehicles collide, witnesses are prone to favor the vehicle in which they happen to be riding, regardless of what the facts are. When a streetcar and an automobile collide, seldom does a witness on the streetcar testify to facts favorable to the automobile, or vice versa.

When a witness has given testimony on direct which is favorable to the contention of the cross-examiner, it is usually the better procedure not to question the witness further about it. If the attention of the witness is again called to the point, he is very likely to temper or alter his previous statement, or interpret his way out of it. When the examiner has brought forth a favorable answer on cross-examination, he should not attempt to emphasize the point



by repeating the question. The witness is likely not to answer the same on the second occasion, in which event he may destroy all that has been gained. When a nail is driven into the wood so that the head is flush, the amateur is tempted to give it one more lick, frequently snapping the head off the nail, cracking the wood and denting its surface. Let well enough alone. If the point needs emphasis, the emphasis can be furnished through the argument to the jury where there is much less danger.

The witness who is dishonest and not obviously dishonest is the most difficult to handle. Sometimes his dishonesty can be shown by crowding him to make more and more extreme statements. If he is given to exaggeration, it may be well to help him exaggerate the facts out of all proper proportion.

Sometimes a very bold question, suddenly propounded, or one which assumes the fact in dispute, will lead the witness into an admission. For example, recently my opponent had attempted to prove that his client had not visited a certain tavern. My first question on cross-examination was, "When did you leave Johnnie's Tavern?" The witness said, "About twenty minutes before the accident!"

If the answer is not responsive, do not hesitate to move to strike the irresponsive answer and to request the Court to instruct the jury to disregard it. If the answer is partially responsive and partially irresponsive, then move to strike the part which is irresponsive. If the witness feigns and indicates that he does not understand the question, then ask the Court Reporter to reread the question, instead of having it put by the examiner. This will call the attention of the jury, as well as the witness, to the fact that a record is being made of the testimony and the whole procedure seems more formal and proper. If the examiner really scores a point with such a witness, it is better to stop the examination there than to attempt to ask further questions which may be much less effective.

Where part of an examination is likely to be disagreeable or to anger the witness, then the agreeable part of the examination should certainly be completed before the disagreeable part is begun. Once the witness begins deeply to resent his examiner, he is likely to lie to get even.

Proof of drunkenness or infectious blood diseases should not be attempted unless the proof will show them to be material and establish them to a moral certainty; otherwise evidence of such conditions may prove a devastating boomerang.

It is within the discretion of the Court to allow a witness to

be recalled for further examination, but in the case of a hostile witness, this is very dangerous. In the meantime he may have received further coaching. If only one question is to be asked, it is better to ask the question of the witness where he sits or stands in the courtroom, instead of recalling him to the witness stand. Recalling the witness lends unnecessary emphasis.

Cross-examination may legitimately have for its purpose the showing of interest, monetary or otherwise, motive, bias, a careless manner of thinking, a habit of exaggerating, a poor memory, deliberate scheming, or previous statements inconsistent with the presented testimony.

Almost all things are relative in a lawsuit, and it is difficult to say that anything should always be done or anything should never be done. On cross-examination, however, one should very seldom, if ever, ask the question, "Why?" "Why" opens the door for the witness to testify to anything which he chooses to call a reason, whether it be prejudicial, hearsay, speculation, or pure imagination, and to argue his side of the case indefinitely.

Impeachment of a witness must rest upon a foundation first laid as a basis for the impeachment. Attempted impeachment involving a conversation, previous testimony, or a signed document should be preceded by questions tending to prove the time, the place, and who were present, including the general circumstances. The witness must first be given an opportunity to affirm or deny the statement. For instance, "Did you there at that place in the presence of Mr. Jones and Mr. Smith, say to Mr. Smith, 'I was not there and I did not see the occurrence'?" If the witness answers that he did not say so, then you have a foundation for proving by the testimony of others or by signed documents that he did say so.

Impeachment must be upon a material point. One cannot impeach a witness upon a collateral issue, nor try a case within a case. If the impeaching document is a statement which the witness is supposed to have written or signed, then the witness must be shown the document and be allowed to read it. When the witness is allowed to see the document, then opposing counsel also has a right to see it. If the witness admits the statement, then there is no reason for further evidence on the matter, and the statement is not admissible; but if the witness denies the statement or says he does not remember, then the statement may be shown and may be read to the jury. It should be read to the jury then and there.

If the witness denies the statement or says he does not remember, it is proper to inquire in respect to other related statements or facts which the witness may admit are true, because the related facts have a direct bearing upon the truth of the fact in

dispute. For example, I was recently defending the Cubs Ball Park against a claim for injury alleged to have resulted from slipping on ice brought by an ice cream vendor employed by the park. The defense was that the patron in fact became too impatient to walk down the steps and jumped from an upper to a lower level, thereby causing the injury. The hospital record contained a rather complete history of the occurrence, including a statement written by an intern to the effect that the patient stated he jumped from an upper level to a lower level and fractured the heel bone. When confronted with this statement, the witness denied it. I was then allowed to ask the witness whether or not he had also told the intern at that time and place that his father died of cancer, that his mother died of pneumonia, that his sister had lost an arm through osteomyelitis. The witness admitted that he did tell the intern these facts about his relatives. All of the facts were on one page, written in pen, by the intern. It is difficult to see how the information concerning the relatives, admittedly true, would appear on the hospital history sheet along with the other statement which the witness claimed not to be true unless, in fact, they were all true. It was obvious that the jury believed that all of the statements on that page had been made by the witness.

It must be remembered that where counsel for one litigant asks an impeaching question about a written statement or document, then his opponent has a right to inquire as to all of the things which the witness said about that particular related point, at that time, if they tend to temper or explain the statement. The Court has discretion to prevent the inquiry about such related facts from getting out of hand.

Where the witness has given previous testimony or made previous statements on a certain subject, it is legitimate to show, after careful foundation, that the witness talked about such facts or testified to them before and gave no such testimony.

It should be remembered that in case of a party to the action, no foundation need be laid for impeachment, since the statement of a party is in almost every instance an admission against interest which may be shown without any other basis or foundation.

In the Trial Courts of the United States and in many states today, litigants may take depositions for discovery of a party or a witness. Under the rules of the Federal Court, these depositions may be used for evidence in the event the witness is dead, at a greater distance than one hundred miles, is unable to attend because of age or imprisonment, etc., as is related in Rule 26 of Rules of Civil Procedure. In the Federal Court also the depositions may be used for impeachment.

In most state courts where discovery depositions may be taken, they may be used only for purposes of impeachment. In taking such depositions, one should look far ahead to the time when they may be needed for impeachment. For this purpose, the questions in the deposition should be so formed as to bring forth short, distinct, positive answers. In the event the witness on deposition, in addition to answering the question, testifies also to unrelated facts, then the question should be repeated until the witness answers only the question asked. Such a question can then effectively be used for impeachment, unadulterated by extraneous matter. An answer which contains an argument or material unrelated to the question is almost useless for impeachment purposes. The examiner, at the time of the deposition, should see to it that he gets answers which are not adulterated or poisoned through the interjection by the witness of statements or facts not inquired about. At the time of the deposition also, the examiner should not allow the witness to evade a direct answer nor to lead the examiner off the subject, as a quail, feigning a broken wing, leads the fox from her young ones. The effectiveness of the impeachment on the trial will depend almost wholly upon the accuracy with which the deposition records definite and single answers to definite and single questions.

It is the practice of our office to take a great many discovery depositions, and many cases are practically tried in the hearing room of the office, which is almost constantly in use in the taking of depositions of one kind or another. We ask the court reporters to leave a comfortable blank margin on the left of the page. It is not too difficult to induce them to do this. Before the trial, the deposition itself is briefed by marking in this left-hand blank column, in ink, a terse memorandum of the points thought of probable value in cross-examination. One does not know in what order his opponent will call witnesses, but with a deposition properly briefed, at a moment's notice the cross-examiner can put his finger upon the important previous statements of the witness. Without such briefing, it is difficult to find the points involved, and much effectiveness may be lost. Material to be used in cross-examination for impeachment or otherwise is of little value unless the examiner can find it within a few seconds. Judges do, and should, become impatient while a lawyer fingers through a stack of jumbled papers or a long deposition to find something which he should have at hand. The jury also resents such waste of time.

Usually the memory of a witness can best be tested by an inquiry into numerous and even petty details. For example, if the examiner believes that the witness did not see a vehicle which

he insists that he saw before an accident, then follow with such questions as: "How far away was it? How far did you see it move? What was its speed? What was the make of the car? Was it a sedan or a coupe? What color was the car? Did it have men or women in it? How many people were in it? Did a man or woman drive it? Did you notice the license? Did the car have an outside visor? Was the windshield in front a divided windshield or one solid piece of transparent material? Did it have a radio antenna?" and so forth.

Should the examiner not be completely satisfied with his cross-examination, and should the time for adjournment at noon or at the close of the day be imminent, it is usually a good plan not to finish with the witness, but to continue to examine until the adjournment has been called by the Court. Almost always during the noon hour or during the evening, additional questions, often material questions, will occur to the examiner. Many a witness who does well the first day will do poorly the next, and the examiner has the advantage on the second sitting because he has had time to think of his questions, perhaps had time to discuss the matter with his associates, from whom he may obtain valuable ideas, and has had time to organize his attack. If necessary, the examiner should not hesitate, in the trial of a complicated case or one involving scientific data, to request the Court for a postponement for the very purpose of preparing further cross-examination. Such a postponement should be allowed for a reasonable time in cases where it appears that the facts testified to are unforeseeable.

The type of witness with which the examiner is confronted in large measure will determine the attitude of the examiner in putting his questions. Where the amount, or principle, involved warrants a thorough investigation, an experienced investigator can, before trial, bring to the examiner very helpful information in the way of an advance description of the individual witness, that is, as to his age, education, reputation, standing in the community, habits for accuracy, powers of observation, keenness of retort, interest in the case, ability to falsify plausibly, poise, self-possession, etc., etc. If one must enter deep water, it is better to know in the beginning that he cannot depend on wading.

Some lawyers will say that the cross-examiner should never ask a question unless he is reasonably certain what the answer will be. This admonition, however, cannot always be followed. There are many occasions when the examiner must take a chance, but the risk should be a calculated risk.

Many years ago when people rode through the forests, good

horsemanship required that a horse be given his head. Otherwise the horse would decide to go on one side of the tree while the rider decided to go on the other. On cross-examination, however, a witness should not be given his head. He is almost certain to bring out immaterial or prejudicial testimony, and is likely even to cause a mistrial. If an opponent asks his witness, "Now go ahead and tell all you know about the occurrence," then the good examiner will usually object, requesting that the examination proceed upon question and answer, so that the Court and counsel will know what to expect.

It is usually advantageous to have an eager beaver for a client. He will help get information and make things easier generally. He may, however, sit behind his counsel at the trial and continuously insist that his attorney ask the witness this and ask the witness that. It is well to listen to all such suggestions. With him the controversy has been an experience, while the lawyer has only heard about it. It must be remembered, however, that it is the lawyer's duty to decide what is to be asked, and he should not hesitate to refuse to ask any question which he believes to be inadvisable. The lawyer should accept the same responsibility in asking the questions that the doctor does in giving the pills. In the formation of questions on cross-examination, one usually may not assume a fact which has not been proved. He may not put a question which is argumentative in form nor one which is double, but he is at liberty to ask questions in a form which is as leading and as suggestive as he can contrive.

Many witnesses enjoy a special confidence and favor with juries. When a child or elderly person or school teacher or person with obvious physical limitations is called to the stand, the examiner should assume that the jury will believe the witness unless the examination reveals a definite falsehood or glaring inaccuracy. With such witnesses, the examiner must proceed with absolute fairness, gentleness, and extreme caution. Children who are witnesses are the special ward of the Court. The Court will, and should, interfere if any question tends to frighten, confuse, or unduly embarrass a child. Usually there is no need for interference by the Court. Such an offense by an examiner will be so resented by a jury that the attorney will suffer his penalty without any interference from the Court. One should keep in mind that many cases nowadays are tried one, two, three or more years after the date of the occurrence. A child who is eight years old when called to the stand was probably only five when he became aware of the facts about which he is called to testify. The examiner should begin his examination of a child with a few unimportant questions which

the child can answer easily, so that the child will thereby be put at ease, and so that his mind will function normally. Then, if there has been a lapse of time, these preliminary questions should be followed by short, easy questions designed to show the child's present age, his position in school, the length of time that has elapsed, and the difference between his size and mental capacity at the time of the occurrence and his size and mental capacity at the time of his testimony. If the elapsed time indicates that the child at the time of the occurrence was very small, then his capacity to testify should be challenged.

Unless the child is completely and obviously obstreperous, it is fatal to become angry with a child witness. Since children are easily influenced, one frequently finds that the story has been told to them, or that they have memorized the story. Where the examiner suspects that the story has been memorized, he has only to ask the child to tell the story in his own words. He will probably almost sing it. Then, after asking other noncommittal questions, the child should be asked again to tell the story in his own words. A memorized story is almost certain to be repeated word for word. If it is so repeated, no further questions will be necessary. His testimony thereafter will be useless. If a child has not testified to facts which are injurious to his cause, the examiner should ask him nothing or ask him only a few complimentary or noncommittal questions.

School teachers usually make very good witnesses. Most of them know a great deal about human nature. Generally they have the respect of the community. Unless the examiner has evidence which will definitely and certainly show glaring inaccuracy or falsehood, it is better to compliment the witness, share in the favor of the jury by not disfavoring a favored witness, and let the witness go.

Elderly witnesses usually deserve the respect which is shown them. They are often approaching that period in life where material things seem to interest them less, and no good examiner will show any disrespect or unkindness to such a witness. If an elderly witness is wholly inaccurate, or even if he is telling a falsehood, it is better for the cross-examiner to ascribe it to the frailties of old age or lack of memory than it is to ascribe it to a deliberate attempt to falsify. For instance, in cross-examining an elderly person, instead of attempting to impeach him in the usual way, it is better to say, "Now Uncle Tom, or Mr. Ronald, let me see if I cannot refresh your recollection. Don't you remember that you talked to Mr. Jones and that Mr. Jones asked you this question, and don't you remember, now, that you made this answer?" Such an

approach will be just as effective and not so offensive. Elderly people are much more likely to "go along" with the examiner if he is kind to them, and may even be liberal with him in their answers if he is extremely polite. Another attitude on his part may bring out the vitriolic cynicism of old age.

The woman witness generally is stronger in her likes and dislikes than a man. She will go farther for a friend and much farther against an enemy. She is more emotional and more likely to be excused for evasion. She is more tenacious in her position. No one expects her to be logical, nor good at figures, nor accurate in judging distances or speeds, nor in remembering dates or times of the day. The examiner will not profit by being too severe with her for inaccuracies of such a nature. He will find it easier to cause her to show her emotions. She is likely to admit readily that she is a good friend of the litigant for whom she testifies, that she would do almost any favor for her friend, that she wants to see her friend win the lawsuit, and perhaps that she does not like the other party. Her knowledge of short periods of time may be tested with the watch, and her knowledge of distances may be tested by estimates of distances in the courtroom, or the length of a city block. The examiner will do well to use a moderate tone of voice, keep an absolutely even temper, be polite and chivalrous, but nonetheless firm and insistent upon answers as direct as is possible under the circumstances.

The wise-cracking witness, or one who thinks himself clever, is seldom as effective as he thinks he is. If he really has a joke, it may pay to laugh with it. If he is trying to poke fun at the client, the examiner may ask him, "Do you find this lawsuit amusing? If you lost a leg in an accident, do you think that would be funny?" Or, "If you were sued for money which you believed you did not owe, and were obliged to defend yourself, do you think that would be funny?"

If a witness hesitates for long periods without answering, the examiner may refer to his watch and say to the Court, "May the record show that the witness took fifteen seconds to begin answering the last question?" Such a process usually speeds up the answers.

Where a witness is brought into the courtroom in a wheel chair or on a stretcher, every reasonable consideration should be taken for his comfort. He should be allowed to testify from his couch or wheel chair, at whatever place in the courtroom seems convenient. Recently at a trial involving the claim of a plaintiff in a wheel chair against a railroad, the plaintiff's attorney started interrogating the witness where he sat in the wheel chair. De-



pendant's counsel insisted that he take the witness stand. The whole courtroom sat quietly while the witness rolled his chair as close to the witness stand as possible, slowly wriggled his way to the edge of the chair, took his crutches one at a time and put them painfully under his arms, grasped hold of the railing, finally getting himself on to the crutches, and then step by step ascended the rostrum where the witness chair was located. This performance probably added twenty thousand dollars to the judgment.

Where X-rays or documents are offered in evidence, it is better not to object to them unless the objection has real merit. Most juries want to see everything, and resent any effort on the part of either counsel to keep out of evidence any material thing which looks interesting. When the exhibit is offered in evidence, the cross-examiner has a right to interrupt the direct examination for the purpose of cross-examining the witness as to such facts as may affect the admissibility of the exhibit. In case of a picture, for instance, the examiner may inquire as to whether or not it was taken at the time of the occurrence, whether or not conditions have changed, whether or not any objects shown thereon have been touched up or any objects deleted. The time of year should be kept in mind. Many pictures of scenes of accident which happened on cold, snowy days have been taken months after when leaves are on the trees, and so forth. At this time also the examiner can make it plain that the exhibit is not offered for the purpose of showing the positions of any movable object, such as persons, automobiles, railroad cars, and so forth. If the exhibit is not objectionable altogether, it may be admissible only for a limited purpose. If the exhibit is a map, it is important to know whether or not the map is to scale.

The expert witness gives most cross-examiners the greatest difficulty. The expert witness has an education which equals that of the examiner. He is testifying in his own special field, a field in which he has unusual knowledge, and in which the lawyer usually has a limited knowledge. In addition to these circumstances, the expert witness also is probably an old hand at the game, has proved his ability to parry and evade questions, and has, before taking the stand, carefully considered the methods by which he will defend himself against attack.

If the name of the expert witness is known before the trial begins, the examiner will find it well worth while to determine, through the use of Blue Books or persons who have like scientific knowledge, the actual standing of the expert witness in his field. If he overstates his qualifications, the examiner should have at hand facts which will enable him to force the expert witness to

admit whatever limitations may actually exist in the expert's qualifications, or to show that some of the professional organizations to which he belongs are of little consequence. If the expert witness is an author of books or treatises, and the case warrants it, the examiner or his assistant should search these writings in the hope of finding some statement inconsistent with the position which the expert witness may be expected to take on the stand.

Too often the expert witness is called to testify because of a known leaning with respect to certain subject matter or a willingness to testify to those facts which he is called to expound. Under such circumstances, it is folly for the expert examiner to question him generally or without a definite plan, and it is suicide for the amateur to try it. As such a witness proceeds with the testimony, the examiner should try to single out the one, two, three, or four points which may favor his client's contention and which he may feel reasonably certain the expert must admit. When these questions have been asked and answered, it is time to stop. If the answers are as anticipated, the blow has been softened, and that is all the cross-examiner has a right to expect. He has taken the blow going away, as they say in boxing.

In the cross-examination of expert witnesses, counsel should not hesitate to seek the advice of other experts in the same field. In cases involving facts with which the average juror will not be acquainted, the subject matter should first thoroughly be studied by the examiner himself so that he is certain not to become lost in the maze of technical terms used by the expert. Through consultation with his own expert, the examiner should try to anticipate the testimony of his opponent's expert and to plan ahead of time a choice of methods for cross-examining the expert witness. Good plans for such examination are seldom laid after the expert takes the witness stand. The "catch as catch can" method cannot be classified as good trial work.

The attorney is entitled to have in Court, and at his side, a doctor who can assist him in the cross-examination of a doctor, or a chemist who can assist him in the cross-examination of a chemist. The very presence of a respected expert in front of the one on the stand is in itself usually enough to prevent the expert witness from making statements which are untrue or ridiculous from the scientific standpoint. With such assistance, the cross-examiner will usually be able to elicit from the expert sufficient answers to form the basis for a hypothetical question in his own defense, if in fact such a defense is possible and justified. Too often lawyers attempt to cross-examine an expert in a field which they know little or nothing about, and usually, as often, they fail to be effective.

In most jurisdictions, a physician who is not an attending or treating physician and who is called wholly as an expert may not testify to subjective symptoms, that is, symptoms upon which the physician must depend for his information upon responses of the patient. He may testify only to objective symptoms, that is, such as he can see, feel, or determine without any response from the patient. As soon as the qualifications of such a witness have been covered, and when the first question is asked of the non-treating physician, it is well to interrupt the examination with a request for a few questions with reference to the qualifications of the witness, which questions are proper at such a time. Then ask, "Doctor, I assume you did not treat the patient?" If he answers that he did not, the examiner is then in a position to insist that the examination of the doctor on direct be limited to objective symptoms.

The testimony of an expert witness more often than not culminates in the expression of an opinion in answer to a hypothetical question, based upon a long list of assumed facts and upon a supposed reasonable degree of scientific certainty. In the hypothetical question, the proponent frequently relates as an hypothesis the whole story of his evidence. This is done partly because it furnishes an opportunity for the lawyer to review all of the evidence in front of the jury, and in a more or less subtle way to argue his case through hypothetical question. It is obvious from the beginning that the expert will answer the hypothetical question in the affirmative. One way to attack such a hypothetical question is to ask the expert if he can recite all of the question put to him. Usually he cannot. Often he cannot recite even a respectable portion of it. This gives the cross-examiner an opportunity to argue later that the witness could not even remember the question which he was asked to answer, and that he was determined to answer it in the affirmative regardless of what it was.

Another method of attacking the hypothetical question is to ask the expert if there are any of the elements of the hypothesis set forth in the hypothetical question which he can leave out of consideration and still answer the hypothetical question in the affirmative as he did. If the expert says that all of the recited elements are necessary, then the examiner can take the elements one at a time and ask, "Do you mean that this assumed fact or that assumed fact is necessary to your answer?" He will probably say no, and thus break up the continuity. If he admits that many of the elements are not necessary, then the examiner can pin him down exactly to those elements which are necessary, and show that the answer is based upon a mere shell of the exaggerated, irrele-

vant, and argumentative hypothesis couched in the question.

Not long ago in the trial of a case involving a shooting, my opponent produced a ballistics expert who came into Court with five mechanical gadgets enclosed in shiny leather cases. These were deposited by the witness beside the witness stand as he took the oath. Various hypothetical questions were put, and objected to on specific grounds. It must be remembered that objections to hypothetical questions must be specific, and must point out wherein they are immaterial or have not been proved, etc. Finally, after a full hour, the Court allowed the witness to answer one question. He answered the question in the affirmative, as was expected. The witness was then asked, "Are there any of the elements of the hypothetical question put to you by counsel which you can leave out of consideration and still answer the question in the affirmative as you did?" The witness answered no. The next question was, "Then I take it that every statement of fact which counsel asked you to assume in his hypothetical question was necessary to your answer?" The witness answered, "Yes, and probably more." A motion to strike the only answer given by the witness was allowed, whereupon the witness was excused from the stand. The expert picked up his gadgets like the Arabs their tents and silently stole away.

As has been said, strictly speaking, re-cross-examination is limited to an examination concerning matters which have been brought out upon re-direct, but in this the Trial Court has wide discretion, and most Trial Courts in such matters are extremely liberal.

A trial lawyer will find his time well spent if he is able to read examples of cross-examination taken from cases tried by other lawyers. Illustrations are so much easier to remember than abstract statements or principles.

A lawyer's ability to cross-examine can be improved if he will, at the close of his trial, think over the methods that he has employed, with a view to trying improvement in the future. He should read his own records critically.

However, there is no reason for a lawyer to be too critical with himself when he wins. He should go on the principle that is used by some aviators: "Any landing that he can walk away from is a good landing."

**SECTION ON MUNICIPAL AND PUBLIC CORPORATIONS**

**Jack M. Pace, Esq.**

“Notice Required in Zoning Matters” .....Jack E. Lyman, Esq.

“Notice Required in Connection with the Levy of Special Assessments” ..... Warren C. Johnson, Esq.

“Constitutional Aspects of School Reorganization Legislation” ..... Richard A. Dier, Esq.

**THE PERSONAL NOTICE IN MATTERS OF ZONING WHICH IS NECESSARY IN CITIES OF THE FIRST AND SECOND CLASS**

**Jack E. Lyman**

Possibly a clearer statement of the topic that has been assigned to me for discussion would be: What notice of the hearing in matters of zoning is required in cities of the first and second class? Is personal notice necessary?

Sections 19-901 to 19-914 inclusive, R. S. Nebr. 1943, as amended, provide direct authority for cities of the first and second class for zoning legislation. Sections 19-904 and 19-905, require a public hearing prior to any zoning or change in zoning and provide for notice of such hearing. I have approached the question of what notice of such hearings is required in the light of Nebraska Legislative Bill 589, passed by the 1957 Legislature, which provides that in addition to notice by publication, personal notice in any action or proceeding before the governing bodies of municipal corporations is necessary. This interpretation of Bill 589 is ours. Also we have considered the United States Supreme Court decisions that have held that if the whereabouts of an interested party is known, although the notice by publication is given as required by law, such notice is not sufficient.

We think we should also note that Section 904 as amended pertains to original zoning by a municipality and Section 905 pertains to amending, supplementing, changing, modifying and repealing zoning regulations theretofore enacted and that the two sections distinguish in the notice necessary.

Referring first to Section 904, we find that such bill provides that in zoning legislation, the legislative body of the municipality shall hold a public hearing in relation thereto at which hearing

parties in interest and citizens shall have an opportunity to be heard. Notice of the time and place of such hearing shall be given by publication thereof in a paper of general circulation in the municipality at least one time, ten days prior to such hearing, i.e., that the only notice necessary is by publication.

Secondly, referring to Section 905, we find that public hearings and official notice of all changes or amendments to existing zoning are controlled by Section 19-904 as to the conduct of the hearing and the required notice. In addition to its being necessary to meet the requirements of Section 904, additional requirements are made, which are as follows:

. . . a notice shall be posted in a conspicuous place on or near the property on which action is pending. Such notice shall not be less than eighteen inches in height and twenty-four inches in width with a white or yellow background and black letters not less than one and one-half inches in height. Such posted notice shall be so placed upon such premises that it is easily visible from the street nearest the same and shall be so posted at least ten days prior to the date of such hearing. It shall be unlawful for anyone to remove, mutilate, destroy, or change such posted notice prior to such hearing. Any person so doing shall be deemed guilty of a misdemeanor. If the record title owners of any lots included in such proposed change be nonresidents of the municipality, then a written notice of such hearing shall be mailed by certified mail to them addressed to their last-known addresses at least ten days prior to such hearing. The provisions of this section in reference to notice shall not apply in the event of a proposed change in such regulations, restrictions, and boundaries throughout the entire area of such municipality but only the requirements of section 19-904 shall be applicable.

We believe that we can summarize as to the notice required under Sections 904 and 905 as follows:

1. That notice of the required public hearing for initial zoning, or change of zoning throughout the entire area of the municipality, need be by publication only.
2. Changes or amendments to pre-existing zoning require notice by publication, posted notice and written notice mailed by certified mail to title owners of any lots included in such proposed change, if nonresidents of the municipality.

The question presents itself under Sections 904 and 905: "Has the due process clause of the Constitution of the United States been met when personal notice is not given under said Section 904, nor given except as to a certain class under said Section 905?"

In considering the decisions of the Supreme Court of the United States beginning with the landmark case in 1950 to which we will later refer, such decisions indicate that the notices required under 904 and 905 are not sufficient to meet the Due Process Clause of the Constitution. Further, a question arises as to the statutory law of the state being complied with if no other notice in zoning matters is given than that required by Sections 904 and 905.

Referring to the United States Supreme Court landmark case, which is the case of *Mullane v. Central Hanover Bank and Trust Company, et al.*, 339 U.S. 306, 94 L.E. 578, 70 S. Ct. 652.

In January, 1946, Central Hanover Bank and Trust Company established a common trust fund, and in March, 1947, it petitioned the New York Court for settlement of its first account as common trustees. During the accounting period a total of one hundred thirteen trusts, approximately half inter vivos and half testamentary, participated in the common trust fund, the gross capital of which was nearly three million dollars. The record does not show the number or residence of the beneficiaries, but there were many and it is clear that some of them were not residents of the State of New York.

The only notice given beneficiaries of this specific application was by publication in a local newspaper in strict compliance with the minimum requirements of the New York Banking Law. Appellant appeared specially objecting that notice and statutory provisions for notice to beneficiaries were inadequate to afford due process under the Fourteenth Amendment, and therefore that the Court was without jurisdiction to render a final and binding decree.

The United States Supreme Court, in the opinion of Justice Jackson, states:

Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. . . . The fundamental requisite of due process of law is the opportunity to be heard.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such

nature as reasonable to convey the required information, and it must afford reasonable time for those interested to make their appearance.

The Court held (1) that as to those beneficiaries whose interests or whereabouts could not, with due diligence, be ascertained, the statutory notice was sufficient; (2) that as to known present beneficiaries of known place of residence, notice by publication stands on a different footing. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency. The trustee had on its books the names and addresses of the income beneficiaries represented by appellant, and the court found no tenable ground for dispensing with a serious effort to inform them of the accounting, at least by ordinary mail to the record addresses: (3) that notice of the judicial settlement of accounts required by the New York Banking Law is incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights. Accordingly, the judgment was reversed and the cause remanded for further proceeding.

Following the Mullane case, the Supreme Court of the United States decided the case, *City of New York v. New York, New Hampshire and Hartford Railway Co.*, 344 N.S. 293, 73 S.Ct. 299, 97 L.Ed. 333, which strengthened the principle announced in *Mullane v. Central Hanover Bank and Trust Company*. The next case which should be considered in consideration of the necessary notice in the question before us is the case of *Walker v. Hutchinson*, 1 L.Ed. 2d 178.

*Walker v. Hutchinson* reached the court by reason of condemnation proceedings instituted by a city against a landowner. Notice of the proceedings to determine the landowner's compensation was given only by publication in the official city newspaper, as authorized by statute then in force. After the time authorized by statute for an appeal from the compensation award had elapsed, the owner brought an equitable action in the District Court of Reno County, Kansas, alleging that he knew nothing of the condemnation proceedings until after the time of appeal had passed. The trial court denied relief, holding that the newspaper publication provided for by statute was sufficient notice to meet due process requirements. The Supreme Court of Kansas affirmed. The judgment below was reversed by the Supreme Court of the United States. The opinion written by Justice Black in which six members of the court concurred was that the newspaper publication alone



was not adequate notice as required by due process, where, as in the instant case, the owner's name was known to the condemning city and was on the official records.

Justice Frankfurter dissented on the grounds that the only constitutional question raised by the owner was whether failure to give adequate notice of the hearing on compensation of itself invalidated the taking of his land, apart from any claim of loss; and that the taking was valid, there being no allegation in the record that the compensation was inadequate.

Justice Burton dissented on the ground that the statute providing for ten days' notice by publication of the hearing to assess compensation was within the constitutional discretion of the state legislature.

The Court in this case made reference to the *Mullane* case as follows:

In *Mullane v. Central Hanover Bank and Trust Co.*, we gave thorough consideration to the problem of adequate notice under the Due Process Clause. That case establishes the rule that feasible notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. *We there called attention to the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions. We recognized that in some cases it might not be reasonably possible to give personal notice, for example where people are missing or unknown.*

Following the *Walker v. Hutchinson* case is *Wisconsin Electric Power Co. v. City of Milwaukee*, reported in 76 N.W. 2d 341, 352 U.S. 948, 77 S. Ct. 324, 1 L. Ed. 2d 241 and 81 N.W. 2d 298.

The trial court sustained a demurrer to plaintiff's amended complaint, after which, by judgment, it dismissed the action on the merits.

Plaintiff owned certain property in the city of Milwaukee abutting on streets which the city improved in various ways. The city levied assessments against the property for such improvements and, complying with the provisions of the city charter, gave notice by publication to the affected property owners. Plaintiff's original complaint alleged that its property was not benefited by the improvements; that it had no actual notice until it was too late to protest the assessments against its property; and that the constructive notice by publication was inadequate to comply with the requirements of due process of law. The complaint demanded judgment, declaring unconstitutional the sec-

tions of the city charter which make such notice sufficient, and holding null and void the assessments levied pursuant to such notice. The city interposed a general demurrer which was sustained by the circuit court. Upon appeal the supreme court divided evenly which, perforce, resulted in an affirmance of the order sustaining the demurrer.

Upon remand plaintiff obtained leave of court to plead over and then drew and served an amended complaint to which the city again demurred generally. The circuit court again sustained the demurrer and granted judgment dismissing the amended complaint upon the merits, and again the plaintiff appealed.

The amended complaint did not differ in any material respect from the original complaint, nor did appellant contend that it did. It presents to the Court the identical issue which had before been considered and determined. The reason for the second appeal appeared to be that since the first one the Supreme Court of the United States has considered once more the sufficiency of notice given by publication. That when more certain means of communication are reasonably available, notice by publication is insufficient to meet the demands of due process of law. In effect, appellant did no more than to ask the Court to reconsider, in the light of the more recent authority, its previous decision that the notice of special assessments given by the city by publication did not offend constitutional requirements.

The question presented to the Court for the third time received thorough consideration upon the first appeal and the motion for rehearing. Under the circumstances, the decision automatically following from the equal division of the appellate court has little weight as a precedent in other cases; but a decision, even by a divided court, ought at some stage to attain stability for the duration of the action in which it was rendered. We think that stage was reached in the motion for rehearing the original appeal. We consider that when that motion was denied, the sufficiency of the published notice became the law of the case and the question is not to be repeatedly reargued and reconsidered in the subsequent stages of the litigation.

Thereafter, the plaintiff appealed from such latter judgment of the Wisconsin court to the United States supreme court. Under date of December 17, 1956, the United States supreme court entered the following order:

In this case probable jurisdiction is noted. The judgment of the Supreme Court of Wisconsin is vacated and the case is remanded to the Circuit Court for Milwaukee County.

Subsequently on January 14, 1957, the United States supreme court amended such order of December 14, 1956, so as to remand the case to the Supreme Court of Wisconsin instead of the circuit court for Milwaukee county. The mandate of the United States supreme court was filed in the Supreme Court of Wisconsin on January 24, 1957. The plaintiff then moved the Supreme Court of Wisconsin for judgment in its favor according to the prayer of its complaint upon the mandate of the United States supreme court, which motion is opposed by the defendant city.

In view of the determination made by the United States supreme court we hold that the constructive notice given by the defendant city by publication of the proposed special assessments against the plaintiff's lands did not meet the requirements of due process.

As to L. B. 589, we believe it is worthy to take your time to quote verbatim from this Bill.

Section 1. In any action or proceeding of any kind or nature, as defined in section 2 of this act, where a notice by publication is given as authorized by law, a party instituting or maintaining the action or proceeding with respect to notice or his attorney shall within five days after the first publication of notice send by United States mail a copy of such published notice to each and every party appearing to have a direct legal interest in such action or proceeding whose name and post-office address are known to him. Proof by affidavit of the mailing of such notice shall be made by the party or his attorney and shall be filed with the officer with whom filings are required to be made in such action or proceeding within ten days after mailing of such notice. Such affidavit of mailing of notice shall further be required to state that such party and his attorney, after diligent investigation and inquiry, were unable to ascertain and do not know the post office address of any other party appearing to have a direct legal interest in such action or proceeding other than those to whom notice has been mailed in writing. Mailing of notice may be waived in writing by any competent person, by any fiduciary, or by any partnership or corporation.

Section 2. The term action or proceeding means all actions and proceedings in any court and any action or proceeding before the governing bodies of municipal corporations, public corporations, and political subdivisions for the equalization of special assessments or assessing the cost of any public improvement.

We have, from a comparison of Section 19-904 prior to the 1957 legislative amendment and the Section as passed by the 1957

Legislature, attempted to determine what changes the amendment was intended to accomplish. Prior to 1957 the Statute provided that notice of the time and place of the hearing would be given by publication thereof, and that the owners of all real estate located within three hundred feet of the property to be zoned or rezoned would be personally served with a written notice; that where such notice could not be served personally upon such owners, a written notice of such hearing would be mailed to such owners, addressed to their last known address. The 1957 Legislature amended such Section of the Statute to provide for notice by publication only.

Section 19-905, prior to the amendment by the 1957 Legislature, provided for public hearing and the same notice of such public hearing as set forth in 19-904, which, as we have heretofore stated, provided for personal notice. We might add that the notice required in 19-904 insofar as personal notice applied to the owners of real estate located within three hundred feet of the property to be zoned or rezoned but did not apply to the owners of the property actually being zoned or rezoned. The 1957 Legislature in 19-905 provided as we have heretofore set forth notice by publication, posted notice, and personal notice on a class.

From examination of the 1957 legislative amendments of Sections 904 and 905, it would appear that the Legislature was attempting to substitute notice by publication for personal notice. Actually, as has been pointed out, personal notice was not required to all interested persons by the two sections prior to the 1957 amendment, and therefore a question certainly arises as to what the Legislature did intend. In the light of Legislative Bill 589 which requires personal notice on all interested parties, it is difficult to understand why 19-904 and 19-905 were amended.

We believe we should state that there may be a question as to whether personal notice is required under the Due Process Clause in all kinds of actions, i.e., condemnation, as distinguished from zoning, and although the United States Supreme Court has found such notice is required in condemnation actions, would it find it is required in zoning matters? Further, some of you may have a question regarding the difference between the notice necessary under the Due Process Clause in actions before the courts and before a city council by reason the council may be acting under its administrative or legislative power and not judicial power. We have not attempted to reach any conclusion as to either of these two questions for several reasons. Firstly, the time allotted to us for the delivery of this paper; secondly, if L.B. 589 controls, then personal notice is necessary, regardless of the Due Process Clause; and thirdly, we have approached this matter from the

basis of what we believe is the safe method to proceed and not what we believe may be the minimum requirements. We therefore conclude:

1. Initial zoning and a change in regulations, restrictions and boundaries throughout the entire area of such municipality requires notice by publication under Section 19-904, and notice through the United States mail under L.B. 589 if the whereabouts of the interested party or parties is known.

2. If zoning regulations, restrictions and boundaries of the zoned area are amended, supplemented, changed, modified or repealed, we believe published notice, and personal notice forwarded by certified mail if the whereabouts of the interested party is known, are necessary under Section 19-905 and Legislative Bill 589. In addition, the posted notice as required under Section 19-905 must be given.

## NOTICE REQUIRED IN LEVYING SPECIAL ASSESSMENTS

Warren C. Johnson

Since at least the year 1879, municipal corporations in Nebraska have had the right to levy special assessments. At the present time there are probably thirty-five to forty different special assessment procedures. In all of the procedures, the notice given the property owner is by publication, except in some procedures there is an alternative of giving notice of the meeting of the Board of Equalization and Assessment by personal service. The validity of giving published notice had long been a settled question in Nebraska. In the case of *Murphy v. Metropolitan Utilities District*, 126 Neb. 663, 255 N.W. 20, our Supreme Court said that it was within the province of the Legislature to determine that publication in a newspaper of the principal city located within the district would be the most reasonable means of affording notice to property owners within the utilities district.

While notice by publication to the property owners of the sitting of the Board of Equalization and Assessment had been considered due process for over seventy-five years, three recent decisions of the Supreme Court of the United States have changed such concept. You have previously heard Mr. Lyman discuss the three cases in question. As you will recall, the *Mullane* case dealt with an accounting by a trustee. In this case the Supreme Court of the United States said that due process requires the right to be heard, and due process requires notice reasonably calculated to apprise interested parties of the pendency of the proceedings. The means employed, the court said, must be such as one desirous of

actually informing the absentee might reasonably adopt to accomplish it. The case of *Walker v. City of Hutchinson* was a condemnation case wherein the Supreme Court of the United States said that notice to the property owner by publication in a newspaper was not due process. Of particular import to the subject of this paper is the Supreme Court decision in the case of *Wisconsin Electric Power Co. v. City of Milwaukee*, 263 Wisc. 111, 56 N.W. 2d 184. This case dealt with special assessments levied in an improvement district. The plaintiff electric company property was located within the district. Notice of the sitting of the Board of Equalization and Assessment was given by publication. The plaintiff did not appear and assessments were made. This was a suit to invalidate the assessments on the basis that notice by publication was not sufficient for due process. The defendant, City of Milwaukee, demurred to the petition and the Wisconsin Supreme Court upheld the demurrer by a divided court of three to three. In a memorandum opinion, the same being number 404, 1 Law Edition 2d 241, the Supreme Court of the United States reversed and remanded the case for reconsideration in the light of its decision in *Walker v. City of Hutchinson*.

Municipal corporations and political subdivisions in the State of Nebraska levying special assessments were then in a position where notice by publication of the sitting of the Board of Equalization and Assessment was probably not due process. The 1957 Legislature of Nebraska enacted three bills designed to correct this situation. The first of these bills was L.B. 589. This bill provides in effect that where a notice is given by publication, the party instituting or maintaining the action or proceeding or his attorney, within five days after the first publication of said notice, must send by United States mail a copy of such notice to each and every party appearing to have a direct legal interest where the name and post office address of such party or parties are known to him. Proof is made by such party or his attorney filed with the officer with whom filings are required to be made in such proceeding within ten days after the mailing of the notice. This act raises several questions with respect to special assessments.

... *What notice is mailed?* In the ordinary special assessment district, there is more than one notice by publication. Let us take a paving district created by ordinance as an example. The first notice given is a notice of the creation of the district. After the district has been created and no remonstrance has eliminated the district, there is a second notice given which is usually the notice to bidders or notice to contractors. There is then a third notice given which is the notice of the meeting of the Board of Equalization and

Assessment. Must all of these notices be mailed to parties having a direct legal interest? The subcommittee which assisted the Judicial Council in drawing L.B. 589 agreed that legally there is no burden on the property by the mere creation of the district. There is no constitutional right of the property owner to be heard at the time the district is created. Examples of this are the paving of a main thoroughfare that comprises part of the state highway system in villages and cities of the second class. Another example is the creation of sewer and water districts in cities of the first class. In none of these instances is there any right of petition or remonstrance by the property owners. There are other such examples present in special assessment districts involving metropolitan and primary class cities. L.B. 589 is of particular significance in determining which notice must be mailed. It defines "actions and proceeding" as any action or proceeding before governing bodies of municipal corporation, public corporation and political subdivisions for equalization of special assessments or assessing the cost of any public improvement. It is therefore clear that the notice which must be mailed is the notice of the sitting of the Board of Equalization and Assessment.

*To whom is the notice mailed?* L.B. 589 provides that the notice shall be mailed to each party having a direct legal interest. Who has a direct legal interest? No doubt the record owner, life tenants and remaindermen have direct legal interest. But what about mortgages, mechanic lienholders, judgment creditors, easement holders, purchasers under a contract, occupying claimants and lessees? In the broad sense, all of these parties could be said to have a direct legal interest in the special assessment, and if they are so considered, then a copy of the notice should also be mailed to them.

*Diligent investigation and inquiry.* L.B. 589 also provides that the party giving such notice must file an affidavit within ten days after mailing of said notice listing the persons to whom such notice has been sent. There is an additional requirement, and this is that the party *and* his attorney, after diligent investigation and inquiry, were unable to ascertain and do not know the post office address of any other party appearing to have a direct legal interest. This raises the question as to what is diligent investigation and inquiry. Certainly the Municipal Clerk and the Municipal Attorney would be obligated to examine the records of the Register of Deeds of the county. But in addition, many addresses of property owners may be available in the records of the County Treasurer or the City Treasurer or the County Assessor or in probate proceedings, in the County Court. Is it necessary that the clerk and attorney check all of the above places? What about persons in possession of the

property? Even though the owner's address is not otherwise known or available, in most cases the tenant of property would probably know the address of the owner, as he has undoubtedly been sending rent checks to the owner.

*To what bodies does L.B. 589 apply?* It would appear that L.B. 589 is broad enough to apply to any village, city, municipal corporation or political subdivision, including cities under a Home Rule Charter.

*Form and filing of affidavit.* Who files the affidavit? It would appear that either the village or city clerk or municipal clerk or the village, city or municipal attorney is the person to make and file the affidavit. It must be filed within ten days after the mailing. I have with me a form of an affidavit. A copy of this form will be passed among you and it should help serve as a guide in such proceedings.

The second act of the Legislature dealing with this question is L.B. 591. This act is, in effect, a statute of limitations and provides that any person claiming any rights because of inadequate notice where notice is by publication must bring an action to enforce such rights within one year of June 5, 1957. Therefore, as to past assessments, municipal corporations should not be bothered with any claims after June 5, 1958.

The problem for village and city attorneys and other municipal officers with respect to notice required in levying special assessments is probably not as dark as heretofore related. This is because of two factors. First, so far as I know, in all special assessment districts in Nebraska, the warrants or bonds issued in such district or because of such districts are general obligations of the issuing agency and therefore the bond examiner does not have to depend upon the validity of the special assessments. In other words, where there have been defects in the special assessment, bonds can still be issued. The second factor, even more important for the municipalities, is the third legislative bill dealing with the problem, which is L.B. 590. This is the real protection for bodies levying special assessments. This act gives the power to all bodies levying special assessments to reassess and relevel any assessments where the original assessment is void or invalid for want of adequate notice. Such reassessment is made in substantially the same manner as the original assessment. In addition, the act preserves the lien of the original invalid assessment. It also requires that the assessing bodies take into consideration any amounts paid on the prior invalid assessments. In effect, this provides that if any person claims that they did not receive adequate notice with respect to a special assessment, the assessing body can proceed to



give them another notice and hearing and reassess. The presence of this section alone should be a real deterrent to nuisance claims and suits and probably will only have to be used in cases where there was inadequate notice and the assessment made was in excess of the benefits conferred upon the property.

It is submitted that the mailing of the notices within the five-day period and the filing of the affidavit within the ten-day period are a jurisdictional matter with respect to special assessments and village, city or other municipal attorneys should follow the procedure carefully.

Undoubtedly L.B. 589 has increased the work of village, city and other municipal attorneys, but unfortunately it will probably not increase the remuneration that they receive.

“EXHIBIT A”

STATE OF NEBRASKA }  
COUNTY OF..... } ss. AFFIDAVIT OF MAILING

....., being first duly sworn deposes and says that he is the duly qualified and acting Clerk of ..... that on the .....day

(Name of City or Village)

of ....., 19....., he sent by United States Mail, Notice of Hearing on Special Assessments in Paving District No. 1 of the City of ....., a copy of said Notice being attached hereto as Exhibit A, which was first published in ..... on the..... day of ....., 19..... to the following parties at the address shown opposite each name, to-wit:

Name

Post Office Address

.....	.....
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

Such notice was properly stamped, addressed and deposited in the United States Post Office or some receptacle maintained by the United States Post Office Department for the receipt of mail. Affiant further states that....., and its attorney, after diligent investigation and inquiry were unable to

ascertain and do not know the post office address of any other party appearing to have a direct legal interest in the equalization of special assessments or assessing the cost of public improvements in said Paving District No. 1 other than those to whom notice has been mailed in writing and other than those who have waived in writing such notice as evidenced by the record herein.

Subscribed and sworn to before me this.....day  
of ....., 19.....

Notary Public.

**CONSTITUTIONAL AND LEGAL ASPECTS OF EXISTING  
SCHOOL REORGANIZATION LEGISLATION**

**Richard A. Dier**

The topic for this discussion is "Constitutional and Legal Aspects of Existing School Reorganization Legislation." Fortunately for the speaker, it is sufficiently broad that any important omissions may be explained by the limitation of time allowed for its presentation. Secondly, it is still in its creative state and therefore permits speculation.

The school reorganization law of Nebraska is now in a state of ferment. The legislation is somewhat uncertain. The goals of educational leaders have been the elimination of small, costly educational units and the improvement of educational opportunities and standards. The vehicles to arrive at those goals, now furnished by the Legislature, are not so easily adapted for the trip.

Historically, there have been two major methods by which redistricting has been accomplished in the State of Nebraska. These statutory provisions are Section 79-402 and Section 79-1102. Both of these statutes were designed for self-determination by the majority of people within already organized school districts.

The first one of these, Section 79-402, has been in the statutes in one form or another since 1881. It has habitually required a percentage of the legal school voters, addressing the county superintendent of schools, to request a change in boundary, or consolidation. The superintendent then has had a mere ministerial duty to perform. As individual situations arose, the legislatures changed the Act to permit the exercise of quasi-judicial determinations by the county superintendent of schools. For many years prior to 1953 the language of the Statute included the words, "The county superintendent shall . . . change the boundaries . . ." upon the sig-

natures of 55 percent of the legal voters. The Act, up until 1953, permitted Class II, III, IV and V districts to act through their boards, but Class I districts acted through their legal school voters. In 1953, this Act was changed, making three basic differences, which were:

1. That a petitioner could not withdraw his name from the petition after it had been filed, thus eliminating the pressures that came after the signer had once committed himself
2. The fixing of a date and the conduct of a hearing, at which time the county superintendent made a quasi-judicial determination of the validity of the signatures and of the percentages required under the law
3. The requirement that the plan must be submitted to the State Committee for School District Reorganization and be approved there before the hearing was had

The following cases are of importance in the interpretation of the 1953 changes. In the case of *Olsen v. Groshans*, 160 Neb. 543, the Court found that it was the absolute duty of the county superintendent to effect the desires of the petitioners by providing that the superintendent make an affirmative finding of regularity and the proper percentages, as required by the Statute. Another case, *District No. 42 v. Marshall*, 160 Neb. 832, does not offer such a simple analysis. Here the court ran squarely in conflict with the new Reorganization of School Districts Act, as amended, in the initiative method as provided in Sections 79-426.20 and .21. Under the Reorganization Act, the state committee is wholly "advisory" to committee actions within the counties. However, the language of 79-402, as amended in 1953, said "any plan of reorganization" must be submitted to the state committee for approval. The Court, however, in *District No. 42 v. Marshall* followed the reasoning of the Iowa case of *Smaha v. Simmons*, 245 Iowa 163, and stated that this provision in 79-402 applied only to lands organized as a "group of districts" and not to a plan of consolidation where individual school districts executed separate petitions to form a single district for consolidation purposes. This ruling still left the door open, without state bureaucratic control, for people individually to tie together separate, individual districts. Left to be faced as a result of this interpretation, however, was one initially plaguing the state committee and county committees for reorganization: that while plans were being worked out for Reorganization Act elections, petitions were completed covering part of the territory under consideration under the Reorganization Act. Conflict accordingly arose along the boundaries.

Tested both in the *Marshall* case and in *Cacek v. Munson*, 160 Neb. 187, is an interesting procedural problem. The Court found that the county superintendent of schools, when he holds the hearing provided for in Section 79-402, may hear evidence and other data without a record of statements or testimony therein, and subsequently make his finding of sufficiency, and wait the prescribed time for a writ of error to be sued out. Duty lay upon any objecting school patron to anticipate the results and prepare his own record in advance, for on that record alone will his rights in district court be determined. At the hearing on sufficiency of petitions, the superintendent acts as a primary tribunal. A potential objector had better have a court reporter present to preserve the facts. The Court held in the *Olsen*, *Cacek* and *Marshall* cases that the order of the county superintendent can be reviewed by petition in error, which is an adequate remedy for appeal. Objectors also must act within the time limit for suing a writ of error. This holding, of course, seems squarely on the opposite side of the house from the holding in *State ex rel Larson v. Morrison*, 155 Neb. 309, wherein the Court concluded that if the petitions in fact are insufficient, no hearing *could* change the boundaries, because the entire proceeding was void. Perhaps the distinction lies in requiring patent error in the records, together with adequate proof thereof to show invalidity of the petitions. We have on the one hand the questions of jurisdiction because the petitions are invalid, which can be attacked as it was in the *Larson* case by injunction, and, as held in the *Cacek* and *Olsen* cases, which indicate that unless such error is patent upon the record and the objector doesn't follow his remedy through writ of error and a self-made record of the evidence, he is without remedy thereafter to complain. I submit the law is not entirely clear, and advice as to this procedural problem is extremely difficult to give.

### THE REORGANIZATION ACT

We will now leave Section 79-402 for a short period, since the actions of the 1957 Legislature have so interrelated Section 79-402 with the Reorganization for School Districts Act that consideration of the Reorganization Act should be made before the most recent changes can be analyzed.

The 1949 Legislature passed what has been known as the Reorganization of School Districts Act, being Section 79-426.01 to 79-426.19. This was a comprehensive act designed to encourage the elimination of the many small school districts in Nebraska. The Act substantially provides: (1) setting up of a state committee for reorganization, with five members and the State Superintendent,

appointed by the governor; (2) a procedure for selection of a county committee for each county; (3) the job to initiate reorganization plans to the state committee, but solely in an advisory capacity; (4) that the county committee should determine all actual readjustments, establishing the criteria to be considered by the county committee; (5) the provision for notice and hearing before the plan is completed and requiring a record thereof; (6) that the plan be returned to the state committee for advice and recommendations and be then returned to the county committee; (7) that the county committee then shall submit a special election with the rural territory voting as a unit and any existing high school district voting as a separate unit. Thereafter, if the plan is approved by both said units, the county superintendent classifies the district and appoints a new board to act until the next school meeting or election.

In 1953 this Act was amended in two material phases. First amendment required planners to add on additional voting units for that territory more than halfway to the nearest corporate limits of a city or village having a Class II, III, IV or V school district. The obvious purpose of this change was to eliminate gerrymandering in which rural areas close to another city could be forced in by the massed vote of the rural areas immediately surrounding the central school area to be redistricted. The second change was the addition of 79-426.20 and 426.21, wherein groups of districts could get a redistricting plan on a ballot by their own initiative when county committees were reluctant to act, or were playing politics along county boundary lines. Another change in the Act required reports to the state committee of the actions of the county committee. Still another amended the Act to require the county committees to prepare a comprehensive plan within two years or be dissolved by the state committee and a new committee selected.

The 1955 Legislature also changed Section 79-426.09 and lumped all of the districts closer to another town into a single voting unit, thus eliminating the opportunity for self-determination of *individual* districts which are closer to another town. The 1957 Legislature finally eliminated entirely the restriction on gerrymandering and simply stated that all districts of a like class shall vote as a unit, with a single majority controlling. Thus, except for joint county activities, the addition of the initiative plan, and discipline for the dormant county committees, the Act is not now essentially different than when originally passed.

The Reorganization for School Districts Act had its major constitutional test in the case of *Nickel and Porter v. School Board*, 157 Neb. 813. In it were tested the following basic issues:

1. Whether the delegation of legislative power to a county redistricting committee was a delegation of legislation
2. Whether proper notice is provided for in the Act, since changes in boundaries and areas to be included can be made, subsequent to the only hearing required by the Act, without further notice and hearing
3. Whether there was a proper appeal provided for from the quasi-judicial decision of the county redistricting committee
4. Whether a misrepresentation of facts will estop the organization of the new district

With respect to the delegation of legislative power, the court, in the *Nickel* case, held squarely that where authority had been delegated, with some restrictions and limitations, such delegation is constitutional. Concerning notice, the Court held that, although the steps of reorganization required but a single hearing at which time the hearing would cover only the initial proposal of the county committee, no other hearing was required. The Court indicated that the electorate, in fact, changed boundaries, and that the changes of the county committee, upon advice by the state committee, or on their own instance, do not require a subsequent notice to the public and hearing thereon concerning different territories to be included or omitted. The Court said:

Under the situation here, the duties of the county committee do not fall within the category to which the due process clause of either the state constitution or the federal constitution has application.

The Court quoted the case of *Tanner v. Warrick*, 106 Neb. 750, stating:

The terms of the statute which provide for a hearing on the initial question of fixing the boundaries of consolidated districts by the redistricting committee, furnish sufficient notice to all parties interested of the proposed boundaries of the district.

It states further: "We think the requirements of the Act would be sufficient in that regard."

With respect to the third constitutional issue on provision for appeal, the Court stated that Section 25-1901 authorizes a review on petition in error of judgments rendered by inferior jurisdictional tribunals, and is an adequate remedy.

In issue number four the Court held that the misrepresentation made by the county committee at the hearing, which misrep-

resentations indicated self-determination, would permit former districts to get out after the reorganization was a misrepresentation of law, and not of fact, and therefore did not qualify for an estoppel.

The Court thus established that the provisions of the Act, as passed by the Legislature, were constitutional in every respect on the issues above presented.

Immediately following the *Nickel* case, the constitutional issues were again presented to the Supreme Court in *District No. 49 v. District 65R*, 159 Neb. 262. Again, the gerrymandering possibilities were attacked, as were the due process requirements and the delegation of legislative power without adequate limitation.

The Court quoted the *Nickel* case. Here the specific problem of not including a school district at the one hearing held, and then subsequently including it, was discussed, but the court found, as a matter of fact, that the patrons of District 49 knew of its possible inclusion, by virtue of the conduct of the county committee at the one hearing held. Though the actual inclusion of District 49 was done after a subsequent hearing to the first hearing, the Court easily ruled out lack of notice because of the factual finding of actual notice.

Not squarely considered by the Court, however, was the question of whether a substantial area could be afterwards included when the plan is returned from the state committee, and, without further hearing or notice, be presented to the public at an election. It would appear, under the rule established by the Court, that organizers could have a preliminary hearing prior to submission to the state committee, covering only a small portion of land, and then, with no further hearing of any kind, include vast areas in the plan and first present it to the public at an election. Under this possibility, the school patrons on the majority of the land would never have been present in the hearing nor have notice of the proposal to include them prior to the election itself. This particular narrow issue could well be presented to the Court at some future time, and perhaps a new ruling be derived on the basis of failure of notice to a substantial segment of the population.

We will now return to the 1957 Legislature's amendments to Section 79-402 to consider their effect on the whole reorganization picture. It is considered with apprehension. You will recall that this was the historical Act permitting self-determination, by petition of 55 percent of the voters in changing their boundaries, and in effecting consolidation. You will recall that it was used on some occasions to thwart efforts of committees under the Reorganization Act by consolidations along boundaries. You will recall the efforts

of the 1953 and 1955 Legislatures to coordinate consolidations, under this petition method, with master reorganizations, under the Reorganization Act. The 1957 Legislature furthered the coordination by establishing "slow-down" processes, required for the use of Section 79-402. Under the new 1957 provisions, petitioners must submit their petitions to the county committee for school district reorganization, who may hold them for forty days. The county committee may then send these petitions to the state committee, who may hold them forty days. The state committee then returns the petitions to the county committee, who must hold a hearing within fifteen days and, finally, ten days following the hearing, deliver them to the county superintendent, who subsequently advertises and holds another hearing upon the validity and sufficiency of the petitions. Thus, the time factor for consolidation under 79-402 may extend to as much as 120 days. Section 79-402 still makes it mandatory for the county superintendent to effect the changes thereafter, and provides for no means by which the purpose of the petitions may be changed by County or State Committees for Reorganization. That provision of 79-402 is clear. The speed of the possible changes by petition, however, are definitely slowed to the Reorganization Act tempo.

Section 79-402 then sets up provisions, the correlation of which and the logic of which escapes the reason of this speaker. It says as follows:

Such officer [county superintendent] shall have the discretionary power to annex *any territory, not organized into districts*, to any existing districts; provided, changes affecting cities, villages or Class III school districts may be made upon the petition of the school board or the board of education of the district or districts affected; and provided further, that school boards or boards of education *shall* sign such petitions when requested to do so by *persons desiring to transfer their land* from a Class II or III district to a Class I district, or another Class II or III district, when such persons have personally paid tuition for their children to attend school in the other district over a period of two years or more *or* reside nearer the schoolhouse in the other district than the schoolhouse in their own district. Territory may be annexed to a district from an adjoining county upon joint action of the county committees, as provided in Section 79-426.08 and 79-426.09. [Italics added.]

In statutory analysis, the questions which immediately arise are:

1. Do the provisos in which individuals pay tuition for two years, *or* reside nearer, apply only to any territory "not organized into districts," as the sentence begins, or does that proviso have gen-



eral application to landowners in any portion of any district?

2. If it is of general application, then may a "person" pay tuition for his children in any other district and then have "their land" transferred upon request to his Class II or III school district board so to do?

(It is noted the language of this Act includes the word "shall" in application to the board.)

3. Does this proviso, if of general application, apply to landlords, or to any tenant thereon, as well as the landowner?

4. Do the boards of education have any discretion whatsoever in the transfer?

5. What is "their land" in the case of an extensive landowner?

Some of the above questions were presented to the Attorney General, who issued an opinion on the 26th of September, 1957. In that opinion, the Attorney General has stated that any form of notice for any of the hearings will be only that which is "reasonably expected to inform personnel of the proposed changes, in time for them to be heard at a meeting." It states that the boards of education do *not* have any discretion in the new Act by virtue of the word "shall" therein. The Attorney General has indicated the change in the Act was made upon the floor of the Legislature, changing the word "freeholder" to the word "person," and therefore concludes that any "person," be he tenant or anyone else, may send his children to the school of his preference, concluding that any person residing on the land concerned may request the transfer, whether he has children of school age or not.

What, then, is the effect of this change, if it is of general application and not restricted to territory "not in an organized district"? It means substantially this, as I read the law. First, any person now in a reorganized Class II or III district could, upon request to the school board of his home district, force them to execute a petition to transfer his land out, first, if his land lay closer to any adjoining operating rural schoolhouse or adjoining city schoolhouse in any other district. This he could do without paying any previous tuition, and without respect to the class of the schoolhouse which is closer to his land. How much land he can take with him is not clear, but the amendment speaks of "their land," and I would assume whatever land he has or is on. Secondly, he may pay tuition to another school for a period of two or more years and then make such a written request, *regardless of whether or not he is closer to the newly selected schoolhouse*. Thus, it would appear that someone in the very heart of a reorganized school district who became unhappy with his school board could send his child

to another school district, pay tuition there for two years, and then, upon written request to the board, require them to sign a petition transferring his property. It seems apparent that the boundaries have become fluid between school districts, and dissident school patrons may go where they please. There appears no restriction limiting transfer to adjacent or contiguous property, and it is likely that "islands" may appear throughout reorganized school districts which will belong to some other school district. It appears that where a large area has redistricted around a community and is currently surrounded by Class I districts, any persons on the edges thereof may get their land out by reason of being closer to a "schoolhouse" on the edge of the reorganized district.

It is also apparent that the Attorney General interprets that these rights are not limited to persons in "territory not organized into districts," but to persons anywhere in any Class II or III school district.

It seems that something slipped in the passage of the law, since the Legislature and the Supreme Court in the past ten years have given no indication of having school patrons loosely shifted in and out of districts on the basis of mere preference. This appears in the case of *Roy v. Bladen School District*, 165 Neb. 170, wherein Section 79-403, the so-called Freeholders' petition transfer method, was ruled upon by the court in language as follows:

The intention of the legislature was that the board, in making such determination, should predicate it upon the convenience of transportation of children of school age to schools, and the educational welfare and needs of petitioners' children, and not upon mere personal preference of petitioners based upon non-educational reasons. That section and others in pari materia deal with schools in order to promote their proficiency in the education of petitioners' children of school age, and not upon the secular business affairs of the petitioners. In other words, the best interests of the petitioner or petitioners means the best educative interests to petitioners and not the best non-educational interests of petitioner or petitioners.

The Court, further discussing the philosophy of the Act, stated as follows:

The Legislature has placed great emphasis upon the reorganization and consolidation of numerous inefficient and costly small school districts.

The provisions of 79-402, after the 1957 Session, are violently opposed to the principle as established by the Court and by previous actions of the Legislature. They have previously fostered the

reorganization with a view to some finality in boundaries for school patrons.

#### SECTION 79-1102

The last statute authorizing reorganization is Section 79-1102, which has been changed little for many years. It permits the creation of rural high school districts, covering an area of independent Class I districts for the elementary grades. This statute permits the rural areas who make use of high schools to join with the other areas similarly situated to pay the full tax for the operation of the high school. These districts maintain character as individual Class I or consolidated Class I districts under their own board control and local taxation. A rural high school district requires minimum area and may be formed by 55 percent petitions of the legal voters in each district and board action in the Class II or III district. They are commonly known as Class VI districts.

The efforts of the Legislature in making special-purpose amendments have created what might become a chaotic condition. It is suggested respectfully that the Legislature review the whole matter and establish broad principles authorizing reorganization both by petition and by over-all vote. Once a workable plan is accomplished, transfers should be limited to cases of special hardship, with an educational basis for any such changes. Other sections than those discussed today, and specifically Section 79-403, do permit such transfers on such bases. They need not be tampered with.

**SECTION PROCEEDINGS**

**FRIDAY, NOVEMBER 1, 1957**

**SECTION ON TAXATION**

Thomas M. Davies, Esq.  
Chairman

“Joint Tenancies and the Gift Tax”.....William H. Lamme, Esq.

“Unreported Gifts—To File or Not to File”.....John C. Mason, Esq.

“Key Provisions of the Marital Deduction Trust”.....  
John E. North, Esq.

CHAIRMAN MILLER: I am pinch-hitting this afternoon. Tom Davies, who is Chairman of the Section on Taxation, called me and said that he regrets he is home with the flu, and so I will take over for him.

Throughout the program this afternoon, I would like to have all of you kind of churn around in your minds what you think would be appropriate topics, which would have a broad interest for all of us, which might be the subjects of our papers to be given in the Annual Institute of the Section on Taxation, which this year will be held the week of December 2; and if I am right and the program is later confirmed, we will meet two days in Scotts-bluff, two days in Grand Island and then two days in Omaha, following the same pattern as we have in the past.

But we have tried to stress the past few years getting topics which have prompted broad interest for all lawyers, and which will have real down-to-earth value for all of us.

So if at the end of the session any of you will submit topics which you think would be appropriate and which could be used in our December Institute, it will be appreciated. I think we make a better Institute by letting us find out what you think are the important topics and are matters of interest to all lawyers.

Of course at the end of the session this afternoon we will have an election for two new members of the Executive Committee of the Section, but without further ado I think we will get into the meat of our program, which our three speakers this afternoon have.

The first one is Bill Lamme, whom you all know, of course, of the firm in Fremont of Spear, Lamme and Simmons. Bill is going to talk about Joint Tenancies and the Gift Taxes. Bill.

WILLIAM H. LAMME: Thank you, Keith.

For those of you who know me, you will probably recognize

I am not an expert in the field of taxation. I might explain that my presence here is accounted for by the fact that Tom Davies and I happen to attend the same church and go to some meetings together. He called me this fall and suggested he was looking for a man in a panel who was a good Episcopalian and a good Democrat, and those are my qualifications.

The subject of joint tenancies is, of course, one that we all run into from day to day. They arise to plague the lawyers and they arise to plague the taxpayers at unexpected times.

Under the Internal Revenue Code the term "gift" has a much broader concept and meaning than it has at common law.

Every transfer of money or property, whether made as a sale or otherwise from one person to another without adequate and full consideration in money or money's worth, is in whole or in part a gift in the meaning of the gift tax law.

The tax is imposed upon all such transfers in excess of the exemptions and deductions allowed by law made by any individual. The gift tax is not a tax on property as such, but an excise tax imposed on the exercise of the donor's right during life to transfer property to others in the form of gifts.

Its main purpose is to compensate for the estate tax that would have been payable on the donor's death. The theory is that if the gift had not been made, the property would have constituted a part of the donor's taxable estate when he died. Transfers in joint tenancy of real estate and in joint ownership in personal property with but few exceptions come within the purview of the act.

Except for one important change, the 1954 Code left unchanged the pre-1954 rulings, regulations and code decisions concerning joint tenancies. We are, therefore, dealing largely with the treatment of such property as found under the 1939 Code. Any transfer in joint tenancy or joint ownership prior to January, 1955 is, of course, governed by that Code.

It should be noted that in the statutory language and the regulations that joint tenancies and tenancies by the entirety are treated interchangeably except where some fine legal distinction is in itself in issue.

Broadly stated, it may be said that under the 1939 Code all transfers of property, real or personal, in joint tenancy or joint ownership with right of survivorship were subject to gift tax when made in excess of the applicable exemptions and deductions, with the exception of joint bank accounts and jointly held United States savings bonds which were excepted under a special rule.

Respecting joint bank accounts, the regulations provide that if *A* creates a joint bank account for himself and *B* or similar type of ownership where *A* can regain the entire fund without *B*'s consent, there is a gift to *B* when *B* draws upon the account for his own benefit, to the extent of the amount drawn. In respect to United States savings bonds, the rule is that if John Jones purchases with his separate funds savings bonds and has them registered in his name and that of another individual in the alternative as co-owners, for example, "John Jones or Mrs. Ella S. Jones," there is no gift for federal gift tax purposes unless and until he during his lifetime gratuitously permits "Mrs. Ella S. Jones" to redeem them and retain the proceeds as her separate property, in which event a gift of the then redemption value of the bonds would be made.

With these exceptions all transfers in joint tenancy or joint ownership with right of survivorship are taxable as gifts under the 1939 Act if in excess of the statutory exemption.

A gift tax liability upon the creation of a tenancy by the entirety was upheld under prior law despite the subjection of the entire property to estate tax on the death of the donor. In this case a husband and wife purchased a home for \$30,000, taking title by the entirety. The husband paid the entire consideration except for a small sum received from the sale of their former residence, also held by the entirety. The Commissioner determined that the transaction was in effect a gift, valued the wife's interest and assessed a tax. On appeal the husband taxpayer contended:

(1) The husband intended no gift and the District Court so found. He was merely fulfilling his marital obligation to furnish a suitable residence for his wife and family.

(2) His wife at the time of transfer received nothing of value, but she received the possibility of acquiring it should she survive her husband. Death is the generating source of that gift; and the transfer was the subject of estate taxes, not gift taxes.

(3) The gift tax act and the estate tax act are to be construed *in pari materia*, and since interests acquired through conveyances of estates by the entirety are specifically covered by the estate tax act and not mentioned in the gift tax act, it is clear that Congress did not intend to include such acquisitions in the gift tax act.

The 7th Circuit Court of Appeals sustained the Commissioner, concluding that the gift tax applied to transfers to a wife of an estate by entirety. The Court said, "The fact that the estate of the decedent must pay an estate tax on the entire value of the fee simple upon the death of the spouse would be persuasive if the

same statute [the estate tax act] did not provide for a credit of the amount paid as gift tax on the estate tax.”

Similarly, one-half of a trust created out of jointly held securities was held taxable as a gift when the surviving beneficiary relinquished a power to modify the trust.

The proposed regulations provide that if *A* with his own funds purchases property and has the title conveyed to himself and *B* as joint owners with rights of survivorship (other than joint ownership described in Example 4) but which rights may be defeated by either party severing his interest, there is a gift to *B* in the amount of one-half the value of the property.

The only change in the 1954 Code in respect to joint tenancies is the addition to the gift tax law of Section 2515. It provides that effective as to transfers made in 1955 or later, in the case of the creation between husband and wife of a tenancy by the entirety or a joint tenancy with right of survivorship in real property, the donor may elect to have the transaction treated as it was before, but that, unless he does so, it will not be treated as a gift. Where the creation is not treated as a gift, the termination of the tenancy (other than by death of a spouse) is deemed to have resulted in a gift by one spouse to the extent that the proportion of the total consideration furnished by such a spouse multiplied by the proceeds of termination exceeds the value of such proceeds of termination received by him. The election referred to above must be made on a gift tax return filed for the year in which the tenancy is created and without regard to the value of the property involved. Where the spouse creating the tenancy does not wish to treat the transaction as a gift, no special action is required.

Since Section 2515 IRC applies only to real property, interests in personal property are governed by the general definition of “gift.” So too are interests in real property held jointly by persons other than husband and wife.

As to valuation, the scheme of the law generally is to treat the creation of a joint tenancy where one tenant furnishes the entire consideration as a gift of one-half of the value of the property held jointly which is the amount that the co-tenant would take by severing the tenancy.

If *A* with his own funds purchases property and has the title thereto conveyed to himself and *B* with rights of survivorship but which right may be defeated by either party severing his interest, there is a gift to *B* in the amount of one-half the value of such property.

This applies to all transfers in joint tenancy with right of sur-

vivorship under the 1939 Code except joint bank accounts and jointly held United States savings bonds. It also applies to transfers of real estate in joint tenancy with right of survivorship in the event that the joint tenant donor elects to treat the transfer as a gift. If a joint tenancy in real estate between spouses treated as gift is terminated during the joint lives of the spouses, a gift will arise if the proceeds are divided otherwise than in the proportions in which they originally contributed.

By way of illustration, the committee report says: "If the husband furnished \$30,000 and the wife \$10,000 as consideration for the purchase of the real property, and when the property was sold for \$60,000, the husband received \$35,000 and the wife \$25,000, the gift at the time of sale would be computed as follows:

"Value of husband's interest equals  $\$60,000 \times \frac{\$30,000}{\$40,000} = \$45,000$ .

"Value of gift equals value of interest minus value of proceeds received.

"Where the proceeds of a sale, exchange or other disposition of such property are not actually divided between the spouses but are held in their joint names in a bank account or otherwise or in the name of one as custodian or trustee for both, each spouse is presumed to have received, as of the date of termination, proceeds equal in value to his or her enforceable property rights in respect of the proceeds.

"If the donor spouse who creates a joint tenancy in real estate does elect to have such transfers treated as a gift under the provisions of Section 2515, IRC there should be allowed as a deduction in computing taxable gifts for the calendar year an amount in respect to such interest equal to one-half of its value.

"Gift equals \$45,000 minus \$35,000 equals \$10,000."

The proposed regulations state that a termination of a joint tenancy in real estate between spouses is effected with resulting gift when all of a portion of the property so held is sold, exchanged or otherwise disposed of by gift or in any other manner or when the spouses through any form of conveyance or agreement become tenants in common of the property or otherwise alter their respective interests in the property formerly held by them in joint tenancy.

A termination is not considered as effected to the extent that the property subject to the tenancy is exchanged for other real property, the title to which is held in identical tenancy. A tenancy



is considered identical if the proportionate values of the spouses' rights are identical to those in the property which was sold. In addition to the sale, exchange or other disposition of property so held is not considered a termination if all three of the following conditions are satisfied:

1. There is no division of the proceeds of sale or exchange.

2. If on or before the due date for filing of a gift tax return for the calendar year in which the property held in joint tenancy was sold, exchanged or otherwise disposed of, the spouses enter into a binding contract for the purchase of other real property.

"3. After such contract is entered into, such other real property is actually acquired by the spouses within a reasonable time and held by them in identical tenancy. To the extent that all three of these conditions are not made a termination of the tenancy is effected and a gift will then result.

Briefly, in closing, it may be said that all transfers and joint tenancy are subject to the Gift Tax Law with the exception of three situations. One, a joint bank account; second, United States savings bonds held jointly, or third, real property held by a husband and wife in joint tenancy.

Otherwise all transfers and joint tenancies are deemed to be gifts. We all, of course, know of many, many such transfers that our clients have or purchases that our clients have made, generally not arising through your law office or mine, but through some real estate agent who thinks that is a fine way to hold a title. A young man will go out and buy his first farm, and at the real estate dealer's suggestion he will put it in joint tenancy with his wife. He does not realize it, but he has actually made a gift to his wife under the 1939 Act, and any transfer prior to January 1, 1955 is subject to the tax. He is liable for the tax.

I am not going to get into that phase of it, because my friend John Mason here has prepared an excellent article on the subject of when or whether or not you should file delayed returns.

And you are subject to penalties if you do not. It is a vital question. I think you will find that it frequently arises in your practice, whether you are conscious of it or not. We all have clients who have taken property in that manner and hold it in that manner, and who have never made gift tax returns or are never conscious of the fact that returns are due.

**CHAIRMAN MILLER:** Does anybody want to fire questions at Bill?

**VOICE:** You were telling about a gift of a man to his wife.

He only considers half of it because of the marital deduction. You would take three thousand or six thousand away from the other half; it would be three thousand, would it not?

MR. LAMME: Well, he is entitled to his annual exclusion of three thousand dollars, in any event; on top of that, of course, he would be entitled to marital deduction in computing tax.

VOICE: I mean take a hundred thousand, divide (that would be fifty), and then would he pay on forty-seven thousand or forty-three thousand?

CHAIRMAN MILLER: The problem, I take it, is this: A man acquires property in joint tenancy with his wife, and the property is worth one hundred thousand dollars.

VOICE: Yes.

CHAIRMAN MILLER: And you want to know what annual exclusion he gets and—

VOICE: Does he take the three thousand or six thousand annually?

CHAIRMAN MILLER: You are assuming that this is a transfer subject to gift tax. In other words, it is not a real estate.

VOICE: Yes, it is subject to gift tax.

CHAIRMAN MILLER: Bill, is it not that he has made a gift of fifty thousand, then, half the property? The marital deduction then is twenty-five thousand, and he also gets an annual three-thousand-dollar exclusion, so he would have made a net gift before exemption of twenty-two thousand. Is that right, Bill?

MR. LAMME: That is correct.

VOICE: Well then, how would that figure be different if the gift is one hundred thousand and you take off fifty thousand?

CHAIRMAN MILLER: I am sorry. I was assuming that the total value of the property was one hundred thousand, so that he makes a gift of half of it or fifty thousand, then half of that gift qualifies for the marital deduction of twenty-five thousand.

VOICE: Then he pays on twenty-two thousand then.

CHAIRMAN MILLER: That is right.

Are there any other questions?

VOICE: If he has not used that thirty thousand exemption, he could still use that so he would not have to pay any gift tax.

CHAIRMAN MILLER: That is right.

MR. GAUGHAN: Do we have tenancy by entirety in Nebraska?

CHAIRMAN MILLER: No.

MR. LAMME: No, the Supreme Court held long ago that such a state does not exist in Nebraska.

CHAIRMAN MILLER: Are there any other questions?

(There was no response.)

CHAIRMAN MILLER: If not, Bill, thank you for a very enlightening talk. I am sure we all appreciated it.

Next on the panel is another topic which I am sure we will all find interesting, and I do not know, but I hope John will come up with some answers for us on this business of when and when not to file returns, and the effect is not a very pleasant one for all of us, and has been for many years.

I now present John Mason of Lincoln, of the firm of Beghtol, Mason, Knudsen and Dickeson, who will go further into the gift problems. John.

JOHN C. MASON: Thank you, Keith. I think I have come up with a real answer. The question is whether I can support my answer.

The title which I have assigned my remarks today is "Unreported Gifts: To File or Not to File."

### Gift Tax Returns

To file or not to file, that is your client's question.  
 Whether 'tis nobler in the end to suffer  
 The slings and arrows of outrageous taxes,  
 Or to take chances against a sea of collectors,  
 And by not filing, fool them?  
 To evade, to pay, no more;  
 And by evasion to say he ends  
 The heartaches and the thousand penalties  
 That taxpayers are heir to;  
 'Tis a consummation  
 Devoutly to be wished.  
 To evade, to cheat,  
 To cheat, perchance to be caught;  
 Aye, there's the rub.  
 For in that failure to file, what penalties may come,  
 When he has shuffled off to jail to toil, must give us pause.  
 The penalties, there's  
 The respect that makes honest taxpayers of our mortal clients.  
 I would like to examine with you this afternoon these penalties

and pitfalls built into our gift tax system which enjoin us to prod our reluctant clients along the stony paths of compliance, reporting and tax-payment, despite their natural and mulelike inertia where such matters are concerned.

I will discuss first the requirements of filing returns and paying gift taxes, followed by a description of typical situations in which we may discover that our clients should have, but have not, filed returns. Next I will outline the criminal and civil sanctions built into the gift tax system to persuade taxpayers to do their duty, the enforcement picture in this District, and I will conclude by touching briefly on the subject of "Ethical Considerations."

*Requirements of filing returns and paying gift taxes.* Our first inquiry is: What are the requirements for the filing of gift tax returns by donors, and what are the conditions under which donors are required to pay gift taxes on their gifts?

For a brief period in 1924 and 1925 there was a gift tax law in effect, which was repealed. For practical purposes I think we need not concern ourselves with gifts made during that period. The present gift tax laws, however, originated in 1932. We are therefore initially concerned with any gifts made during the more than twenty-five years since June 6, 1932, the effective date of the first Act.

During this period it has always been required that a return must be filed by any individual who makes a gift or gifts to any one donee in any one calendar year, which gifts exceed the annual exclusion. The annual exclusion has been changed twice during this period.

For the years 1932 through 1938 the annual exclusion was \$5,000. The annual exclusion for the years 1939 through 1942 was \$4,000, and then beginning in 1943 and continuing to date the annual exclusion has been \$3,000.

This requirement for filing a gift tax return applies to charitable donations as well as private gifts to relatives, paramours and other objects of the donor's bounty.

With respect to gifts made after April 2, 1948, married donors are given the right to have their gifts treated as having been made one-half by the donor and one-half by the donor's spouse, if the spouse consents to this arrangement. The consent must be signified on the gift tax return when filed. There are certain circumstances in which the right to split the gift may be lost, and this will be discussed later. With respect to the question of whether a gift tax return is required in a situation in which the gifts are being split between the husband and wife, the rule is that if without splitting

the donor would be required to file a return, then he is required to file a return even though as a result of the splitting his share of the gift may be less than the annual exclusion. The spouse who is not the donor is not required to file a return unless his or her one half of the gift, after giving consideration to the splitting, is great enough to exceed the annual exclusion. Also, beginning in 1948, gifts by one spouse to the other may be treated as a gift of only half the value of the property.

There is one exception to the annual exclusion which should be borne in mind. That is that if the gift is a gift of a future interest, then the gift is not entitled to the annual exclusion, and any amount of a gift of a future interest subjects the donor to the requirement of filing a gift tax return. There is an exception to this exception in the case of a gift to a minor, where the rule under the 1954 Internal Revenue Code now is that a gift to a minor will qualify for the \$3,000 gift tax exclusion if the property given and the income therefrom may be used for the minor's benefit during his minority, and if the unexpended property and the accumulated income will be distributable to the minor outright at age 21. A further requirement is that if the minor dies before reaching age 21, the property and its accumulated income must pass to his estate.

Thus, the lawyer has a number of situations to keep in mind in determining whether his client may have unlawfully failed to file a gift tax return in connection with transfers made during the past twenty-five years. He must consider whether the transfers in any one year exceeded the amount of the annual exclusion applicable to that year, whether the transfers were transfers of future interests, whether the transfer, if a future interest and if transferred to a minor, comes within the exception, and whether the spouse other than the donor has or intends to consent to the splitting of gifts made by the donor.

If the gift is determined to be a reportable gift, then the donor is required to file a donor's return on Form 709. On this form he is required to list not only the gifts for the current year, but also prior taxable gifts. The instructions on Form 709 require the donor to list the "correct amount of the taxable gifts for each prior year during which gifts were made" and not merely the amounts reported on any returns made in such year. Thus, if the donor is intending to make gifts in the current year which will be reportable, but has failed to report gifts in a prior year, I believe that the Commissioner, through the instructions on the form, has required him to list the earlier gifts, and you, as a lawyer, are obligated to advise him of this fact.

There is a further requirement that if the donor dies before filing his return, his executor or administrator shall file the return. Likewise, if he becomes incompetent before filing his return, his guardian shall file the return.

In addition to the requirement that the executor file any gift tax return which the decedent failed to file during his lifetime, there is a requirement that, where a federal estate tax return must be filed, certain questions must be answered by the executor on the estate tax return Form 706 which pertain to gifts made by the decedent during his lifetime. These questions appear on Schedule G. The executor is asked to state whether the decedent made any transfers within the general categories which would require them to be includable for estate tax purposes, such as transfers made in contemplation of death, transfers taking effect at death, etc; and whether the decedent at any time made any gifts of \$5,000 or more which are not believed to be includable in the gross estate. If the question is answered "yes," details must be listed. Next the executor is asked whether any transfers at all were made within three years immediately preceding the death of the decedent, and if any such transfers were of an amount of \$1,000 or more, details must be furnished. The executor is also asked whether the decedent had created any trust during his lifetime.

These questions place a broad obligation on the executor to inquire into the gifts which may have been made at any time by the decedent, and disclose them to the Commissioner.

In addition to the donor's return, there is a return required of the donee who receives a gift or gifts in excess of the annual exclusion, and this return is Form 710. This requirement does not apply to the donee of a charitable gift, but does apply to all other donees.

There is another requirement of which you should advise your client, and that is a record-keeping requirement imposed by regulation of the Commissioner. Pursuant to this regulation every individual shall, for the purpose of determining the total amount of his gifts, keep such permanent books of account or records as are necessary to establish the amount of his total gifts, together with the deductions allowable in determining the amount of his net gifts and such other information as is required to be shown in a gift tax return.

The foregoing, then, gives us a general outline of the requirements for filing of returns and for keeping of records, and we may now proceed to an examination of the conditions creating liability to pay gift taxes.

*Liability for payment of gift taxes.* In computing gift tax liability, only the amount of gifts in excess of the annual exclusions are taken into consideration. From these amounts are deducted charitable gifts and any amount of the donor's specific exemption which is still available to him and which is claimed by him on the gift tax return. Originally the specific exemption, also referred to as the lifetime exemption, was \$50,000 for the years 1932 through 1935. For the years 1936 through 1942 the specific exemption was \$40,000, and for 1943 and subsequent years the exemption is \$30,000. The gift tax liability is computed on the basis of all taxable gifts made at any time by the taxpayer, including those made in the calendar year for which the return is filed, from which is deducted the amount of tax computed on the basis of gifts made in prior years, except that no greater specific exemption can be claimed than that in force for the year in question.

If taxable gifts were made in a prior year on which tax should have been paid, the date for payment of the tax is the date when the return was supposed to be filed, that is, March 15 for years up to and including 1954 and April 15 thereafter. The tax is therefore delinquent from that date.

The law and the regulations impose a personal liability for the tax on the donor. They also impose personal liability on the donee of any gift for payment of the donor's gift taxes, if the gift taxes were not paid by the donor when due, and the donee's liability is limited only by the value of his gift. It is not limited to the tax attributable to his gift. In fact the donee has been held to be liable for the donor's gift taxes due as the result of gifts to other donees during the year, even though the gift to the donee was free of tax. Furthermore, the liability of the donee is a direct liability, and it is held that he is not entitled to reimbursement from the donor for gift taxes the donee is required to pay.

The beneficiary of a trust is liable for the donor's gift taxes owing in a year when gifts were made to the trust, the beneficiary's liability being limited to the value of the beneficiary's interest in the trust resulting from the gift.

Thus, we see that the donor, the donees and the executor or administrator or guardian of the donor or donee may be in trouble if they fail to file returns, if they fail to keep records in accordance with the requirements of the regulations and particularly, of course, if they fail to pay taxes which are due. I would now like to suggest a few examples of situations which are likely to be brought to your attention from time to time by your clients, and which should cause you to make further investigation of the facts

to determine whether there has been a failure on the part of your client to comply with the gift tax law and regulations.

*Typical gift situations where there may be failure to comply.* A gift is considered to be a transfer of property for less than an adequate and full consideration in money or money's worth. Thus, a transfer may constitute a gift not only where there is no consideration other than love and affection for the gift, but also where the consideration is less than adequate compared to the value of the gift itself. The adequacy of the consideration must be measured in money or money's worth, thus including as gifts transfers made for love and affection.

Transfers pursuant to antenuptial agreements, made in consideration of the release of dower and marital rights are not considered to be transfers for an adequate consideration, and therefore they are treated as gifts for gift tax purposes. Transfers made pursuant to divorce and separation may be considered transfers for an adequate consideration, however, if certain requirements are met. Generally these requirements are that the transfer be pursuant to a written agreement, and that a divorce occur within two years thereafter.

From time to time you have the opportunity to do estate planning, will drafting, business planning, such as the creation of partnerships or corporations, or the reorganization of existing business entities. You will have occasion to deal with clients on domestic relations matters. In any of these situations you may come across facts indicating that gifts have been made by your clients or to your clients.

I believe it is your duty to make inquiries whenever you suspect that there may have been transfers for less than an adequate consideration.

Typical situations involving such transfers include the following, to which you may no doubt add many others. The client may have transferred an interest in his business, his farm or his ranch, to his wife or his children. There may have been transfers of stock in the family corporation, or transfers of partnership interests. There may have been sales of property to the wife or children for less than an adequate price.

A property settlement incident to a separation or separate maintenance, not followed within two years by divorce, would involve a transfer which would be considered a gift.

Transfers made pursuant to antenuptial agreements are gifts.

Your client may have created an inter vivos trust, or your



client may be the beneficiary of an inter vivos trust created by his parents or others.

Joint tenancy interests in real or personal property may have been created, where one joint tenant did not contribute his or her share of the purchase price.

Your client may have made charitable gifts, or gifts to his college or school.

Your client may have paid his son's mortgage or other indebtedness. Or he may have released an indebtedness owing to him by one of his relatives. He may have created life estates or remainder interests. He may have given away some valuable life insurance policies or paid premiums on policies owned by another.

Let us then discuss the considerations which the attorney should bear in mind in advising his client what to do about a situation where the client has made a reportable or taxable gift at some time prior to his visit to your office but has not reported the gift. This involves a consideration of what I will term the sanctions imposed by law for failure to file a gift tax return and for failure to pay gift taxes when due. The sanctions are both civil and criminal, and the civil and criminal aspects will be discussed separately. Sanctions are imposed by law for failure to file gift tax returns or failure to pay gift taxes when due.

*Criminal sanctions.* The criminal sanctions are concise and to the point, and frankly, if there was much likelihood of their being resorted to by the Government, they could very well cause some sleepless nights not only for your client but also for yourselves unless you adopt a very stern attitude in favor of compliance with the gift tax requirements in your dealings with your clients. However, as I shall refer to later, there is little use of the criminal sanctions in gift tax matters in this district.

Article 7201 of the Code makes it a felony to willfully attempt to evade or defeat any tax or the payment thereof.

Article 7203 applies to any person required to make a return or keep records or supply information, and provides that any such person who willfully fails to make a return or pay the tax or keep the records or supply the information at the time or times required by law or regulations shall be guilty of a misdemeanor.

The foregoing sections probably would apply only to your client, but Article 7206 might apply to yourself as well as to your client. It provides that any person coming within its terms shall be guilty of a felony. Article 7206 applies first to anyone who willfully makes and subscribes a return, statement or other document

verified by a written declaration that it is made under the penalties of perjury, and which such person does not believe to be true and correct as to every material matter.

Article 7206 further applies to anyone who willfully aids or assists in, or procures, counsels or advises the preparation in connection with, any matter arising under the Internal Revenue Laws of a return, affidavit, claim or other document which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present the return. Thus, even though your client might wish to file a false return, you yourself are not excused if you have counseled him or helped him in the preparation of such a return.

Article 7207 provides that any person who willfully delivers or discloses to the Secretary or his delegate any return, account, statement or other document known by him to be fraudulent or to be false as to any material matter shall be fined not more than \$1,000, or imprisoned not more than one year, or both.

The other sections mentioned carry fine and imprisonment penalties also. Thus we see that the criminal sanctions on their face are very serious and apply both to lawyers and clients. There is a limitations section, Article 6531, which limits the prosecution of such crimes to cases where the indictments are found or the informations instituted within three years next after the commission of the offense, except that the three-year limitation is extended to six years for the following types of crimes:

Defrauding or attempting to defraud the United States;

Willfully attempting to evade or defeat payment of tax;

Willfully aiding, assisting in or procuring counselling, or advising on the preparation or presentation of false or fraudulent returns, claims or other documents, whether or not the falsity or fraud is with the knowledge or consent of the person required to file the return;

Willfully failing to pay any tax or make any return at the time required;

Verifying a false statement or false document with knowledge that it is fraudulent or false.

Therefore, the six-year limitation actually applies to most any criminal sanction which we have considered.

*Civil sanctions.* If the criminal sanctions do not persuade your client to deal honestly with his Government, then the civil sanc-

tions certainly ought to leave no doubt in his mind that a return should be filed, and tax paid, with respect at least to gifts which subjected him to tax.

Most of the noncriminal factors included in the gift tax system which tend to make it desirable for the taxpayer to do his duty, and which I am grouping under the general heading of civil sanctions, apply particularly to the situation where the taxpayer has failed to pay a gift tax, rather than the situation where his failure is only a failure to file a return on which no tax was due in any event. These civil sanctions include liens imposed upon the property of donors and donees, penalties in the nature of additions to the tax, and a few miscellaneous situations where the taxpayer may lose some right by not filing the return, such as the right to split the gift with his spouse, and the right to have the values fixed so that they can not later be attacked by the Government.

Article 6324 of the Code provides that the tax due as a result of the donor's gifts for the calendar year is a lien, which lien continues for ten years from the time the gifts are made. Thus, the donee received the property subject to a lien for any gift taxes owing by the donor for gifts made during the year, and the lien is not limited to the portion of the gift tax allocable to the gift which the particular donee has received. If the tax is not paid when due, then the donee becomes personally liable for the tax to the extent of the value of the gift which he has received. If the donee transfers the property to a bona fide purchaser or mortgagee for an adequate consideration, then the property which was the subject of the gift is divested of the lien, but the lien to the extent of the value of the gift attaches to all of the other property of the donee, including after-acquired property. Thus, the donee has personal liability, and has a lien on the gift property, and in the event of the transfer of the gift property, he has a lien on all of his property for the amount of the tax limited by the value of the gift.

The donee, therefore, has a real incentive to ascertain that the donor files a proper return and pays the tax.

If the donee is a trustee, the beneficiaries of the trust become liable for the tax to the extent of their interest as beneficiaries of the trust in the gift made to the trustee.

This special lien statute, Article 6324, imposes a lien upon the donee and the donee's property. The general lien statute, Article 6321, imposes a lien on all of the property of the persons liable to pay any tax, which therefore would include the donor and the donee, if such person neglects or refuses to pay the tax after demand. Therefore the lien for gift taxes applies to the donee im-

mediately, but does not apply to the donor until demand for payment has been made.

*Penalties.* What penalties may accrue to the taxpayer upon failure to file a return and pay the gift tax due? In the first place, interest at the rate of 6 percent per annum shall be paid from the time when the tax was due until the tax is paid. For failure to file a return on the date prescribed therefor, Article 6651 provides for a penalty of 5 percent of the amount of the tax for each month of delinquency, with a maximum of 25 percent, unless it is shown that the failure to file a return is due to reasonable cause and not to willful neglect. Apparently if there is a failure to file, but there was no tax due in any event, this provision would not result in a penalty. It has been held by the Board of Tax Appeals in one case that the lack of familiarity with the law on the part of the administratrix, plus reliance upon the advice of an attorney who contended that a return was not necessary under the circumstances, constituted reasonable cause, and no penalty was assessed. On the other hand, it has been held by the Sixth Circuit that ignorance of the law is no excuse for failure to file a timely return.

Even one day of delinquency can result in the assessment of a 5 percent penalty.

The penalties for failure to pay the tax when due are, of course, more serious.

It is provided in Article 6653 that if any part of the underpayment is due to negligence or intentional disregard of the rules and regulations, there shall be added a penalty equal to 5 percent of the underpayment. It is further provided that if any part of the underpayment is due to fraud, there shall be added to the tax as a penalty an amount equal to 50 percent of the underpayment. It is further provided that if a penalty is assessed under this section for fraud, then no penalty is to be assessed under Article 6651 for failure to file a return, in order to avoid adding the penalty for failure to file a return to the penalty for failure to pay the tax. Article 6653 provides that an underpayment of tax is the difference between the tax actually due and the tax shown as due on the return. Thus in the case of late filing the entire tax due will be considered the underpayment. This is another incentive for filing the returns on time.

Article 6659 provides that the additions to tax and penalties became a part of the tax, which therefore subjects the donee to liability for the penalties resulting from the donor's failure to file a return or pay the tax.

*Miscellaneous factors.* Leaving the area of liens and penalties, I would like to suggest a few miscellaneous points for consideration with respect to the problems which might result from failure to file returns or failure to pay tax. One of the important benefits granted to taxpayers with respect to gifts made after April 2, 1948, was the right to have the gift of a spouse treated as a gift by both husband and wife, and split between them, if they both consented to the splitting. However, certain formalities must be complied with in order to be certain of this privilege.

Article 2513 provides that in order for the splitting to be effective, both husband and wife must consent to this special treatment as to all gifts made during the calendar year by either of them. The consent may be signified at any time after the close of the calendar year, except that it may not be signified after April 15, the due date of the return, if the husband and wife had filed returns before that date without signifying such consent. If neither files a return before the due date, the consent may be signified at any time up to the time when either of them files a return. However, there is one further exception, and that is that the consent may not be signified after a notice of deficiency has been sent to either spouse.

In other words, if you do not urge your client to file a return as soon as the delinquency is discovered, it is possible that the Government will discover the delinquency also, and if they send a notice of deficiency, then your client will no longer be able to claim the splitting advantage. This is another reason for not delaying in the filing of a return after you have discovered that there is a delinquency.

It has been held in some cases that the executor of a decedent may indicate the consent of the decedent to the splitting of gifts. Arkansas, Colorado and Illinois have passed laws specifically permitting the executor to consent to the splitting where the surviving spouse was the donor. Such a statute might be important, because consent to the splitting also subjects the consenting spouse to liability for the gift tax. Therefore, there could be some question as to whether the executor of the deceased spouse should and would consent to the splitting of gifts made by the surviving donor. Apparently where the donor is the decedent, there should be no question but what the surviving spouse is authorized to consent to the splitting of the gift on the return filed by the executor.

Apparently there is no limitation on the claiming of the specific exemption, or any part thereof, as a deduction, even though the return is filed late. Therefore, I cannot find where the donor is

incurring any risk of loss of the right to claim his specific exemption by failure to file the return when due.

There is one additional advantage to filing a return where there will be a gift tax owing, and that is that under Article 2504, if a return has been filed with respect to gifts for a preceding year, if any tax has been paid in connection with the return for that year, and if the time has expired for assessment of the tax, then the value of the gift as returned cannot be questioned by the Government in connection with the computation of taxes for 1955 and subsequent years. This could be quite important where, for example, a client is making periodic gifts of stock in his family business. If the gifts are great enough that they result in even one dollar of tax, then the valuations become final after the limitations period has run. Where, however, he limits his gifts to amounts which do not quite require payment of tax, then the Government might, in the audit of a gift tax return involving current gifts, be able to go back for a period of many years and claim that his ideas of the value of the gifts made in previous years were quite inadequate and assess a tax and penalties which might be severe.

This suggests the possibility that it might be to the advantage of your client in some cases not to claim all of his specific exemption in connection with gifts for a particular year, but claim only enough to reduce the tax to a minimum amount, so that there will be some tax on the gift. Or if he has already used up his specific exemption, it might be well to have him make gifts which are slightly over the annual exclusion instead of slightly under the annual exclusion in order to commence the running of the statute of limitations on valuations claimed by the client.

There is one other practical reason for advising a client against failing to file returns on gifts made in prior years. Because of the requirements that the executor disclose gifts made in prior years, there is some likelihood that the Government will eventually catch up with the client. He no doubt will have some records and some memory as to the dates and values of gifts made in previous years, and the tracing of the funds which were used to purchase the property which was the subject of gifts. It might be a very practical advantage to have these facts accumulated, analysed and reported in gift tax returns during the client's lifetime, rather than waiting until after his death when the facts may not be so easy to ascertain.

*Limitations.* We should now examine the limitations applicable to civil sanctions. Article 6501 imposes a limitation on assessments and collection of tax. The assessment shall be made within three years after the return was filed, and no proceeding in court without

assessment for the collection of the tax shall be begun after the expiration of the period. The return, if filed early, is deemed to be filed on the last date when it could have been filed. In other words, the March 15 and April 15 dates are applicable in the case of gift tax returns.

However, there are exceptions extending the limitations period in the following cases: a fraudulent return with intent to evade tax, a willful attempt to defeat or evade the tax and failure to file a return.

Thus if your client for any reason has failed to file his return, there is no limitation applicable.

Finally, if the taxpayer omits items which should have been included as gifts for the year, which items exceed 25 percent of the total amount of gifts stated in the return, the limitations period is extended to six years.

In this connection, if there is any doubt as to whether an item should be included in the return, it is advisable to disclose it in the return, even though it is not listed as a taxable gift, because in determining the items omitted from the total gifts under this provision, there shall not be taken into account any item which is disclosed in the return, even though it is not listed among the total gifts stated in the return. Thus, by advising the Secretary of the existence of a transfer, the three-year limitations period is preserved.

The foregoing limitations apply to the donor. Article 6901, dealing with transferred assets, provides that for assessment, collection and limitations purposes, a donee is treated as a transferee. The period of limitations for assessment of liability on a transferee is one year after the expiration of the period of limitations for assessment against the transferor. Thus, if the limitations period for the donor is three years, the limitations period for the donee is four years. If the liability extends under the transferee provisions to a transferee of the donee, then an additional year is applicable, etc., except that the maximum limitations on transferees of transferees is three additional years.

Therefore, to advise your client properly, you must analyze whether or not the limitations period may have run, not only on criminal penalties, but also on assessment of the tax. If he fails to file a return, he is never free from the possibility of liability. If your client is the donor and has filed a return and the three years have expired, then he is probably in the clear, in the absence of fraud, but his donee may still be subjected to paying a deficiency, if the donee's limitations period has not expired.

Article 6502 provides that where the assessment of tax has been made within the proper period of limitations, then the tax may be collected by levy or by proceedings in court at any time within six years after the assessment of the tax.

*Enforcement picture.* Well, now for a little more cheerful news let me sketch briefly the enforcement picture in the Nebraska District. This information was received from officials of the Director's office in Omaha, who were very cooperative in discussing the gift tax situation. In a few minutes I am going to tell you the amount of estate and gift taxes collected in the Nebraska District during the past two years. Meanwhile, you might see how close you can estimate it.

Altogether there are eighty-five agents handling the field audit work for the Nebraska District. These agents must cover income taxes, estate taxes, gift taxes and excise taxes. Of these eighty-five agents, only six are assigned to the estate and gift tax returns. All six of the estate and gift tax agents are attorneys. Income tax and excise tax agents are not required to be attorneys. Of course the estate and gift tax agents have received special training in estate and gift tax matters. It may be interesting to you to know that at the present time there is no requirement that agents in the field audit division who are covering income tax returns have any special training in estate and gift taxes.

The income tax auditors might stumble onto a gift tax delinquency, and if they do, they are supposed to refer it to the estate and gift tax auditors. Occasionally this happens, but because they are not specially trained in estate and gift tax matters, and because they are not especially looking for estate and gift tax problems, this is infrequent.

One cheery note is that within the past twenty-eight years, according to the memory of an official of the Director's office, there has never been a fraud case on a gift tax delinquency in the Nebraska District and there has only been one estate tax fraud case. Whether this is a result of inherent honesty in the Nebraska taxpayers or insufficiency of the enforcement staff of the Director's office I will leave to your own judgment.

Each year the Nebraska District receives between 800,000 and 900,000 returns of all types, and of course the overwhelming number of these are income tax returns. A little rough arithmetic brought me to the conclusion that there is one field audit man for every 10,000 returns filed in Nebraska.

In the first six months of the year 1957, there were 666 gift tax returns and 340 estate tax returns filed. Thus in a six-month period



there were a total of 1,006 returns filed in the division covered by six field audit men. Therefore the estate and gift tax auditors had 167 returns filed per agent in the six-month period, or an average of 333 per year. Obviously there is much closer opportunity for checking of the estate and gift tax returns than the income tax returns.

It was surprising to me to learn that the total amount of collections of estate and gift taxes in the Nebraska District for the year ending June 30, 1957, was \$6,306,028.08. The collections for the preceding year ending June 30, 1956, were \$6,012,159.03.

With respect to the question of delinquent gift tax returns, the estate and gift tax field audit men are supposed to study the answers to the questions required of the executor on Schedule G of the estate tax return. If it is indicated that gifts were made and returns were not filed, the estate and gift tax audit men have their duty cut out for them. They must investigate it. If the questions are not answered, then this is also a red flag to them to investigate the question of gifts.

*Ethical considerations.* I would like to wind up this discussion with some comment on the lawyer's ethical responsibility in this field of discovering the client's delinquencies, advising the client about the gift tax requirements, and particularly the responsibility of recommending a course of action for the client to follow. As attorneys, engaged in any tax practice, we are not only subject to the canons of ethics of the Bar Association, but also the regulations governing enrollment and practice before the Treasury Department. It might be in order to review Canon 32 of the Canons of Ethics, entitled "The Lawyer's Duty in Its Last Analysis":

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudi-

cation, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will 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.

In addition to the canons of ethics which govern us, the regulations of the Secretary of the Treasury issued pursuant to authority of Congress govern us. The Secretary is authorized to prescribe rules and regulations governing the recognition of agents and attorneys representing claimants before the Treasury Department. He is authorized to require a showing of good character and good repute. He is authorized, after due notice and opportunity for hearing, to suspend and disbar from further practice before the Treasury Department any person shown to be incompetent or disreputable or who refuses to comply with the rules and regulations.

The regulations issued pursuant to this statutory authority are contained in Circular 230. Section 10.2 (c) provides that each enrolled attorney or agent who knows that a client has not complied with the law or has made an error in, or an omission from any return, document, affidavit or other paper which the law requires such client to execute shall advise his client promptly of the fact of such noncompliance, error or omission. Sub-paragraph (g) provides that every claim, affidavit, written argument, brief or statement of fact prepared or filed by the enrolled attorney or agent in any matter pending before the Treasury Department shall have affixed thereto a statement signed by such attorney or agent showing whether he prepared such document and whether he knows of his own knowledge that the statements and facts contained therein are true.

Section 10.10 (b), dealing with disreputable conduct, sets forth certain acts which are deemed to constitute disreputable conduct and therefore subject the attorney to disbarment from practice before the Treasury Department. These include preparing or filing for himself or another a false federal income tax return or other statement on which federal taxes may be based, knowing the same to be false. They include suggesting to a client or prospective client an illegal plan for evading payment of federal taxes, knowing the same to be illegal. They cover the giving, with intent to deceive, of false or misleading information relative to a matter pending before the Treasury Department to any officer or agent of that department.

It seems to me that, as officers of the Court, as attorneys enrolled to practice before the Treasury Department, and as min-

isters of the law, it is our duty not only to point out to our clients the requirements of the statutes and regulations, but that in addition we have the duty to counsel and advise our clients to comply with those laws and regulations, to make the necessary filings and pay the necessary taxes whenever facts are brought within our knowledge indicating that a noncompliance may exist. For the most part, I believe that our clients come to us to advise them on how to comply with the law and keep out of trouble, rather than for advice on how to evade the law and escape the trouble. Even though there is little likelihood of penalties in a case where no tax could be due, it seems to me that we should advise our clients to file gift tax returns as required by law. Certainly, in cases where taxes should have been paid, and therefore penalties and interest are likely, it is our clear duty to advise the client to file the return and pay the tax. If after such explanations, disclosures and recommendations have been made, the client persists in refusing to file the return or pay the tax, then at least you as the lawyer will have discharged your responsibility. I think it would be most unfortunate, however, if a client who had discussed the matter with his lawyer and had not been advised to pay the tax is subsequently caught by the Treasury Department and penalized for his delinquency. In my opinion there would be at least a possibility of personal liability on the part of the attorney for failing to counsel his client properly in such case.

Therefore, I recommend that the answer to the question "to file or not to file" is clearly "to file." Thank you.

CHAIRMAN MILLER: Does anybody have any questions they would like to ask John?

VOICE: Is there a practical way to protect the donee?

CHAIRMAN MILLER: The question is, is there a practical way to protect the donee?

MR. MASON: The donee, of course, can only operate on what information is available to him. I think that the donee should make every effort to see that a return is filed by his donor, and, of course, that the tax is paid; if the donor refuses to make information available to him, then the donee may not be in a position where he can effectively protect himself. I do not know for sure what the answer to that is, but at least he can make every inquiry that is possible to ascertain that the donor is doing what he is supposed to do. That is all I know what to say.

MR. EMMERT: Mr. Chairman.

CHAIRMAN MILLER: Mr. Emmert.

MR. EMMERT: Is it really necessary to file a return of a substantial charitable gift?

MR. MASON: My understanding, from reading this material, was that a charitable gift from the donor's standpoint is no different than any other gift, and if it exceeds the annual exclusion it should be reported by the donor but not reported by the donee, and of course it would not be subject to the tax, if it is a true charitable gift.

CHAIRMAN MILLER: Are there any other questions? Art.

ARTHUR KNAPP: In a case where the husband *A*, who is the whole property owner, enters into an antenuptial agreement with *B* and then dies within one year. In the payment of a hundred thousand dollars, would it be made in view of all dower and so forth, and then the executor in the first ninety days of probate settles that, what is the effect of it when the executor makes out the federal estate tax?

MR. MASON: You mean the transfer was not completed during lifetime:

MR. KNAPP: No transfer was made until after that death.

MR. MASON: But there was an obligation to make the transfer; is that right?

MR. KNAPP: That is right, the antenuptial agreement.

MR. MASON: I do not know for sure if I know what the answer would be to that. I think it would be the same to make a gift that was not completed at the time of death, but it was completed by the executor. Now whether that subjects it to a gift tax or not, I mean, is it a gift—but it seems to me offhand that it might, that the contract itself might constitute the giving of property interests or property rights. The contract is valuable, in other words, and perhaps it would be a gift at the time that the contract was signed. I am not sure.

VOICE: Is the purchase of a five hundred dollar bond payable on death to the beneficiary included in the actual exclusion?

MR. MASON: I think a purchase of a government bond is not a gift anyway.

MR. LAMME: Not a gift?

MR. MASON: Even on the death it would be an estate. It would be no gift at all is the consensus of opinion.

JOHN BAYLOR: Have they removed the requirement that you may not file a gift tax return before December 30 of the year in which the gift was made? In other words, if you are handling a

farm transaction in February, do you still have to wait a year before you can file the gift tax or can you get it out of the way while it is fresh in your mind?

MR. MASON: I was not aware that there was a ruling that prevented you from filing it before the end of a year, so you are two steps ahead of me.

WALTER HUBER: I had one returned and they suggested that I wait until the end of the year to see if there were any more gifts.

MR. MASON: I do not know whether that is a result of the regulation or just a policy. I do not recall seeing it in the regulation, but that does not mean it does not exist.

VOICE: If a husband and wife make a gift of property that truly belongs to them jointly, they do not have to file a return to claim any tax splitting, do they?

MR. MASON: I would think the answer would be if each owned half of the property already, a splitting would not help them any, and therefore they would not need to consent to splitting in a return in order to have advantage of the splitting in effect. That enters the question of where the husband and wife each own half interest in the property and make a gift of it together to a third person.

VOICE: You mentioned only one fraud case in an estate gift tax in many years. Was that a criminal or civil?

MR. MASON: Criminal case. I think he was talking about a criminal fraud case. I was talking to Mr. Hayes, the assistant director, and he made that statement. We were talking about criminal sanctions at that point, and I am pretty sure he meant a criminal case.

TED FRAIZER: I do not want to extend clear over into the estate tax department, but I was fascinated by your suggestion to make slightly over, say, a three thousand dollar gift in order to get the statute, or to pay a small tax to get the statute running as to the valuation. Now in a closely held corporation where ultimately you can foresee a problem of valuation in an estate matter, do you think that if you set your valuation in such a manner to be slightly over three thousand so you had the statute run, and the statute did run, and generally speaking there was no change in valuation of this closely held corporation in the next several years, that your valuation established and on which the statute was running on your gift tax would then stand up for estate tax purposes?

MR. MASON: It would not be legally binding upon the Com-

missioner, in my opinion, in that situation; however, it might have great weight on it. If he had accepted such a valuation previously and there had not been any substantial change in the corporation, he might conceivably be willing to accept it again. But I do not think the limitation that I was suggesting which is in the law and the regulations has significance in the estate tax valuation standpoint, but only from the standpoint of revaluing gifts that were made in an early year in the course of taxing gifts made in the current year.

VOICE: Under the new law is there not a provision that property taken in joint tenancy by husband and wife does not necessarily mean a gift to the wife.

MR. MASON: If it is real estate.

VOICE: It is real estate, but I thought there was a provision in there too that applied only if under the applicable law the joint tenancy could not be terminated by either party. Now I do not know what effect that has.

MR. MASON: That is not right. That would be the effect of it, I believe, in a state that recognizes tenancy by entirety, but, as Bill said, tenancy by entirety could not be terminated, but in Nebraska joint tenancies are subject to that benefit and they are also severable or terminable, so it would not be necessary that they would not be terminable.

VOICE: I was just wondering if in Nebraska then that new provision in the law does not apply to Nebraska.

MR. LAMME: It does apply.

MR. MASON: It is generally thought that it does apply, I am sure of that.

VOICE: Well, it would be correct whether it is going to be considered as a gift or not.

VOICE: A gift of seventy-five thousand dollars on which the gift tax is paid and death occurs a year later. How does that affect the federal estate tax?

MR. MASON: There is a credit of the amount of the gift tax, and a direct credit on the estate tax.

CHAIRMAN MILLER: I want to thank John very much for a very well done paper.

Our next speaker this afternoon is John E. North, commonly known to us here in Omaha as Jack, who is a professor of Taxation at Creighton University, and who I am happy to say is associated

part time in the practice of law with the law firm of Young, Holm and Miller.

Jack, take over.

JOHN E. NORTH: Mr. Chairman, members.

With the enactment of the Marital Deduction in 1948, it has become a rather common practice to insert in the typical wealthy taxpayer's will a marital deduction trust. Each of you has been given a mimeographed copy of the basic provisions which may be found in a testamentary marital deduction trust commonly referred to as the "formula" type. A brief analysis of these provisions in the light of the Internal Revenue Code and Treasury Regulations may serve to highlight the problems involved in obtaining maximum benefits from the marital deduction.

First, let us dispose of a common misconception. The maximum marital deduction will not always afford the maximum tax benefits. The best estate tax consequences will result if the marital deduction is used to equalize the taxable estates of the husband and wife. Consider the following hypothetical situation. John Jones has property and business interests worth approximately \$200,000 and his wife Mary has property worth \$100,000. If John Jones dies first and by his will obtains the maximum marital deduction, the federal estate tax on his estate will be a mere \$4,800. However, his wife's estate must bear the burden of the marital deduction property and at her death, assuming that she has not made any substantial inter vivos gifts, the federal estate tax on her estate will be \$32,700. This produces a combined tax on both estates of \$37,500.

If John Jones had availed himself of exactly one-half of the maximum marital deduction and had limited his wife's interest in his other property to a life estate, the combined federal estate tax on both estates, his and his wife's, would not exceed \$35,800. Thus, by using one-half of the maximum marital deduction rather than the full deduction, there would be a combined federal estate tax saving of approximately \$1,700.

With this in mind, let us examine the first paragraph of the Marital Deduction Trust:

"If my wife (1) survive me, I give to my trustee hereinafter named such sum of money or other property the value of which shall be exactly the sum needed to obtain (2) the maximum marital deduction in determining the Federal estate taxes on my estate after taking into account all other items of my gross estate (whether passing under this will or otherwise) that qualify for said deduction." In using the foregoing formula clause it will be

necessary for you to compute mathematically that percentage of the maximum marital deduction which will produce the maximum estate tax benefits and insert the percentage where the number 2 appears in the formula clause.

The beauty of the formula clause is that it takes into account automatically property which has been specifically devised or bequeathed to the surviving spouse, such as the home, the family automobile, personal effects or any specific sum of money bequeathed outright to the surviving spouse. The formula clause also takes into account inter vivos transfers of property which may be includible in the decedent's gross estate, for example, gifts in contemplation of death, transfers with a reserved life estate and transfers conditioned on survivorship where the decedent has retained a five percent reversionary interest. Care should be taken to insure insofar as possible that the portion of the gross estate which passes to the surviving spouse other than by reason of the formula clause does not exceed in value the amount provided in the formula clause. Otherwise the purpose of the formula clause will be frustrated. To illustrate: If John Jones, having an estate of \$200,000, made a specific bequest to his wife of \$150,000 in Article I of his will, there would not be any point in setting up a formula marital deduction trust in Article II, for he has already bequeathed to his wife an amount in excess of the sum equal to the amount of the maximum marital deduction.

Paragraph 2 of the marital deduction trust authorizes the executor to select and designate the assets which should be placed in the trust. However, the executor's discretion in this regard should not be unlimited. Section 2056 (b) of the Internal Revenue Code provides that an interest passing to the surviving spouse which will fail or terminate upon the lapse of time or the fulfillment of a condition will not qualify for the marital deduction if (1) the decedent has given an interest in this property to a third party for less than an adequate consideration in money's worth, and (2) it is possible that such third party, or his successor, may have the possession or enjoyment of his property interest after termination of the surviving spouse's interest. Suppose that John Jones during his lifetime purchased an apartment building. He acquires the fee interest. Five years before his death, Jones transfers the apartment to his son but reserves a twenty-five year term. At Jones' death the balance of the twenty-five year term would be properly includible in his estate but could not qualify for the marital deduction because it is a terminable interest. The Executor should be precluded from transferring this terminable interest to the marital trust. That is the basic purpose of the



first proviso following Paragraph 2, which states: "Only assets which qualify for the said marital deduction shall pass under this Article."

Due to the structure of the credit for foreign taxes allowed by Section 2014 of the Code and by various tax treaties, a tax saving may be effected if the marital deduction bequest does not include property which is subject to foreign as well as United States death taxes. Thus, if the testator has foreign investments, for example, Canadian securities, it is a good plan to insert the second proviso following Paragraph 2, which reads: "and provided also however, that to the extent possible without reducing the amount of this gift my Executor shall not transfer to this trust any interest in property in respect of which a credit against United States Estate Tax for inheritance, estate or legacy taxes imposed by a foreign country or a political subdivision thereof is provided under a law or treaty of the United States."

A provision should be inserted in every formula marital deduction trust to prevent unforeseen, and possibly undesirable, income tax consequences when the trust is established. A transfer of property by an executor or trustee in discharge of a cash legacy is treated as a sale or exchange, and to the extent that the fixed amount of the cash legacy exceeds the basis of the asset transferred, the executor recognizes a taxable gain. The problem is only significant when there is a substantial change in the value of an asset between the date of death, or the optional valuation date, if selected, and the date the asset is transferred by the Executor in satisfaction of a specific legacy.

Since the rule requires recognition of gain only when there is a specific bequest of a fixed dollar amount, you may be wondering how the rule could be applied to a formula marital deduction trust. This question has been answered by the Treasury in Revenue Ruling 56-270, which involved the following hypothetical problem:

"The decedent bequeathed in trust for the benefit of his wife an amount sufficient to utilize the marital deduction to the maximum extent authorized by Section 2056 of the Internal Revenue Code of 1954 after taking into account any other property with respect to which such deduction is allowable. The income from the trust was to be paid to the wife annually and she was given a general testamentary power of appointment."

The Revenue Ruling states, "The Marital trust was provided for in a fixed and definite dollar amount. Accordingly, capital gains were realized by the estate to the extent that the fair market value of the property on the date of distribution to the trustee

exceeds the fair market value thereof on the date of the decedent's death, or, in the event alternate valuation is elected, the fair market value thereof, on the alternate valuation date." To circumvent the implications of this ruling, and to assure that the Executor will not recognize any taxable gain when the marital deduction trust is actually established by transfer of assets to the trustee, the following provision should be inserted in the trust instrument: "In making the computations necessary to determine the amount of the gift under this Article, all property shall be valued at the values finally determined for Federal Estate Tax purposes, whether by agreement, litigation, or otherwise." Under this provision, which is Paragraph 5 on page one of your mimeographed materials, the basis of the assets transferred to the marital trust and the fixed dollar amount of the marital trust bequest will always be identical. Consequently there can be no gain nor loss when the trust is established.

The marital trust should be specifically named or designated so that it will not be confused with other trusts established by the decedent and so that it may be easily and readily referred to in other provisions of the will. This is the purpose of the sixth paragraph on the first page of the mimeographed materials.

Generally a terminable interest will not qualify for the marital deduction. However, there are three exceptions to this rule, the most important of which is incorporated in Section 2056 b 5 of the Code. This section provides, in substance, that if the surviving spouse is entitled to all the income for life from an interest in property and has a general power of appointment, her interest is not disqualified for the marital deduction.

Under the foregoing section the surviving spouse must be entitled to all of the income from that portion of the interest which qualifies, and that income must be payable to her not less frequently than annually. The Treasury Regulations provide that if the instrument fails to state when the income is to be paid, the interest will not qualify unless local law requires that all income be paid at least annually (Regulation 20.2056 b - 5 e). To meet these income requirements of Section 2056 b, the marital trust should provide "During the lifetime of my wife, the trustee shall pay over the net income of the trust to my wife in periodic installments not less frequently than annually." See Paragraph 1a of the mimeographed materials.

Ostensibly this provision fulfills the income requirements of Section 2056 b. However, your attention is directed to two related problems.

One, the Treasury Regulations provide that a trust containing non-income-producing property which can not be converted will not qualify (Regulation 20.2056 b-5 f 5). If the trustee were required to invest in "growth" stock which did not pay current dividends, or if the trustee had discretion to invest in such stock and could not be compelled by the surviving spouse to convert such stock to income-producing property, the income requirements of Section 2056 b would not be met. To guard against this possibility it may be desirable to insert a Cure-All Clause providing, "Any of the provisions of my Will, including any powers and authorities granted to my Executor or Trustee which could be construed as disqualifying the Marital Trust for inclusion in the marital deduction for Federal Estate Tax purposes shall be deemed to be void in respect of said trust to the extent necessary to permit the qualification of said trust for inclusion in the marital deduction." See the last paragraph on page two of your mimeographed materials.

If the testator is insistent that his wife be given only "growth" stock, or other non-income-producing property, and he does not want her to be able to compel conversion of such property, then you should not use an income and power of appointment trust—the type contained in the mimeographed materials. Instead you should draft an estate trust. An estate trust is one in which the trustee can either accumulate or distribute the income for the benefit of the wife. Since there is no distribution requirement, growth stock is permissible. However, in an estate trust the property must pass to the wife's estate upon her death. She can not be given a general power of appointment; nor can there be any gift over to persons other than her estate. An estate trust need not meet the requirements of Section 2056 b because the interest given to the wife is not terminable since it does not pass at her death from her to third persons, but to her estate.

The second problem in connection with the income requirements of Section 2056 b arises in connection with an administrative provision which gives the trustee power to allocate receipts between income and principal and to determine what is income and what is principal. Could this administrative provision be construed to deprive the wife of her right to receive the income, and all of it, annually, and thereby disqualify the trust for the marital deduction? Considering both the local law of Nebraska relating to trusts and Treasury Regulation 20.2056 b-5 f 4, it would seem clear that the trust would qualify for the marital deduction. However, to eliminate any chance of disqualification, the Cure-All Clause should be used.

The second requirement of Section 2056 b is that the surviving

spouse must be given a power to appoint the trust property to herself or her estate. The decedent may provide that the power of appointment can be exercised by the surviving spouse only during life or only by will (Regulation 20.2056 b-5 g). However, the power must be exercisable alone and in all events. Thus, Paragraph 2 of the marital deduction trust provides, "My wife alone and in all events shall have the power to appoint by a specific reference thereto in her Will the entire corpus of this trust, together with any undistributed income thereof and accretions thereto, to any person, persons, corporation or corporations or to her own estate."

Be sure that exercise of the surviving spouse's power is not made dependent upon joinder or consent of another person. If it is, the marital deduction will be lost (Regulation 20.2056 b-5 g 3). Do not provide in the trust instrument that the power shall be exercisable only so long as the wife is competent. This was treated in *Starrett v. Commissioner*, 223 F. 2d 163, as a condition precluding exercise of the power in all events, even though the mere possibility of future incompetence under local law does not disqualify the power (Rev. Rul. 55-518, 1955-33 Int. Rev. Bulletin 11).

Oftentimes a testator will want the provision inserted that the power shall be exercisable "only so long as my wife remains single." If you accede to his request the marital deduction will be lost.

Paragraph 3 of the marital deduction trust provides for disposition of the trust property upon death of the surviving spouse. If she has appointed the property, of course it will pass according to her appointment. However, in the usual family situation a surviving spouse may be quite willing to let the property pass as her husband wanted it to. She may effectively do this by failing to exercise her power of appointment. For this reason the gift over, in case the power of appointment is not exercised, should be very carefully drawn. A very common and oftentimes desirable disposition is a gift over to the residuary clause.

One final comment. Maximum benefits will only be afforded if the wife is given nothing more than a life estate in nonmarital deduction property. So if you establish a marital trust and a residuary family trust, limit the wife's interest in the family trust to a life estate. You can give the trustee power to invade the family trust for the benefit of the wife during her lifetime but request him not to do so if there is available liquid principal in the marital trust which may be expended for her benefit. By exhausting the marital trust first you will reduce the surviving spouse's taxable estate. Exhausting the family trust will not provide any tax benefit because if the wife has only a life estate, none

of the family trust property will be includible in her estate at her death.

In conclusion it should be mentioned that advantages will be derived from the marital deduction only if the spouse with the most property dies first. The surest way to take care of this problem is to personally administer poison. Since some of you may have moral compunctions against this, there is a second suggestion, though not nearly so effective, that may do some good. Put a clause in the will indicating that in the case of doubt, for example, a common disaster, the testator shall be presumed to have predeceased his spouse.

Now such a provision, if there is doubt, will be recognized by the Treasury Department. In that connection that provision will only be used if the tax savings resulting from the marital deduction will be more than the probate and administration expenses of the wife's estate. If the contrary were true, you would not only not use a presumption that the testator predeceased his wife, but you might condition the marital bequest upon survivorship by the surviving spouse of a period not to exceed six months. If the period exceeds six months, the property will not qualify for the marital deduction.

If there are any questions in connection with the formula clause or marital deduction, I will be glad to try to answer them.

J. TAYLOR GREER: Would you explain again this percentage that would go in the third line? I do not quite understand that.

MR. NORTH: The percentage requires a certain amount of prognostication because you have to estimate what the taxable estate of the husband will be at the date of his death independent of marital deduction, what the taxable estate of the wife will be at the date of her death independent of the marital deduction. So in the illustration that I have there, if we estimate that the husband's estate will be \$200,000 and the wife's estate would be \$100,000, the maximum marital deduction in the husband's estate could be \$100,000. That would reduce his estate to \$100,000 and increase hers to two hundred.

So instead of taking the maximum, we take 50 percent of the maximum, so that we would assure his estate will be reduced \$50,000 to \$150,000, and her estate will be increased \$50,000 to \$150,000. So at the date of death both the estate of the husband and the estate of the wife, the taxable estate, will be identical.

JOHN MASON: I would like to ask a question. I think it is a very, very important point and you have discussed it, but I think

that it might be interesting to see whether everybody agrees with your conclusion.

There are two types of formula clause, the pecuniary clause and the formula clause basically, and this, I think, you have intended as a pecuniary clause to be filled by assets valued as of date of death, I mean, or as estate tax value. Is that correct?

MR. NORTH: Yes.

MR. MASON: I wonder if there would be any possible question about whether the fifth paragraph on the first page actually accomplishes what you want, because it says in making the computation necessary to determine the amount of the gift, you use the estate tax value. And my first reaction in reading that was that that determines the amount of property which is going to go into the marital deduction trust, but I don't think it clearly states that in filling that bequest or distributing property to the marital deduction trust, the distribution value shall be the value. But yet that is a very important part to make clear.

MR. NORTH: That is it, John. By this provision, if the wife sued to get her one-half, she could get only that portion of the property which he actually gave her. That under a federal estate tax computation equalled one-half. In other words in computing the amount of her gift, he has the right to assign any property, and in assigning that property and adding that property up for the purpose of making the computation, you would have to use the values.

MR. MASON: But I do not think that it says that. I believe there are two things that you compute values on. One is determining how many dollars' worth of property is to go into the marital deduction trust to make the marital deduction, and, secondly, on distribution date, what is the value of the property which will be used to fill that bequest. In other words, you compute on the first point that it is going to take \$38,000 or \$138,000 to fulfill the marital deduction trust and get the benefit. And then, what property or what value will be used to make up the \$138,000?

MR. NORTH: Yes, but in determining the amount of the gift by selecting and designating, he also has to compute the amount of the gift on the basis of values for federal estate tax purposes. He is satisfying that in kind.

MR. MASON: I only raised a question of whether this paragraph actually does that, and if I am the only one who thinks there is any question about it, then I am off, but we have been through a case where we had that very argument and that is the reason I am conscious of it.

VOICE: You mentioned residuary trusts and life estate of the widow and also mentioned the power of evasion. I wonder if you would not want to add that that can not be cumulative.

MR. NORTH: It can not be cumulative, of course.

VOICE: It should be limited to a standard.

MR. NORTH: It should be limited to a standard. It can not be cumulative, and it should be limited to a standard. That's right.

VOICE: As I understand it under the new Code, under 54 you no longer have to use the two trusts. You can use one trust.

MR. NORTH: That is right; you can use one trust. You do not have to subdivide into separate trusts, just so the wife has a power to appoint a definite portion of the corpus and just so she has the right to the income annually from that portion of the corpus.

VOICE: One further question. You mentioned on the problem of providing for survivorship. Now are you suggesting that you use those exact words, in case of doubt in the will, or do you mean merely to use that kind of terminology?

MR. NORTH: Use the typical, common disaster clause.

FLAVEL WRIGHT: I do have one question. John Mason has raised a question which his office and our office have had some concern with, and I think he and I both feel that if you do not specify, if you use the language as you have in your form of a sum or amount, it becomes a pecuniary bequest, which is later satisfied by property that has increased in value and this may create an income tax problem. What is your feeling at least with reference to making your bequest in a fractional interest, using that language, rather than a pecuniary amount?

MR. NORTH: One-half of the adjusted gross state, or one-half of the residue.

FLAVEL WRIGHT: Well, do not even say one-half, say a fractional portion, a fractional part.

MR. NORTH: That is right; that would qualify and you would not raise any income tax problem, because you would be making a bequest in kind rather than a bequest in cash.

FLAVEL WRIGHT: I think the speaker yesterday had that suggestion to make.

MR. NORTH: Yes. I think if you make a bequest in kind rather than in cash, but I am not so sure that the revenue ruling would recognize that.

FLAVEL WRIGHT: I understand that there is still some question about that too.

MR. NORTH: You would have a better argument then in the hypothetical question which we have already considered, and it might reasonably apply.

This provision is just set in here to illustrate the problem. Any provision that would make it clear that you are not satisfying a fixed dollar amount with a particular asset will suffice.

FLAVEL WRIGHT: That is what I had in mind.

## HOUSE OF DELEGATES

Friday, November 1, 1957

CHAIRMAN McCOWN: Members of the House, will you come to order, please.

The first item of business on the program is the report of the Section on Real Estate, Probate and Trust Law, Mr. Herman Ginsburg, Chairman. Herman.

MR. GINSBURG: Mr. Chairman, members of the House. The Real Estate, Probate and Trust Section have had a very fine meeting. There were approximately three hundred in attendance. We had some very fine speeches, and a lot of enthusiasm.

I have two particular pieces of business to announce. The terms of Mr. John Fike and me, as members of the Executive Committee of the Section expired, and there were elected in our places L. R. Ricketts of Lincoln and John W. Delehant, Jr., of Omaha.

The new officers of the Section are: Chairman, Fred H. Richards, Jr., of Fremont; Vice-Chairman, L. R. Ricketts of Lincoln; and Secretary, John W. Delehant, Jr., of Omaha.

In addition to the election of officers, at the suggestion of President Kuhns, our Section proposed and there was adopted at the meeting a Code of Bylaws. I understand that the bylaws can not become effective without the approval of this House; I do not think that there is anybody here that would be interested in going through the entire Code at this time.

I might say roughly speaking that the only thing of any significance is that the Articles provide that to the extent therein provided, organization, government and activities of this Section shall be controlled by Article 4 of the By-Laws of the Nebraska State Bar Association, so we are not doing anything that could be in any way construed as straying off the reservation. We are subject to the Articles and By-Laws of the Nebraska State Bar Association.

Then we in turn divided the Section. Because of the manifold



activities that our Section covers, we divided into three divisions: a Real Estate division, a Probate division, and a Trust Law division; and we have four committees under each division, making twelve committees in all, memberships to be appointed by the Executive Committee.

We provide for the management of the business of the Section by the Board of six members of the Executive Committee, two of whom are elected for terms of three years. Then it provides for three officers: a Chairman, Vice-Chairman and a Secretary.

I move, Mr. Chairman, that the report of the Real Estate, Real Property, Probate and Trust Law Section be approved, and the Code of By-Laws be accepted.

VOICE: I second the motion.

CHAIRMAN McCOWN: The motion has been made and seconded. Is there any discussion?

As many as favor the motion say "aye."

Opposed, the same sign.

The motion is carried.

**Nebraska State Bar Association  
By-Laws of the Section of  
Real Estate, Probate and Trust Law**

**ARTICLE I**

This Section shall concern itself with the study of all questions relating to real estate, probate and trust law.

**ARTICLE II**

Any member of the Nebraska State Bar Association who wishes to take part in the work of this Section shall be entitled to membership in this Section.

**ARTICLE III**

To the extent therein provided, the organization, government and activities of this Section shall be controlled by Article IV of the By-Laws of the Nebraska State Bar Association.

**ARTICLE IV**

There shall be the following divisions of the Section which shall in turn have standing committees with duties as hereinafter set forth, to-wit:

A. Real Estate Division, which shall consider all matters per-

taining to real estate law, and said division shall have the following committees:

1. Committee on Title Standards, which shall consider standards for the examination of abstracts of title
2. Committee on Improvements in Conveyancing and Recording Practice
3. Committee on Current Legislation Relating to Real Property
4. Committee on Current Decisions and Literature on Real Property Law

B. Probate Division, which shall consider matters concerning probate law and shall have the following committees:

1. Improvements in probate procedure
2. Drafting of wills
3. Inheritance taxation
4. Fees and commissions in probate proceedings
5. Significant decisions and literature on probate law

C. Trust Law Division, which shall consider all matters relating to trust law in all its aspects and shall have the following committees:

1. Drafting trusts
2. Significant legislation, literature and decisions on trust law
3. Taxation of trusts
4. Trust procedure
  - a. The several committees shall investigate, study and make recommendations concerning the matters which are within the jurisdiction of their respective committees and shall report to the Executive Committee of this Section.
  - b. Each division shall have a chairman to be appointed by the Executive Committee of this Section.
  - c. Each of said committees shall consist of the chairman and as many members as the Chairman of the Executive Committee shall designate to be appointed by him, unless such number has been determined by the members of the Executive Committee. All such committee appointments shall be for a term of one year, or until the next annual meeting of the Section.

D. The Chairman of the Executive Committee may appoint special committees and define their duties. Special committees shall automatically cease to exist at the regular annual meeting of

the Section unless continued by the Chairman of the Executive Committee of this Section.

#### ARTICLE V

*Officers.* The officers of this Section shall consist of a Chairman, Vice-Chairman and Secretary. As soon as possible after the annual meeting of the Section, the Executive Committee of this Section shall meet and elect such officers from among their number, preferably immediately following the adjournment of the annual meeting of the Section.

##### Duties of officers:

1. *Chairman.* The Chairman shall preside at all meetings of the Section and of the Executive Committee. He shall formulate and present at each annual meeting of the Section a report of the work of the Section for the then past year. He shall be responsible for and perform all duties ordinarily incident to his office and shall recommend such action as he deems proper. He shall be responsible for the program of the Section and its various divisions in connection with the annual meeting of the Section and shall have the same prepared in cooperation with the members of the Executive Committee.

2. *Vice-Chairman.* The Vice-Chairman shall act as chairman in the absence of the Chairman or in his refusal or inability to act.

3. *Secretary.* The Secretary shall keep minutes of all meetings, recording the same in a permanent book therefor and shall send copies of the same to all members of the Executive Committee.

4. In the event both the Chairman and the Vice-Chairman are unable to serve or fail or refuse to serve, then the Executive Council of the Nebraska State Bar Association shall designate one of the members of the Executive Committee of this Section to serve as Chairman.

#### ARTICLE VI

*Meetings.* 1. The annual meeting of this Section shall be held at the same time as the annual convention of the Nebraska State Bar Association and at a time and place to be designated by the Executive Council of the Nebraska State Bar Association.

2. Special meetings of the Executive Committee may be called by the Chairman of this Section or by any three members of the Executive Committee of this Section. Special meetings of the Executive Committee shall be called on not less than five days' notice to the members of the Executive Committee. Any such special meeting may be adjourned from time to time as determined by

the Chairman and members present, whether there be a quorum present or not.

3. For meetings of the Executive Committee three members shall constitute a quorum.

4. The order of business of the annual or any special meeting of the Section or of the Executive Committee shall be at the discretion of the Chairman, unless such order of business is otherwise fixed by a majority of the members of the Section or of the Executive Committee present.

#### ARTICLE VII

*Executive Committee.* 1. The Executive Committee shall have such powers as are normally exercised by such bodies and shall have general charge of the affairs of the Section between meetings with power to act subject to any limitations contained in the By-Laws of the Nebraska State Bar Association or direction by resolution of the Section.

2. Any action of the Executive Committee shall be by majority vote of the members present.

3. Members of the Executive Committee when personally present at a meeting of the committee shall vote in person but when absent may communicate their vote, in writing, upon any proposition to the Secretary and have it counted, with the same effect as if cast personally at such meeting.

4. The Chairman of the Section may, and upon the request of any three members of the Executive Committee shall, submit or cause to be submitted in writing, to each of the members of the Executive Committee, any proposition upon which the Committee may be authorized to act, and the members of the Committee may vote upon such proposition or propositions as submitted by communicating their vote thereon in writing over their signatures to the Secretary, who shall record upon his minutes such proposition so submitted, when, how, at whose request same was submitted and the vote of each member of the Committee thereon, and keep on file such written and signed votes. If the votes of a majority of the members of the Executive Committee shall be in favor of such proposition, or if such majority shall be against such proposition, such majority vote shall constitute the binding action of the Executive Committee.

#### ARTICLE VIII

These By-Laws, approved by the Executive Committee, shall be submitted to the Section at its regular annual meeting in the year 1957 and upon approval by a majority of the members of the

Section present and voting, shall thereupon be submitted to the House of Delegates of the Nebraska State Bar Association and upon approval by the House of Delegates, shall become effective.

#### ARTICLE IX

These By-Laws may be amended at any annual meeting of the Section by a majority of the members of the Section present and voting. Any proposed amendment to these By-Laws shall first be submitted to the Executive Committee of this Section for approval before submission to the Section. Any amendments approved by the Section shall forthwith be submitted to the House of Delegates of the Nebraska State Bar Association for its approval before such amendments shall become effective.

#### CERTIFICATE

The undersigned Secretary of the Executive Committee of the Real Property, Probate and Trust Law, hereby certifies that the above and foregoing to be a true copy of the By-Laws of this Section adopted by the Executive Committee at a duly called meeting thereof on the 21st day of September, 1957.

DATED this 26th day of September, 1957.

Lynn E. Heth, Secretary

CHAIRMAN McCOWN: The next item of business is the report of the Section on Insurance Law, Mr. Floyd Wright, Chairman.

MR. WRIGHT: Mr. Chairman and members of the House. The Section on Insurance Law was well attended. We had two fine talks by two fine lawyers from Chicago.

We elected as members of the Executive Committee A. J. Luebs of Grand Island and Milton Murphy of North Platte.

Mr. Harold Kauffman was elected Chairman of the Section for next year, and Mr. Luebs, Secretary.

CHAIRMAN McCOWN: Thank you, Floyd. The report of the Section on Insurance will be accepted and placed on file.

The next item of business is the report of the Section on Taxation. They are probably working on it, so I will skip to the next one.

The next item, the Report of the Section on Practice and Procedure, Mr. George Healey.

SECRETARY TURNER: I have that report, Mr. Chairman.

The Chairman asked me to give you the following report. The meeting of the Section on Practice and Procedure was held at 2:00 P. M. on Thursday, October 31, with the Honorable E. B. Chappell

as Moderator. A panel discussion was conducted by James Dempsey, Esquire, of White Plains, New York, and Isidore Halpern, of Brooklyn, New York.

The program was well attended and well received.

The nominees nominated by the Executive Council were voted upon by ballot, and those selected for a three-year term were David Dow and Joseph McGroarty.

CHAIRMAN McCOWN: If there are no objections or corrections, the motion will be accepted and placed on file.

The next item of business will be the report of the Section on Municipal and Public Corporations, Mr. Jack Pace, Chairman.

SECRETARY TURNER: I also have that, Mr. Chairman. Mr. Pace asked me to report to you that their regular meeting was held, and the program as printed followed.

Those elected to the Executive Committee were Anne Pickett Carstens of Beatrice and Albert P. Madgett of Hastings.

Officers of the Section elected by the Executive Committee are: Chairman, Harold Rice; Vice-Chairman, Winthrop Lane; and Secretary, Anne Carstens:

CHAIRMAN McCOWN: There being no objections, that report will also be received and placed on file.

They are probably still doing some tabulation on the Section on Taxation.

Is there anyone present from the Junior Bar Section who can report for that Section? If not, whenever you are ready, Keith, you will let me know.

KEITH MILLER: Give me about three minutes.

CHAIRMAN McCOWN: I think at this time, rather than defer it until a later time, may I express my appreciation to each one of you for your attendance as members of this House, both on this occasion and on previous occasions of last year. Certainly you have made the task considerably easier for the Chairman.

As far as I can recall no one has made a motion to supplement a motion and so forth, which would get me into trouble, and therefore not having had this problem I have not been in the trouble as I might well have been, because I assure you that Robert's Rules of Order are far from any subject with which I am familiar. So I appreciate the fact you have been cooperative in that respect.

Now I would like to present to you the new Chairman of the House of Delegates for the Nebraska State Bar Association for the coming two year term. Dick Hunter, will you come up please.

On behalf of the House of Delegates, I want to present to you the gavel of your office and wish for you the very best in that job, and I hope that you will have the same full cooperation that I have had from all of these gentlemen in the past two years.

Good luck to you, Dick.

MR. HUNTER: Thank you.

CHAIRMAN McCOWN: We have a section here that says "presentation of any matter any Section or Committee wishes to bring before the House of Delegates." Is there any unfinished business that anyone wishes to discuss?

PRESIDENT KUHNS: Mr. Chairman, you will recall a committee that you appointed consisting of Tom Quinlan, Mr. Yost and me on this matter of possible amendment to the rules. There is a committee report which Tom Quinlan has had typed and on which he has done most of the work. I think it should be submitted at this time.

CHAIRMAN McCOWN: I think now would probably be the best time.

This is the Committee that was appointed with respect to the recommendations made by Bart, concerning succession and so forth in the membership presidency of the Nebraska State Bar Association.

MR. QUINLAN: Mr. Chairman, we have a written report. It is not very long and I shall read it to you and then move its acceptance.

The Committee to consider the proposed creation of the office of President-Elect of the Association, consisting of Barton H. Kuhns, Charles H. Yost and Thomas C. Quinlan, submits the following report.

The Committee approves the proposal to create an additional office of the Association with title of President-Elect, the member so elected to hold office for one year with automatic succession to the office of presidency, in the case of death, disqualification, resignation or removal from the state of the President, the right of immediate succession in lieu of the Chairman of the House of Delegates.

The member so elected should become a member of the Executive Council. The rules regulating the Association as promulgated by the Supreme Court will require revision to make the proposal effective.

Article 5, Section 1 of the Rules designates the officers of the Association as a President, Chairman of the House of Delegates, and a Secretary-Treasurer, with the President elected for a term

of one year and the Chairman of the House of Delegates for a term of two years. This Section will have to be enlarged to provide for the office of President-Elect and provide for a term.

Article 5, Section 1, Sub-paragraph a designates the duties of the office of President, and b, the duties of the Chairman of the House of Delegates. A section setting forth the duties of the office of President-Elect will be required.

Article 5, Section 1, Sub-paragraph b limits the eligibility for the election of the President and Chairman of the House of Delegates to those members who have served previously as members of the House of Delegates or the Executive Council, effective at the close of the annual meeting in the year 1958. A like provision covering the office of President-Elect will be required.

Article 5, Section 3, providing for the Executive Council, should be enlarged to provide that the member holding the office of President-Elect will automatically qualify such member for membership in the House of Delegates.

Article 9 requires a three-fifths vote of the Executive Council and a majority vote of the House of Delegates before a suggested change in the rules can be recommended to the Supreme Court or, in the alternative, recommendation for the change must be submitted in writing to the House of Delegates, and unless approved by a two-thirds vote of the House present, the proposed changes can not be acted upon until the next regular meeting of the House.

Due to time limitations the Committee suggests the alternative method of originating the proposed changes be not followed at this meeting of the House, and that the Executive Council be requested to consider the proposal for the creation of an office for President-Elect, define the duties and term, order of succession, and effective date of creation of such office, and if approved by a three-fifths vote of the Council, to draft the necessary rule changes for presentation to the House of Delegates at the next regular meeting, and in the event of unfavorable consideration, to report such to the House at the next regular meeting.

I move the adoption of the report.

VOICE: Second.

CHAIRMAN McCOWN: The motion has been made and seconded. Is there any discussion?

MR. SVOBODA: Do I get the mechanics—would it go to the Executive Council and then to the next meeting of the House of Delegates or is there a possibility of the vote?

MR. QUINLAN: No.



CHAIRMAN McCOWN: It goes to the next annual meeting. That is my understanding. Is that correct, Tom?

MR. QUINLAN: Yes.

CHAIRMAN McCOWN: Is there further discussion?

MR. CASSEM: Is there not any way of speeding it up?

CHAIRMAN McCOWN: Yes, it could be, I suppose, yes. Tom, do you want to express the reasons for it?

MR. QUINLAN: If you follow the alternative method prescribed by the present rules, it would be necessary to submit to this meeting the drafts of the proposed changes and have it adopted by a vote here.

Now there is no other way to do it unless you want to wait until we prepare several rule changes and have you vote on them.

We do not consider that that is practical, so therefore we do not recommend following the alternative method, but we prefer that you follow the method that will require it to go to the Executive Council, and come back here at the next regular meeting, which may or not be before the next year.

CHAIRMAN McCOWN: It is, of course, possible that a special meeting of the House could be called. So far we have not seen occasion to do so, although it is possible.

Is there any further discussion?

As many as favor the motion say "aye."

Opposed, the same.

The motion is carried.

Thank you very much, Tom and Bart and Charlie.

The next item of business is the report of the Committee on Taxation. Mr. Keith Miller.

KEITH MILLER: Mr. Chairman, the report of the Section on Taxation. We met this afternoon here in the ballroom. The Section meeting was very well attended, approximately three hundred persons being in attendance.

Three papers were given on federal taxation. Mr. Bill Lamme and Mr. John Mason both spoke on federal gift taxes, and Mr. North spoke on the marital deduction problem and federal estate taxation. All three papers were very well received and very enlightening.

The election of new members of the Executive Committee of this Section was somewhat impeded when our Honorable Secretary gave us all the ballots of the Insurance Section, and so slowed us down. We are now pleased to announce however that

Hale McCown and Jack North were elected as new members of the Executive Committee of the Section.

I move the report be adopted.

CHAIRMAN McCOWN: How about the election of officers?

MR. MILLER: The Executive Committee will meet shortly to elect officers of the Section. We have to round up a couple more members.

SECRETARY TURNER: Let me know who they are.

CHAIRMAN McCOWN: There being no objections, the report will be accepted and placed on file.

SECRETARY TURNER: Mr. Chairman, the Junior Bar Section reports the election of John Gradwohl of Lincoln and Gerald E. Matzke of Sidney to the Executive Committee. The Section further reports that Robert Berkshire of Omaha has been designated Chairman; John Gradwohl, Vice-Chairman; and Edward A. Cook III of Lexington as Secretary.

CHAIRMAN McCOWN: Is there any unfinished business which any member has that needs to be presented to the House at this time?

JUDGE SPENCER: I move we adjourn.

VOICE: Second.

CHAIRMAN McCOWN: It has been moved and seconded that the House adjourn. All in favor will say "aye."

Opposed.

I therefore declare it closed.

Don't forget that there is an assembly of the Nebraska State Bar Association immediately following this meeting.

Thank you again, each and every one of you. (The House of Delegates adjourned.)

PRESIDENT KUHNS: Members of the Association. This will be the final meeting of the Session.

Is there any new business to come before the Association at this time?

George, do you have a record of the attendance at this year's annual meeting?

SECRETARY TURNER: Eight hundred and forty-six.

PRESIDENT KUHNS: That, I believe, is the largest to date. I thought you might be interested in that.

Before we close, I do want once more to express my own appreciation to the members of the Association here and to the mem-

bers of the House, the Chairman of all of the Committees, as well as the members, all those who participated in the different institutes that we had throughout the year, the officers and members of the Executive Committees of the Sections, and also particularly to George Turner and to Hale McCown.

I think this has been a reasonably successful annual meeting, but we do not have such annual meetings without the help and cooperation of practically every member of the Association, and there have been a good many of you who have actively participated in the work throughout the year.

I am very happy to say that no one has been called upon to help or assist in any way at all who has refused.

Now as you all know you have a very fine new President, and I might say in passing that this is the first of the month and I have given the matter some thought, and I have decided to pay the rent again this month and go back in the practice of law, and I do so with the assurance that the Association will be in the very best of hands. Further I want to express to you my very best wishes for a good year and lots of happiness. I do not want to get in your way, but if I can help you any at any time, why I am still a member of the Association.

PRESIDENT PAUL MARTIN: Thank you, Bart. I am not going to say anything except that I want to express the thanks of every member of the organization to Bart Kuhns for the best year we have had. The attendance at the registration, the attendance at every Section and the enthusiasm shown by the members show that the Association has been moving forward.

If there is nothing further to come before the meeting, we stand adjourned.

(Adjournment at 3:55 o'clock P. M.)

NEBRASKA STATE BAR ASSOCIATION

STATEMENT OF CASH RECEIPTS AND DISBURSEMENTS

Year ended September 30, 1957

Receipts:

Active members' dues .....	\$37,960.00
Inactive members' dues .....	5,010.00
Dues received in advance for 1958.....	40.00
Reinstatements .....	123.00
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	\$43,133.00
Reimbursement for football tickets,	
1956 season .....	80.50
Interest .....	181.14
Sale of equipment .....	35.00
	<hr/>
	\$43,429.64

Disbursements:

Salaries and payroll taxes .....	\$ 6,371.35
Printing and stationery .....	819.71
Office supplies and expense.....	835.08
Telephone and telegraph.....	308.99
Postage and express .....	1,147.28
Directory .....	938.20
Officers' expenses .....	684.87
Executive council .....	866.94
Judicial council .....	413.07
Nebraska Law Review .....	5,268.05
Legislative bill digest.....	1,681.66
Nebraska State Bar Association	
Journal .....	\$1,624.69
Less receipts for advertising....	804.00
	820.69
Public service .....	4,947.42
Less receipts for pamphlets	
and racks .....	410.60
	4,536.82
American Bar Association and	
House of Delegates meeting	2,517.70
Less reimbursements .....	264.22
	2,253.48
Annual meeting .....	6,242.35
Less reimbursements and	
exhibit space .....	2,132.50
	4,109.85

Committee on procedure .....	110.00	
Committee on inquiry .....	427.37	
Committee on continuing legal education .....	254.81	
Committee on cooperation with American Law Institute.....	288.69	
Special committee on group life insurance .....	7.38	
Advisory committee .....	239.11	
Junior bar section.....	62.08	
Real estate, probate and trust law section .....	16.25	
Practice and procedure institute.....	1,154.36	
Business law institute .....	563.24	
Condemnation institute .....	39.90	
Tax institute .....	2,435.11	
New legislation institute .....	1,285.24	
Aid to local bars .....	239.25	
State ex rel Nebraska State Bar Association, Richards .....	292.30	
State ex rel Nebraska State Bar Association, Fitzgerald .....	1.40	
Equipment purchased .....	150.00	
Savings bonds purchased .....	2,000.00	
Auditing .....	175.00	
Insurance .....	67.00	
Membership fees .....	50.00	
Miscellaneous .....	54.27	
Donahoe Memorial .....	254.97	
Football tickets purchased to be reimbursed .....	119.25	
Lawyers' desk book .....	4,140.62	45,483.64
		<hr/>
Excess of disbursements over receipts.....		\$ 2,054.00
Cash balance at beginning of year.....		5,347.52
		<hr/>
Cash balance at end of year.....		\$ 3,293.52
		<hr/>
Cash balance represented by:		
First National Bank of Lincoln.....		\$ 31.98
Continental National Bank of Lincoln.....		3,261.54
		<hr/>
		\$ 3,293.52
		<hr/>

ROLL OF PRESIDENTS

1. 1900 *Eleazer Wakely..... Omaha	30. 1929 Anan Raymond..... Omaha
2. 1901 *William D. McHugh..... Omaha	31. 1930 *J. L. Cleary..... Grand Island
3. 1902 *Samuel F. Davidson..... Tecumseh	32. 1931 *Fred Shepherd..... Lincoln
4. 1903 *John L. Webster..... Omaha	33. 1932 *Ben S. Baker..... Omaha
5. 1904 *C. B. Letton..... Fairbury	34. 1933 *J. J. Thomas..... Seward
6. 1905 *Ralph W. Breckenridge..... Omaha	35. 1934 *John J. Ledwith..... Lincoln
7. 1906 *E. C. Calkins..... Kearney	36. 1935 *L. B. Day..... Omaha
8. 1907 *T. J. Mahoney..... Omaha	37. 1936 *J. G. Mothersead..... Scottsbluff
9. 1908 *C. C. Flansburg..... Lincoln	38. 1937 *C. J. Campbell..... Lincoln
10. 1909 *Francis A. Brogan..... Omaha	39. 1938 Harvey M. Johnsen..... Omaha
11. 1910 *Charles G. Ryan..... Grand Island	40. 1939 James M. Lanigan..... Greeley
12. 1911 *Benjamin F. Good..... Lincoln	41. 1940 E. B. Chappell..... Lincoln
13. 1912 *William A. Redick..... Omaha	42. 1941 Raymond G. Young..... Omaha
14. 1913 *John J. Halligan..... North Platte	43. 1942 Paul E. Boslaugh..... Hastings
15. 1914 *H. H. Wilson..... Lincoln	44. 1943 *Robert R. Moodie..... West Point
16. 1915 *C. J. Smyth..... Omaha	45. 1944 George L. DeLacy..... Omaha
17. 1916 *John N. Dryden..... Kearney	46. 1945 Virgil Falloon..... Falls City
18. 1917 *F. M. Hall..... Lincoln	47. 1946 Paul F. Good..... Lincoln
19. 1918 *Arthur C. Wakely..... Omaha	48. 1947 Joseph T. Votava..... Omaha
20. 1919 *R. E. Evans..... Dakota City	49. 1948 Robert H. Beatty..... North Platte
21. 1920 *W. M. Morning..... Lincoln	50. 1949 Abel V. Shotwell..... Omaha
22. 1921 *A. G. Ellick..... Omaha	51. 1950 Earl J. Moyer..... Madison
23. 1922 *George F. Corcoran..... York	52. 1951 Clarence A. Davis..... Lincoln
24. 1923 *Edward P. Holmes..... Lincoln	53. 1952 George B. Hastings..... Grant
25. 1924 *Fred A. Wright..... Omaha	54. 1953 Laurens Williams..... Omaha
26. 1925 *Paul Jessen..... Nebraska City	55. 1954 J. D. Cronin..... O'Neill
27. 1926 *E. E. Good..... Wahoo	56. 1955 John J. Wilson..... Lincoln
28. 1927 *F. S. Berry..... Wayne	57. 1956 Wilber S. Aten..... Holdrege
29. 1928 *Robert W. Devoe..... Lincoln	58. 1957 Barton H. Kuhns..... 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	31. 1920-27 Anan Raymond..... Omaha
2. 1900-08 Andrew J. Sawyer..... Lincoln	32. 1921-21 Alfred G. Ellick..... Omaha
3. 1900-02 Edmund H. Hinshaw..... Fairbury	33. 1921-23 Guy C. Chambers..... Lincoln
4. 1903-06 W. H. Kelligar..... Auburn	34. 1922-24 James R. Rodman..... Kimball
5. 1904-07 John N. Dryden..... Kearney	35. 1923-26 E. E. Good..... Wahoo
6. 1905-08 F. A. Brogan..... Omaha	36. 1924-26 Robert W. Devoe..... Lincoln
7. 1907-10 S. P. Davidson..... Tecumseh	37. 1924-24 Fred A. Wright..... Omaha
8. 1908-09 W. T. Wilcox..... North Platte	38. 1925-28 Paul Jessen..... Nebraska City
9. 1909-11 R. W. Breckenridge..... Omaha	39. 1925-27 Clinton Brome..... Omaha
10. 1910-12 Frank H. Woods..... Lincoln	40. 1927-29 Charles E. Matson..... Lincoln
11. 1910-10 Charles G. Ryan..... Grand Island	41. 1927-28 Fred S. Berry..... Wayne
12. 1910-19 Alfred G. Ellick..... Omaha	42. 1928-29 Robert W. Devoe..... Lincoln
13. 1911-13 John A. Ehrhardt..... Stanton	43. 1928-30 T. J. McGuire..... Omaha
14. 1911-11 Benjamin F. Good..... Lincoln	44. 1928-34 Harvey Johnsen..... Omaha
15. 1912-15 C. J. Smyth..... Omaha	45. 1929-31 E. A. Coufal..... David City
16. 1912-12 William A. Redick..... Omaha	46. 1929-29 Anan Raymond..... Omaha
17. 1913-15 W. M. Morning..... Lincoln	47. 1930-32 Paul E. Boslaugh..... Hastings
18. 1913-16 J. J. Halligan..... North Platte	48. 1930-30 J. L. Cleary..... Grand Island
19. 1914-14 H. H. Wilson..... Lincoln	49. 1931-33 W. C. Dorsey..... Omaha
20. 1915-17 Edwin E. Squires..... Broken Bow	50. 1931-31 Fred Shepherd..... Lincoln
21. 1916-16 John N. Dryden..... Kearney	51. 1932-34 Richard Stout..... Lincoln
22. 1916-17 Frederick Shepherd..... Lincoln	52. 1931-32 Ben S. Baker..... Omaha
23. 1917-17 Frank M. Hall..... Lincoln	53. 1933-35 Barlow F. Nye..... Kearney
24. 1917-18 Anan Raymond..... Omaha	54. 1933-33 J. J. Thomas..... Seward
25. 1918-18 A. C. Wakely..... Omaha	55. 1934-36 Chas. F. McLaughlin..... Omaha
26. 1918-22 Fred A. Wright..... Omaha	56. 1934-34 John J. Ledwith..... Lincoln
27. 1919-19 R. E. Evans..... Dakota City	57. 1935-35 L. B. Day..... Omaha
28. 1919-22 Geo. F. Corcoran..... York	58. 1935-37 James M. Lanigan..... Greeley
29. 1919-20 L. A. Flansburg..... Lincoln	59. 1935-38 H. J. Requisite..... Lincoln
30. 1920-20 W. M. Morning..... Lincoln	60. 1935-38 Raymond M. Crossman..... Omaha
	61. 1935-40 F. H. Pollock..... Stanton

\*Deceased

62.	1935-41	T. J. Keenan.....	Geneva	99.	1946-48	Paul F. Good.....	Lincoln
63.	1935-39	Walter D. James.....	McCook	100.	1947-48	Joseph T. Votava.....	Omaha
64.	1935-37	Roland V. Rodman.....	Kimball	101.	1947-48	John E. Dougherty.....	York
65.	1936-36	J. G. Mothersead.....	Scottsbluff	102.	1947-55	Lyle E. Jackson.....	Neleigh
66.	1936-36	James L. Brown.....	Lincoln	103.	1948-49	Robert H. Beatty.....	North Platte
67.	1937-39	David A. Fitch.....	Omaha	104.	1947-50	Frank D. Williams.....	Lincoln
68.	1937-39	Raymond G. Young.....	Omaha	105.	1947-50	Thomas J. Keenan.....	Geneva
69.	1937-41	M. M. Maupin.....	North Platte	106.	1948-51	Laurens Williams.....	Omaha
70.	1937-41	Golden P. Kratz.....	Sidney	107.	1949-51	Joseph H. McGroarty.....	Omaha
71.	1938-42	Sterling F. Mutz.....	Lincoln	108.	1949-54	Wilber S. Aten.....	Holdrege
72.	1938-42	Don W. Stewart.....	Lincoln	109.	1948-59	Abel V. Shotwell.....	Omaha
73.	1940-46	George N. Mecham.....	Omaha	110.	1949-55	Paul L. Martin.....	Sidney
74.	1940-42	Abel V. Shotwell.....	Omaha	111.	1949-55	Joseph C. Tye.....	Kearney
75.	1940-42	Frank M. Colfer.....	McCook	112.	1949-51	Earl J. Moyer.....	Madison
76.	1941-43	Virgil Falloon.....	Falls City	113.	1950-	Harry A. Spencer.....	Lincoln
77.	1941-43	Joseph C. Tye.....	Kearney	114.	1950-56	Paul P. Chaney.....	Falls City
78.	1941-47	Earl J. Moyer.....	Madison	115.	1950-	Paul Bek.....	Seward
79.	1937-37	C. J. Campbell.....	Lincoln	116.	1950-52	Clarence A. Davis.....	Lincoln
80.	1938-38	Harvey Johnsen.....	Omaha	117.	1951-55	Barton H. Kuhns.....	Omaha
81.	1939-39	James M. Lanigan.....	Greeley	118.	1952-57	Thomas C. Quinlan.....	Omaha
82.	1940-40	E. B. Chappell.....	Lincoln	119.	1951-52	George B. Hastings.....	Grant
83.	1942-45	Fred J. Cassidy.....	Lincoln	120.	1952-53	Laurens Williams.....	Omaha
84.	1941-41	Raymond G. Young.....	Omaha	121.	1953-54	J. D. Cronin.....	O'Neill
85.	1942-48	Max G. Towle.....	Lincoln	122.	1954-	Norris Chadderdon.....	Holdrege
86.	1942-42	Paul E. Boslaugh.....	Hastings	123.	1954-56	John J. Wilson.....	Lincoln
87.	1942-45	John E. Dougherty.....	York	124.	1955-56	Wilber S. Aten.....	Holdrege
88.	1942-49	Yale C. Holland.....	Omaha	125.	1955-	F. M. Deutsch.....	Norfolk
89.	1943-45	Robert R. Moodie.....	West Point	126.	1955-	Clarence E. Haley.....	Hartington
90.	1941-45	B. F. Butler.....	Cambridge	127.	1955-	R. R. Wellington.....	Crawford
91.	1943-46	Frank M. Johnson.....	Lexington	128.	1955-	Alfred G. Ellick.....	Omaha
92.	1944-49	Floyd E. Wright.....	Scottsbluff	129.	1954-55	Jean B. Cain.....	Falls City
93.	1945-50	John J. Wilson.....	Lincoln	130.	1955-57	Hale McCown.....	Beatrice
94.	1945-48	Robert E. Waring.....	Geneva	131.	1956-	C. Russell Mattson.....	Lincoln
95.	1944-46	George L. DeLacy.....	Omaha	132.	1956-	Barton H. Kuhns.....	Omaha
96.	1945-47	Virgil Falloon.....	Falls City	133.	1957-	Paul L. Martin.....	Sidney
97.	1945-49	Leon Samuelson.....	Franklin	134.	1957-	Richard E. Hunter.....	Hastings
98.	1946-48	Harry W. Shackelford.....	Omaha				