

1957

Proceedings of the Nebraska State Bar Association House of Delegates Meeting, 1956

Wilber S. Aten

Nebraska State Bar Association

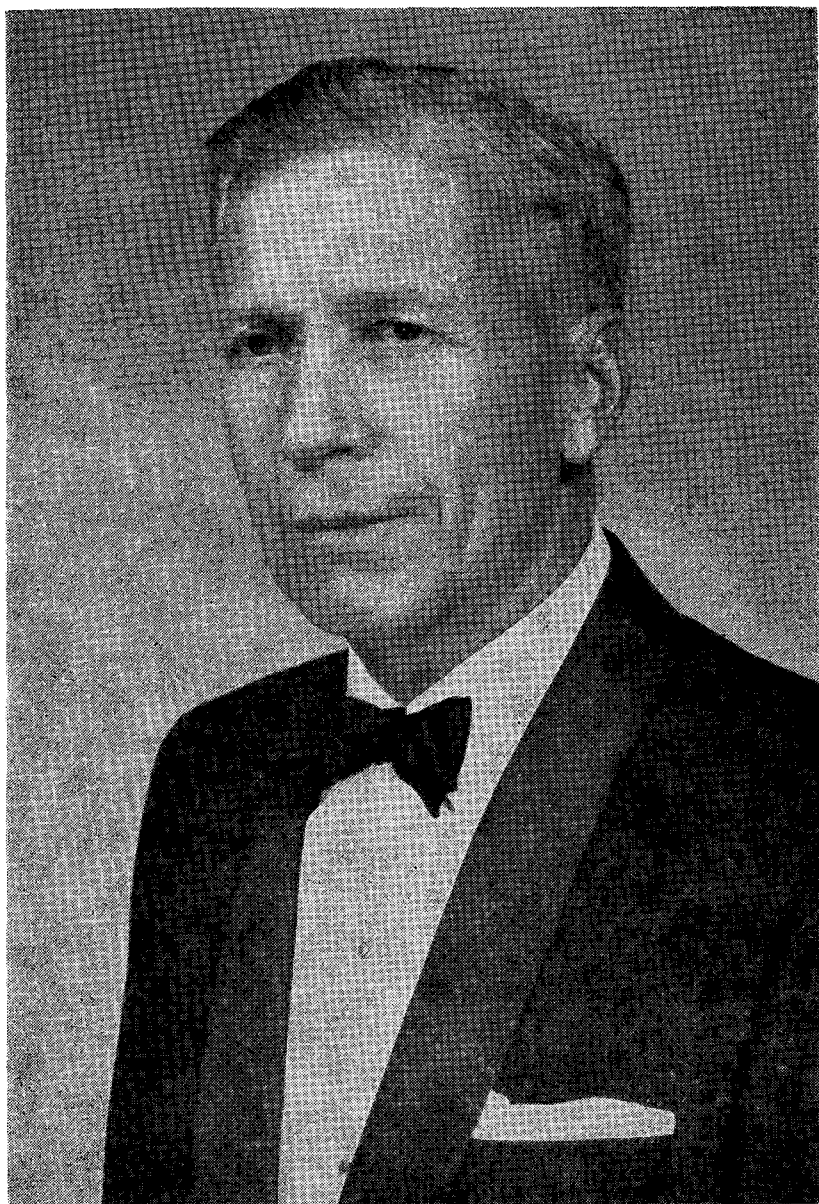
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PRESIDENT WILBER S. ATEN



Nebraska State Bar Association

Meeting of the House of Delegates

OCTOBER 17, 1956

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

HALE McCOWN: Gentlemen, the House will please come to order.

I will ask the Secretary to call the roll.

(Roll call by Secretary George H. Turner.)

HALE McCOWN: Gentlemen, a quorum being present, I think the first order of business is the approval of the calendar.

I will entertain a motion that the printed agenda as printed in your program be adopted as the agenda of the House. Do I hear such a motion?

HARRY B. COHEN: I so move.

HALE McCOWN: Moved by Mr. Cohen. Is there a second?

VOICE: Second.

HALE McCOWN: All in favor say "aye."

Opposed, the same sign.

The agenda is adopted.

At this time I would like to announce the appointment of the Committee on Hearings on Resolutions. The chairman is Robert Van Pelt; members, Charles Adams, Richard Hunter, Frank Mattoon, Joe Votava, and Hans Holtorf.

If anyone has any resolutions which they wish to present which are not presented on the floor this morning at the scheduled time for the resolution presentation, if you will see that some member of that committee receives them prior to 1:30; that committee will hold its hearings at 1:30 P.M.

The report of that committee is the final item of business on the agenda for this afternoon.

At this time we have the statement by the president of our Association, Wilber Aten.

WILBER ATEN: Mr. McCown and gentlemen, actually this is the place where we are supposed to report any unfinished business from the Executive Council to the House of Delegates. There is no unfinished business at this time; however that does not mean that there will not be at the time we get to the last session of the

House on Friday afternoon. At this time there is no unfinished business.

I am very happy that so many are here, and I am sure the business of the Association will go along very well.

HALE McCOWN: May I express my appreciation to each of you for your willingness to act as members of this House of Delegates.

In the same connection, may I add a suggestion to start the matter off with, shall we say, the wrong approach, to call your attention to the fact that on Friday at 4:00 P.M. this House meets again to consider the reports of the various sections and to conclude the final business of this House of Delegates.

I call that to your attention specifically because of our experience of last year; if you will recall, those of you who were here, we had a difficult time in finding a quorum; we had to adjourn and wait and call to get enough people here to have that business presented.

I would therefore suggest that each of you kindly mark on your calendar now and note it in your program the meeting of this House again at 4:00 o'clock, Friday afternoon, at this same place immediately following the final session.

At this time we have the report of the Secretary-Treasurer, Mr. Turner.

GEORGE H. TURNER: Mr. Chairman and members of the House.

The books of the Association have been audited by the firm of Martin and Martin of Lincoln.

They have submitted a report which I will at least summarize. A copy will be lodged with the Executive Council.

The report of cash receipts during the year, \$43,269.92, and the disbursements, \$41,230.17, leaving an excess of receipts over disbursements of \$2,039.75.

This figure is reflected in the increase in the cash balance from \$3,307.77 a year ago on the 24th of September to \$5,347.52 on September 30, 1956.

Principal items of cash receipts, of course, are dues collected from members, of the active members \$37,630.00, inactive members, \$4,960.00.

The major disbursements throughout the year have been salaries and payroll taxes of \$6,253.90; that is substantially less than the same item of a year ago because during this year we have not had a paid public relations representative. What work has been done in that field has been done on a piece-work basis. If we wanted something prepared for publication, an individual would be hired to do it for so much for the particular job.

A year ago we had had a full-time public relations man with a salary of \$5,000.00.

The expense of the Executive Council meetings during the year amounted to \$1,002.65; the expense of officers, \$1,186.07; office supplies and expenses are \$1,316.10; Family Law Institute, \$1,097.77; and the institute on real property law which was held last spring, \$1,243.46.

The publication of the Nebraska Law Review, \$4,330.06. I think most of you are familiar with our arrangement on that. The Law Review is published jointly by the Association and by the Nebraska University College of Law. The Association pays one-third of the expense of three of the issues. We pay the full expense of the January issue which contains the proceedings of the annual meeting.

The next item of expense is postage and express, \$1,180.93; expense of the three delegates to the House of Delegates to the American Bar Association, \$1,936.82; spent on the test case brought to determine the validity of the judicial retirement act, total, \$1,724.43; the purchase of bonds, which many of you will recall was authorized by the House of Delegates a year ago upon the recommendation of the Committee on Budget and Finance, \$2,000.00. The total expense of all public-service activity, \$4,999.72; the expense of the 1955 annual meeting, \$4,310.05; the expense of the annual December Tax Institute, \$2,461.53.

And I might say that actually this report of the auditor does not really, in my judgment, fully reflect the cash situation. They have treated the purchase of those bonds as an expenditure. We have the bonds, so in addition to the slightly over \$5,000.00 cash fund which we had at the close of this audit we also have the \$2,000.00 in bonds, so, while they treated this as an expense, I treat it as a capital item, and I think I am correct in that.

Actually the Association is in excellent financial condition as of the close of this audit.

HALE McCOWN: Are there any questions as to the Secretary's report?

(There was no response.)

HALE McCOWN: Any discussion? What will you do with the report?

MR. MATTSON: I move the approval of the report.

VOICE: Second.

HALE McCOWN: It has been moved and seconded that the report be approved and placed on file.

All those in favor please say "aye."

Opposed, same sign.

Motion carried.

HALE McCOWN: The next item of business is the introduction of resolutions. Are there any resolutions which any member of this House has for introduction at this time?

MR. VOTAVA: Mr. Chairman.

HALE McCOWN: Mr. Votava.

MR. VOTAVA: By request I am introducing this resolution to present to the committee. I am reading it now so the members of the House will know what it is about.

Resolved, That the House of Delegates of the Nebraska State Bar Association approve Constitutional Amendment Number 603 to be submitted at the forthcoming general election, which will permit the Legislature to absolve real estate taxes and assessments delinquent ten years or more.

Be it further resolved that the lawyers of Nebraska are urged to take the initiative in explaining the measure to the voters to the end that the electorate can make an intelligent decision on the motion.

HALE McCOWN: The resolution has been seconded. Is there any discussion? In this connection, may I suggest that resolutions all be referred to the Committee on Hearings and final action on them be taken at the time of the report of the Committee on Hearings on Resolutions. I do not wish to shut off any discussion at the time of introduction, either; therefore I call for any discussion you may have on the proposed resolution and for such further action as you may think appropriate.

The chair will entertain a motion that the resolution offered by Mr. Votava be referred to the Committee on Hearings on Resolutions. Is there such a motion?

MR. SPENCER: I so move.

VOICE: Second.

HALE McCOWN: All in favor say "aye."

Opposed, the same sign.

Motion is carried.

MR. KUHN: Mr. Chairman, on the agenda of the House I find no place where I am sure this would be appropriate, other than as a matter of resolution, and simply to preserve the point, I would like to present a resolution that the by-laws of the Association, which are subject to amendment by a vote of the House, be amended in certain particulars which I will state very briefly, and I might say they pertain only to changes in the by-laws to conform to established practices.

We have, for example, a committee provided for in the by-laws, a standing committee on procedure. There has not been such a committee for some time. I think the by-laws should be amended to eliminate the need for a standing committee on procedure.

Also the by-laws call for a committee on public relations. For some time that committee has been designated the Committee on Public Service, so I would like to propose a resolution that, so far as I know now, pertains only to Section 1 of Article 3 of the by-laws, that the by-laws be amended.

I will say there is nothing controversial and, I presume, the easiest way to bring the matter before the House would be through the Resolution Committee.

HALE McCOWN: Mr. Kuhns, with the permission of the House I am going to suggest that I appoint Mr. Kuhns as chairman and Mr. Mattson and Mr. Yost to condense and set forth the suggested changes and to present them to the Committee on Hearings on Resolutions, to be considered at the time of the report of that committee this afternoon as a definite part of the business.

If you would prefer, they may be offered separately prior to the report of the Committee on Hearings on Resolutions.

If there is no objection on the part of any member, it will be so ordered.

Are there any other resolutions for introduction?

HALE McCOWN: If not, such resolutions as the committee may deem appropriate in its hearings may be adopted as reported by the committee at the time of its report this afternoon.

Reports of Committees

The House of Delegates received, considered, and acted upon the reports of standing and special committees. A full transcript of the discussion of each report is on file in the office of the Secretary, as the official record of the proceedings of the House of Delegates. Printed herein are the reports, and amendments made thereto, of the several committees as adopted by the House of Delegates.

The report of the Committee on Administrative Agencies was presented by Bert L. Overcash, Chairman of the Committee. The report which was approved by the House of Delegates follows:

Report of the Special Committee on Administrative Agencies

This Committee has continued the study of legislation to provide an Administrative Procedure Act for Nebraska. A form of bill adapting the Model Act (Uniform Laws Annotated 9 A supplement) to existing legislation was drafted and submitted to state agencies and other interested parties. A copy of this Bill is attached to this report for the information of all members of the Association.

A variety of suggestions and criticisms with reference to this Bill have been received. Some suggest that the Bill is too mild and will accomplish nothing. Others suggest it is much too broad and sweeping and will hamper the work of administrative agencies. It is to be observed that the Bill has some similarity to federal legislation adopted in this field. 5 U. S. C. 1001.

Some of the more important suggestions received with reference to this Bill are the following:

1. That Section 1 make it plain, if it is not already certain, that this act has no application to the military department of the state and applies only to civil agencies.

2. That findings of fact and conclusions of law (Section 8) be required only if requested by the parties.

3. That Section 4 (1) be amended to permit suit in the county where the claimed act or conduct may be committed.

4. That agencies be authorized in complicated and extensive hearings to require that direct testimony be reduced to writing ahead of the hearing and to require advance notice of a desire to cross-examine witnesses.

That the right of cross-examination be limited to adverse witnesses.

5. That a more definite standard as to rules of evidence be provided in Section 7 (1).

6. That agencies be authorized to appoint members of the bar as hearing officers to receive evidence and make recommendations as to findings of facts and conclusions of law.

7. That the agency be empowered to subpoena witnesses and records on motion of the agency or at the request of any party.

8. That the agency be authorized to compel testimony under a guaranty of immunity from prosecution.

9. That the taking and use of depositions by the agency or parties be authorized by the act.

10. That provision be included in the act for staying by a district court application of a rule pending determination of its validity.

11. That a minimum period for notice be stated in Section 6.

12. That a time limit be placed in Section 2 (1) for the adoption of rules.

Section 12 of the Model Act deals with appellate review of administrative action. The Legislative Council has been considering proposed legislation to simplify and make uniform the practice in this regard. This legislation may be incorporated into the Bill reviewed herein if that appears advisable to the Bill Drafter and the Legislative Council.

It is recommended that this special committee be continued for the next year in order to further the program of obtaining an Administrative Procedure Act for Nebraska.

Bert L. Overcash, Chairman
 James N. Ackerman
 James H. Anderson
 Auburn H. Atkins
 Raymond M. Crossman, Jr.
 Warren C. Johnson
 Joseph L. Leahy
 Earl E. Morgan
 Edward A. Mullery
 T. F. Neighbors
 Robert E. Powell
 Bernard Spencer
 Wayne O. Stoehr
 Hird Stryker, Jr.
 Einar Viren
 Richard D. Wilson

Legislative Bill —

AN ACT concerning procedure of state administrative agencies and to amend section 84-901 Revised Statutes Supplement 1950.

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

Section 1. That Section 84-901, Revised Statutes Supplement, 1950, be amended to read as follows:

(1) "Agency" means each board, commission, department, officer, division or other administrative office or unit of the state

government authorized by law to make rules, except the courts and the Legislature:

(2) "Rule" means the written statement of any rule *includes every regulation, standard or policy of general application statement of policy or interpretation of general application and future effect*, issued by an agency, including the amendment or repeal thereof, *whether with or without prior hearing*, and designed to implement, interpret or make specific the law enforced or administered by it, or governing its organization or procedure, but not including regulations concerning the internal management of the agency not affecting private rights or interests or *procedures available to the public*; *Provided*, that for the purpose of this act every rule which shall prescribe a penalty shall be presumed to have general applicability or to affect private rights and interests.

(3) "*Contested case*" means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.

Section 2. In addition to other rule-making requirements imposed by law:

(1) Each agency shall adopt rules governing the formal and informal procedures prescribed or authorized by this act. Such rules shall include rules of practice before the agency, together with forms and instructions.

(2) To assist interested persons dealing with it, each agency shall so far as deemed practicable supplement its rules with descriptive statements of its procedures.

(3) Prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the adopting agency shall so far as practicable, publish or otherwise circulate notice of its intended action and afford interested persons opportunity to submit data or views orally or in writing.

Section 3. Any interested person may petition an agency requesting the promulgation, amendment, or repeal of any rule. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition.

Section 4.

(1) The validity of any rule may be determined upon petition for a declaratory judgment thereon addressed to the District Court of Lancaster County, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(2) The court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures.

Section 5. On petition of any interested person, any agency may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. A declaratory ruling, if issued after argument and stated to be binding, is binding between the agency and the petitioner on the state of facts alleged, unless it is altered or set aside by a court. Such a ruling is subject to review in the manner provided by law for the review of decisions in contested cases. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition.

Section 6. In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice. The notice shall state the time, place, and issues involved, but if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable, and opportunity shall be afforded all parties to present evidence and argument with respect thereto. The agency shall prepare an official record, which shall include testimony and exhibits, in each contested case, but it shall not be necessary to transcribe shorthand notes unless requested for purpose of rehearing or court review. Informal disposition may also be made of any contested case by stipulation, agreed settlement, consent order, or default. Each agency shall adopt appropriate rules of procedure for notice and hearing in contested cases.

Section 7. In contested cases:

(1) Agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence.

(2) All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

(3) Every party shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.

(4) Agencies may take notice of judicially cognizable fact and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified either

before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed; and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them.

Section 8. Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. Parties to the proceeding shall be notified of the decision and order in person or by mail. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed upon request to each party or to his attorney of record.

Section 9. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Section 10. This act is intended to constitute an independent act establishing minimum administrative procedure for all agencies and shall be considered as cumulative to existing laws.

Section 11. That original section 84-901 Revised Statutes Supplement 1950 be repealed.

The report of the Committee on American Citizenship was presented by Frank J. Mattoon, Chairman of the Committee. The report was amended after discussion by eliminating the recommendation of the Committee that the proposal contained in the report of this Committee made at the 1955 annual meeting be approved. After eliminating all reference to the 1955 report, the report of the Committee was approved by the House of Delegates. The full report of the Committee on American Citizenship follows:

Report of the Committee on American Citizenship

The Committee on American Citizenship submits herewith its report designed to enable the Nebraska State Bar Association to establish and activate a concrete program on American Citizenship.

Because any successful program requires the cooperation and enthusiastic support of individual lawyers, we call attention to the 1955 report which contained basic and fundamental principles for activation of a sound program on American Citizenship. We submit that our Bar Association must first consider whether or not an organized program should be maintained. American Citizenship is a field in which there must be an organized and forthright program,

implemented by active participation of the lawyers of Nebraska, which must go beyond mere annual written reports.

Your Committee feels that the principles of American citizenship in the State of Nebraska should receive renewed emphasis. The fundamentals of American democracy contained in the Declaration of Independence and the Constitution of the United States have been neglected and misrepresented. Information is lacking. Pride in the fundamental principles of these basic documents has diminished. Sarcasm, by imposing the brand "flag-waving," has become popular to a degree that outward expressions of loyalty have been subjected to ridicule and sarcasm. There is a woeful lack of real understanding of the basic principles of democracy and the fundamental differences between that form of government, on the one hand, and communism and militant dictatorships, on the other hand. Three specific areas of the American public should be reached toward the end that principles of Americanism once more be emphasized and applied to our so-called "modern American society."

These are:

1. Our Nebraska youth
2. Aliens applying for citizenship
3. The general public

We point with pride to the efforts of individual lawyers of the State of Nebraska in the participation and assistance rendered to the American Legion in its Boys and Girls State and Boys and Girls County Government programs. Many of the members of our association have contributed time and financial support to these activities. We submit, however, that the Nebraska State Bar Association, through its Committee on American Citizenship, should coordinate its efforts with the Department of the American Legion of the State of Nebraska. The Bar Association is in a favorable position to assist in the preparation of suitable and accurate "mock" trial procedures; to make available films (i.e., the subject of judicial procedure); to furnish public speakers willing to speak on Americanism at the functions associated with these activities; and to cooperate with schools in establishing proper election procedures.

Individual lawyers and local bar associations have indicated a sincere desire to facilitate the above program. Coordination and assistance from the state level would be invaluable to your local lawyers and local committees.

The Nebraska State Bar Association, through publicity and direct contact with the schools, should encourage a more intensive study of American history, including a thorough knowledge and understanding of the Declaration of Independence and the Constitution of the United States and the background of human relations which culminated in the writing of these documents. We

recognize that we are not in a position to interfere with the curriculum of our schools. However, assistance to public speaking departments, oratorical contests, and appearances by lawyers at various group and civic class meetings are suggested as helpful ways to implement programs of Americanism in our schools. In this connection, we do not criticize in any way these programs as they now exist. We do feel that the lawyers in the communities of Nebraska could and should offer assistance to the schools and that coordination of this program should be arranged by the American Citizenship Committee of the Nebraska State Bar Association. *In this connection, we recommend that competitive debate, oratory and forensics be re-established in the high schools of Nebraska; and that lawyers be encouraged to assist local school boards in this program.* Not only would such endeavor assist in the development of future lawyers, but it would also offer a fertile field for development of Americanism.

There is a need for assistance to aliens, including displaced persons arriving in this country since 1946, to enable them to obtain a better understanding of the principles of Americanism and our American society. We understand that, prior to the actual examination for naturalization, these applicants must obtain information and education concerning the various subjects connected with the examination. The Nebraska State Bar Association is in a position to encourage lawyers in the establishment of proper classes wherein these subjects could be developed on a sound basis. The Nebraska State Bar Association should contact the various county and local bar associations, requesting that each county which is confronted with this situation appoint a local committee to assist the pre-naturalization program for aliens in the preparation for their examinations. Specific courses on American history and good citizenship could be implemented by these local committees. Statistics and information could be obtained by the Nebraska State Bar Association Committee on American Citizenship from the Immigration and Naturalization Service in Omaha, Nebraska, for dissemination to local committees.

Some of our local bar associations have established speakers bureaus for the use of the general public. We emphasize that local lawyers have always afforded leadership in speaking before the public on all types of subjects. Lancaster County has a fine program in effect, and other counties have instituted similar programs, but many counties do not have speakers bureaus. The Committee on American Citizenship could facilitate the organization of such program on a statewide basis, thereby affording coordination and assistance which is required by our local lawyers. The speakers should be encouraged to emphasize good American citizenship whenever the opportunity is presented.

The final recommendation of this report is that individual lawyers should be encouraged to participate in the programs outlined

above. It should be emphasized that lawyers of the State of Nebraska are natural leaders in the field of education, public speaking and Americanism generally. However, these lawyers need encouragement. Recognition of their efforts in these fields would supply this encouragement. Moreover, our Bar Association should keep in mind that its public relations are of primary importance.

The 1955 Committee on American Citizenship prepared a comprehensive and effective method of accomplishing a greater degree of enthusiasm and participation of local lawyers in these programs and a system whereby the relationship of the local lawyers to the general public could be improved. *We recommend reconsideration of the entire report of the 1955 Committee and the allocation of funds for the implementation of the entire program on American citizenship.*

In conclusion, we recommend the adoption of the above program by the House of Delegates and its immediate implementation by the 1957 Committee on American Citizenship.

Frank J. Mattoon, Chairman
 Thomas J. Gorham
 Fred N. Hellner
 Lynn D. Hutton, Sr.
 John H. Keriakedes
 M. Charles McCarthy
 Herbert F. Mayer
 S. W. Moger
 Emmet L. Murphy
 Leslie H. Noble
 Merle M. Runyan

The report of the Special Committee on Group Life Insurance was presented by C. C. Fraizer, Chairman of the Committee. After discussion, it was moved that the report be approved; that the House of Delegates go on record as approving the broad, general plan of an effort to make group life insurance available to the members of the Association; that the president be authorized to appoint a committee to survey the matter further, and that the committee be authorized to draft suitable legislation to authorize the writing of such group life insurance in this state and to sponsor such legislation before the Legislature of Nebraska. The report was further amended to permit the special committee, with the approval of the Executive Council, to execute such policies of group insurance and do all things necessary to put such policies in force. The report of the Special Committee on Group Life Insurance follows:

Report of Special Committee on Group Life Insurance

The right to issue group life insurance is at present definitely limited by the Nebraska statutes. Sections 44-1601 to 1606 provide that no policy of group life insurance shall be delivered in this

state unless it is issued: (a) to an employer for benefit of employees; (b) to a creditor to insure debtors; (c) to a labor union; (d) to trustees of a fund established by employers or labor unions; or (e) to an association of public employees.

In order to authorize the issuance of group life insurance to members of the Nebraska State Bar Association, it would be necessary to provide for an additional category.

It is recommended that a statutory amendment be proposed to cover members of state professional associations which could thus include also members of the Nebraska State Medical Association (which has indicated some interest in the subject) and of the Nebraska State Dental Association; or such an amendment could cover members of any bona fide association formed for purposes other than procuring insurance.

The American Bar Association now has a group life plan for its members with a death benefit of \$6,000 at age 25 or less, and reducing to \$1,000 at age 55. Plans have been announced to extend the age limit to 70 years.

The Minnesota State Bar Association is covered by a plan making protection available to all active members who have not attained their seventieth birthday. The amount of coverage for each eligible member is \$10,000 and continues in that amount to age 65 at which time it reduces at the rate of ten per cent per year until it is reduced 50 per cent, and then the benefit of \$5,000 remains constant thereafter. The annual premium is \$42.04 at age 34 and under, increasing at older ages.

All of the foregoing refers to true group, with the Association contracting with an insurance company and being the insured named in the policy, with individual certificates issued to participating members. The Association collects the individual premiums. A suitable amendment might well be prepared after consultation with the Nebraska Insurance Department and with interested insurance companies.

C. C. Fraizer, Chairman
John R. Fike
Harold W. Kauffman

HALE McCOWN: The next matter is the report on the Committee on Budget and Finance. Mr. Fraser.

TED FRASER: Mr. Chairman, members of the House of Delegates. Our Committee does not at this time have a written report. We will file a written report for the record.

As chairman of the Committee, I have examined the audit which has been previously described by the Secretary, Mr. Turner, as prepared by Martin and Martin, certified public accountants of Lincoln, and find from that report that as a result of last year's operation an increase of approximately \$2000 in surplus has been accumu-

lated by the Association. And as a part of our report, we recommend that an additional sum be set aside in the form of investments as capital, to be maintained by the Association for its further use.

I recommend the adoption of the report and the approval of the recommendations of the Committee.

HALE McCOWN: Mr. Fraser, does that have any reference with respect to what our funds shall be invested in?

TED FRASER: No, I leave the form of the investment to the discretion of this House or the Executive Council, which sets aside the exact amount of money to be invested.

HALE McCOWN: As I understand the motion, the Executive Council determines the appropriate amount for setting aside a reserve fund to be invested in capital funds as set by the Council.

Is there a second?

VOICE: Second.

HALE McCOWN: Is there any discussion?

HERMAN GINSBURG: Mr. Chairman.

HALE McCOWN: Mr. Ginsburg.

HERMAN GINSBURG: As of the present, how much does the Association have in a reserve fund?

GEORGE TURNER: By direction of the House a year ago, the sum of \$2,000 was invested in United States bonds, so the Association has those bonds in addition to its cash balance.

HERMAN GINSBURG: Does the committee feel that \$3,000 is enough cash on hand?

TED FRASER: It appears that is a good working balance to maintain.

MR. COHEN: Last year the House of Delegates was the one that directed the amount to be invested?

TED FRASER: Yes, sir.

MR. COHEN: Then I move, Mr. President, that the Committee report be amended by directing that \$2,000 of this cash fund be invested in bonds.

HALE McCOWN: Are you willing to accept that amendment?

TED FRASER: We are pleased to have that amendment.

HERMAN GINSBURG: Well, I don't understand what Mr. Cohen is getting at. As I understood it, last year the House decided that there should be a reserve fund of \$2,000. I do not know whether there had been any previous accumulation in previous years. That is the reason I asked the question I did. I understand now that all we have in reserve is \$2,000 plus the cash balance, which I am informed is adequate for current needs.

I am not opposed to the reserve, but it does seem to me that

this organization is one that should not accumulate any great amount in reserve. I cannot see any reason.

As a matter of fact, I think it would be detrimental if this Association would start the habit of accumulating two, three or five thousand dollars each year for the purpose of building up a fund. I would be very much opposed to that. I am not going to say I am opposed to a reasonable addition to the reserve at this time. I think there is a field of judgment within which we should have some balance on hand put away for emergencies. I think that there should be some limit.

HALE McCOWN: A point of clarification. If I might clarify that, Mr. Ginsburg, the motion as amended which is now before the House is specific in amount, \$2,000 in government bonds. We presently have \$2,000 in government bonds in that reserve account.

MR. COHEN: Mr. Chairman, as I understand it, even though you put this money in reserve, there is no curtailment, no limitation on the amount of reserve for emergencies.

HALE McCOWN: No, this reserve is simply a bookkeeping situation, as far as expenditures are concerned. In other words it is merely an investment of funds, and it has in it no limitation nor specification that it shall or must be kept in reserve or anything of that sort.

MR. VAN PELT: I make a point of inquiry.

HALE McCOWN: Mr. Van Pelt.

MR. VAN PELT: In connection with the duties of the Executive Council in Section 3A, it is stated that it shall have sole authority to approve the expenditure of funds. I wonder if we have any right to entertain or pass on a motion dealing with the investment of \$2,000 in Government bonds, whether or not that is not solely the province of the Executive Council to determine the investment.

HALE McCOWN: It clearly is, Mr. Van Pelt, as to expenditures; as to investment, I do not know.

GEORGE TURNER: I understood that Mr. Fraser's motion was that the House of Delegates recommend to the Executive Council that this be done. If it is an expenditure, the Council does have the sole authority to do that, but as I said in submitting my report, I differ with the auditors. They treated the purchase of those bonds as an expense, and I do not. I think it is just as if we had it in the bank.

Some years ago we had an investment in bonds. Our income was not sufficient to run us that year, and the Executive Council directed that the bonds be sold and the money used for current expenses. I do not anticipate that that will ever happen again, but if it is simply a recommendation to the Executive Council, it would at least express the views of the delegates.

HALE McCOWN: Under the circumstances, and with the permission of the House and Mr. Fraser, is it agreeable that the motion

be amended by stating that it is recommended to the Executive Committee that \$2,000 be invested in United States bonds?

MR. COHEN: Two thousand dollars of present cash.

HALE McCOWN: All right, is there a second?

VOICE: Second.

HALE McCOWN: Is there further discussion?

MR. SPENCER: Question.

HALE McCOWN: Those in favor say "aye."

Opposed the same.

Motion carried.

The Chairman of the Committee on Cooperation with the American Law Institute was not present when the report of that Committee was reached on the calendar of the House of Delegates. On behalf of the Committee, the secretary of the Association moved the adoption of the report of the Committee. Upon vote being taken, the report of the Committee was adopted. The report follows:

Report of the Committee on Cooperation with the American Law Institute

Membership in the American Law Institute may be had only upon personal application of the individual together with recommendation of one of its executives. Screening of applicants results in a high standard of its members. It is an organization of quality rather than quantity.

Its Thirty-third Annual Meeting was held in Washington on May 23-26. Approximately 600 lawyers, judges, reporters, and professors were in attendance.

The convention was favored by addresses by Chief Justice Warren, ex-Senator George Wharton Pepper, and the Honorable Dean Acheson; and the delegates were also tendered a reception by the French Embassy.

The objects of the meeting were the submission and discussion of the Federal Income, Estate and Gift Tax statute, Restatement of the Law Second, and Model Penal Code.

In considering the passage and enactment of laws and amendments thereto, and all phases of the study, practice, and administration of law, the several problems are presented to the body by reporters. Upon completion of a report or recommendation, open discussions are had, at which all members have an opportunity to be heard. This system results in the greatest degree of consideration to the different subjects and in corresponding benefit to the bench and bar. Many of the subjects have been considered at former meetings.

It is absolutely impossible to go into detail in reporting on any

specific item, and for that reason this report will be limited to a statement of the subjects discussed.

Restatement of Law Second, Conflict of Laws, covers the subjects of Jurisdiction in General, Executive and Legislative, and Jurisdiction of Courts. The reporter handling this title was Willis L. M. Reese of the Columbia University College of Law.

Model Penal Code, Tentative Draft No. 5, covers the subjects of Territorial Applicability, Time Limitations, Double Jeopardy, Liability of Corporations, and Parole and Organization of Correction. Herbert Wechsler of the Columbia University College of Law presented this subject.

Tentative Draft No. 11 of the Federal Income, Estate and Gift Tax Statute covers the subjects of Gifts and Estate Tax, Income Taxation of Trusts and Estate, and Income Taxation of Partnerships. Conducting the discussion on this subject were Stanley Surrey, Law School of Harvard University, and William C. Warren, Associate Chief Reporter of the Columbia University Law School.

The work done by the Institute in the past and that now under contemplation is invaluable to bench and bar.

Your Committee recommends that we be represented at the next annual meeting of the Institute, and that the expense of our delegate be paid by the Association.

Lyle E. Jackson, Chairman
 Leslie Boslaugh
 John R. Fike
 Bernard S. Gradwohl
 Harvey M. Johnsen
 Barton H. Kuhns
 Greydon L. Nichols
 Barlow Nye
 Franklin L. Pierce
 Robert G. Simmons
 Daniel Stubbs
 John W. Yeager

The report of the Committee on Crime and Delinquency Prevention was presented by James F. Brogan, Chairman of the Committee. The report was adopted with amendments proving that the Association go on record as favoring a statewide probation system and with the further amendment that the Association, through an appropriate committee, continue its study of the need for amendments to existing laws relating to sex deviates. The report of the committee follows:

Report of the Committee on Crime and Delinquency Prevention

Your Committee on Crime and Delinquency Prevention met at Lincoln on January 21, 1956. The Committee reports as follows to the Association.

PAROLE AND PROBATION

The Committee continues to recommend that legislation be enacted to establish a suitable and useful statewide probation system. A bill for such a system was drafted by this Committee, and was introduced at the 1955 Legislative session. The bill, which was designated as L. B. 210 by the 1955 Legislature, was killed in committee. The Committee believes that the system of probation provided by L. B. 210 is practical and workable, and that a similar bill should be introduced at the next legislative session. The Committee has determined that among bench and bar there is a quite uniform feeling that some system of probation will be a greatly needed forward step in the field of crime and delinquency prevention.

SEX OFFENSES

There has been a considerable amount of agitation recently for more and better laws to deal with sex offenses. The Committee believes that the existing laws are adequate to deal with sex offenders and deviates, and that the existing problems, if any, are primarily local problems of law enforcement.

JUVENILE DELINQUENCY

The Committee has considered the advisability of the preparation of a pamphlet to be distributed to the bar, providing information on community resources which might be useful in family problems such as divorce, adoptions, non-support, delinquency, etc. *We recommend that the study of the feasibility of this project be continued.*

OTHER MATTERS

Other items have been brought before the Committee, on which no final action has been taken. These include transfer of the Criminal Investigation Division from the Department of Roads and Irrigation to the Department of Justice; the employment of a state pathologist or medical examiner to assist in the investigation of violent or unexplained deaths; the advisability of amendment or repeal of the no-fund and insufficient-fund check laws; and the question of whether the generally prevalent inadequate salary scale for county attorneys is contrary to the best interests of law enforcement. *We recommend that the Committee continue the study of these matters.*

James F. Brogan, Chairman
Phil B. Campbell
Alfred G. Ellick
George W. Haessler
William J. Hotz, Jr.
Frederic C. Kiechel
Robert A. Nelson
Virgil E. Northwall
William B. Rist
Betty Peterson Sharp
John E. Sullivan
Joe T. Vosoba

The report of the Committee on County Law Libraries was presented by Lawrence S. Dunmire, Chairman of the Committee. The report of the Committee, which was adopted by the House of Delegates, follows:

Report of the Committee on County Law Libraries

From information received during the year, it would appear that more than one-half of the counties of the state have county law libraries, and that many of these are excellent.

In the past year, some counties for the first time have established a county law library; some have made substantial additional purchases of law books; and some have received sizable donations of law books.

In a few counties there is little, if any, interest in such a library. Local conditions create various local problems, such as lawyers located in several towns in the county.

It is the opinion of your Committee that the number and quality of county law libraries is increasing slowly; that as more lawyers realize the value of a central modern county law library, the increase will be more rapid; that the advantages of such libraries should be continuously brought to the attention of the members of this Association.

As there remains a need for the work of such Committee, we recommend its continuance for another year.

Lawrence Dunmire, Chairman
 Edward Asche
 John A. Bottorf
 J. Howard Davis
 Richard A. Dier
 Myrl D. Edstrom
 William Keeshan
 Raymond B. Morrissey
 W. W. Norton
 Charles B. Paine
 Albert T. Reddish
 C. Firman Samuelson
 Carlos E. Schaper
 George A. Skultety
 Leon A. Sprague
 Joseph T. Votava

The report of the Committee on the Judiciary was presented by C. Russell Mattson, acting for the Chairman of the Committee. The report of the Committee, which was adopted by the House of Delegates, follows:

Report of the Committee on Judiciary

Your Committee on Judiciary submits the following report:

The Judiciary Committee at the annual 1955 meeting of this Association recommended "that the Bar Association cooperate with the County Judges' Association in its efforts to raise the standards of eligibility for county judges and in securing compensation for those occupying this important office, commensurate with its duties and responsibilities." The Committee's report was approved and adopted by this Association.

The Legislature of Nebraska has not been in session since our last annual meeting, and your Committee has not been called upon, nor had the opportunity to render any service to the County Judges' Association pursuant to the recommendation of the 1955 Committee.

Since our last annual meeting, the Nebraska Supreme Court has upheld the constitutionality of the Judges' Retirement Act enacted by the Legislature of this state in 1955, which was initiated and sponsored by this Association. By this act, the supreme and district courts of our state have been greatly strengthened and made more secure. The personnel of such courts have been provided with more adequate compensation commensurate with the high responsibility and services rendered by the judges of such courts and have been provided with some measure of retirement security so long overdue.

The continued improvement of the judicial machinery and processes for the administration of justice by our courts is absolutely necessary and essential to the stability and continuance of our democratic form of government. Nothing less than the most capable jurists within our power to select are, or should be, acceptable to the people and bar of this state.

This Association's duties in the effort to take the selection of judges out of politics by the adoption of the so-called American Bar Association or Missouri Plan or some other acceptable procedure should no longer be neglected, and our concerted efforts in this direction should be vigorously pursued.

Your Committee therefore recommends:

- (1) *That the recommendation of the 1955 Committee be renewed and carried out as the opportunity presents itself.*
- (2) *That this Association should, in the performance of its duties to the public and in an effort to further advance the already high standing and quality of our courts, renew with vigor and determination the task of taking the selection of the personnel of our courts out of politics by the adoption of the American Bar Association plan for the selection of judges at the earliest possible time.*

Robert H. Beatty, Chairman
James F. Begley

Jean B. Cain
 George B. Hastings
 C. Russell Mattson
 James G. Mothersead
 Earl J. Moyer
 W. E. Mumby
 R. Robert Perry
 Rodney R. Smith

HALE McCOWN: The next item of business is the report of the Committee on Hearings, of which Robert Van Pelt is Chairman.

MR. VAN PELT: Gentlemen, two matters came before the Committee. The report of the Committee as to each is a unanimous report.

I shall take them up in the inverse order in which they were presented this morning.

Mr. Kuhns called to your attention Article 3, sub-section 1, and then certain lettered sub-sections of sub-section 1. Our report is as follows with reference to the matters he called up this morning.

Be It Resolved, That Article 3, Section 1, sub-section c of the by-laws of the Association be amended by inserting after the preposition "on" and immediately prior to the word "continuing" the words "legal education."

Now, stepping aside from the resolution to tell you what is being done, the result then will be that the name of the committee will be the Committee on Legal Education and Continuing Legal Education. And if you will examine Item 17 of your program, you will see that the name that this resolution calls for is the identical name that appears upon your printed program. So we are doing nothing except to adopt the name that is now being used.

Now, the resolution continues, that Article 3, Section 1, sub-section h be amended by striking the word "relations" and inserting in lieu thereof the word "service."

Again digressing from the resolution, you will observe that in Item 19, the committee of which Mr. Wilson was the chairman is known as the Committee on Public Service. So again we are simply following the practice which has been in vogue for a year or more in this Association.

And now the final part of the resolution; that Article 3, Section 1, sub-section i, now reading "The Committee on Procedure" be stricken in its entirety. You heard the president-elect this morning say that there was no such committee, so why leave the committee in our by-laws if we don't have such a committee.

I therefore move the adoption of the resolution.

HALE McCOWN: Is there a second?

VOICE: Second.

HALE McCOWN: Any discussion?

All those in favor of the motion say aye.

Opposed the same.

The resolution is adopted.

MR. VAN PELT: The next resolution we have to present to you deals with constitutional amendments Number 306 and 307, which are to be submitted to the voters in Nebraska on November 6th. The resolution which we propose reads as follows:

“Resolved, That the House of Delegates of the Nebraska State Bar Association approve constitutional amendment number 306 to be submitted at the forthcoming general election, which amendment will permit the Legislature to absolve real estate from taxes and assessments delinquent for a period of time not less than ten years as the Legislature determines, and be it further resolved that the lawyers of Nebraska lend their support in explaining the measure to the voters to the end that the electorate can make an intelligent decision on the question.”

I now move the adoption of this resolution and ask leave to make a brief comment about it, Mr. Chairman.

VOICE: Second.

MR. VAN PELT: Mr. Walter Huber appeared before the Committee. Seemingly this is a proposal that has the support of the abstracters and likewise has the support, we understand, of the real estate dealers.

The purpose of it is to create a statute of limitations, so far as delinquent real estate taxes are concerned. The argument has been raised that if there is a statute of limitations against federal estate tax, income tax, and inheritance tax, why should not there be a similar statute of limitations so far as real property taxes are concerned?

The adoption of the resolution would provide for that, putting it in the hands of the Legislature to determine whether it be a ten-year statute, a fifteen-year statute, or some other period of time.

The Committee, after hearing the proposal and the arguments that were advanced, concluded that it would be to the interest of lawyers in examining titles and passing on such items, and similarly to the interest of lawyers who were abstracters to have such a provision adopted.

HALE McCOWN: A motion has been made and seconded. Is there further discussion?

(There was no response.)

HALE McCOWN: Now as many as favor the motion say “aye.”
Opposed, the same.

The resolutions are adopted. Thank you very much, Mr. Van Pelt.

MR. VAN PELT: Mr. Chairman, that concludes the matters, except, I take it, that there is some authority for submitting further resolutions between now and the time that we adjourn at 4:00 o'clock Friday. So if there are further resolutions, the Committee will meet to consider them.

HALE McGOWN: That is correct.

The report of the Committee on Legal Aid was presented by Emory P. Burnett, Chairman of the Committee. In addition to the formal report of the Committee, Chairman Burnett advised the House of Delegates that a committee had been appointed by the Bar of Scotts Bluff County to investigate the necessity of a legal aid program in that county and that the Bar in Dodge County and in Sarpy County had determined that there was no need for a legal aid program in those counties. The report of the Committee was adopted by the House of Delegates and was as follows:

Report of the Committee on Legal Aid

Your Committee has continued its investigation of the status of legal aid services in Nebraska, and submits the following report:

The Legal Aid Clinics in Omaha, Lincoln, and Cheyenne County continued to function during the past year with no change from previous reports of this Committee, and it is the concensus of the Committee that in each of these localities the Bar is fully performing the legal aid function of providing free legal assistance to those persons financially unable to pay for legal services which they require.

The Scotts Bluff County Bar Association, during the past year, initiated a study into the possibility of establishing a Legal Aid Clinic in that county. Byron M. Johnson was appointed chairman of the committee to make the study. As of the date of this report, the study was still in progress and no positive action had been taken.

Your Committee urges that other local bar associations follow the example set by the Cheyenne County Bar Association by establishing a rotation system among their members to furnish legal aid services and thus make legal aid services available throughout the state.

Emory P. Burnett, Chairman
Dixon G. Adams
Eugene F. Fitzgerald
Byron M. Johnson
Melvin K. Kammerlohr
Thomas P. Kelley
Richard A. Knudsen
Elmer M. Scheele
George E. Svoboda

HALE McCOWN: Mr. Ginsburg has some announcements with respect to the Real Estate Section.

Would you like to give those at the present time, Mr. Ginsburg?

HERMAN GINSBURG: Mr. Chairman, members of the House. What I have to submit to you now is somewhat more than an announcement. I was in hopes that the report of the Committee on Legislation could have been acted on before I brought up this subject, because possibly the action taken on that report might answer one of the questions the Real Estate Section wants answered.

At any rate, what I have to submit at the present time is the following.

We have had a Committee on Title Standards which has met on a number of occasions during the past year and which has prepared a report. Now, in the report, they have analyzed all forty-seven of the presently existing standards, have recommended that two of the standards themselves be amended, have recommended a number of changes in the comments to the presently existing standards, and then in addition thereto have recommended the adoption of eight new standards.

It is the intent of the Real Estate, Probate and Trust Section to act upon these, in this report, and to adopt the standards.

However, there is the problem that was brought up about whether or not the section had any authority to speak on behalf of the Association or to adopt standards, which would be binding as the act of the Association, and therefore the Executive Committee of the section requested that I appear before the House of Delegates and in effect ask for a blank check. I do not know how else to phrase it. Apparently, in view of the agenda of the meeting, you have your House of Delegates meeting today; our section will not meet until tomorrow. I know of no particular procedure in getting the approval of the Association of the Code of Standards. Therefore I am going to make a motion, simply for the purpose of bringing it to the floor, and my motion is as follows:

Resolved That the Real Estate, Probate and Trust Fund Section be authorized to adopt a Code of Title Standards to be recognized as the official act of this Association and to arrange for the publication thereof at the cost of the Association.

And that brings me to the second thing I want to discuss. As you all know, in the past the Code of Title Standards, if I may call it that, has been very poorly put up. It is on mimeographed sheets numbered one after another with no particular relevancy between the numbers and so forth. It is our intent to have a permanent committee and keep adding to the standards and amending them, adding, making new ones and so forth and so on. I have discussed with Mr. Turner, who has been very helpful to me, the method that other states have used, and the plan that the Committee proposes is a loose-leaf compilation; we would have a binder that perhaps we would ask the members to buy, and publish the sheets with the holes punched in them, so that they could be added to or taken from.

Also we plan to have the standards set up in chapters, Chapter

One perhaps relating to corporations, Chapter Two to this and that, and so forth, and a person will not have to go through fifty-five or sixty or eventually a hundred or more sections to find the particular subject he is looking for.

That may entail some expense, which again we have no authority to undertake without the permission of the House. Now while I am at it, I might just as well mention the third thing I was going to bring up involving the report of the Committee on Legislation.

At the last session of the Legislature, there were some bills introduced, which at least some of the members of the Real Estate Section felt were very unwise from the standpoint of titles. We had no authority to appear for the Association and did not know to whom to speak for the purpose of entering an appearance.

We had understood that in the matter of proposed legislation the Association has a Legislative Committee, and that if we have some bills that we want introduced, if they are sponsored by the Association, that Committee will act on them, but there are two objections that we have. One is that there was no one to speak for the Association, at least for our particular part of the Association when bills were being considered which were very detrimental to the matter of titles, and if it had not been for two members of the Legislature, who happened to be lawyers and who took a very active part, we would have been in considerable difficulty in a matter of title examination.

Furthermore, there seems to be a lack of coordination between the various sections. In other words I am informed that in 1953 the Taxation Section had a bill passed or sponsored that, with reference to inheritance taxes, completely overlooked the fact that there was the matter of titles also involved.

The result is that now we are confronted with difficulty in the interpretation of it. If the two committees or two sections had only acted together, or had there been any group that could have called the people together and said, "Now how about this?" Two or three little words would have taken care of the whole situation; as it is now, there is considerable tumult over the question of whether there is a five-year statute applicable to people who died before September 14, 1953, all of which could have been avoided.

On that subject, the Legislative Committee's report brings up the question as to their functions and so forth, and perhaps this third point I have mentioned will be clarified in action that may be taken on that report.

I move the adoption of the resolutions which I have read for the purpose of bringing before the House the proposals which we intend to take concerning the matter of Code of Title Standards.

MR. SPENCER: Mr. Chairman, may I rise to a point of information? At the third session of the House of Delegates on Friday, Mr. Ginsburg will make a report of the activities of his section.

Wouldn't the proper procedure be to take whatever action they care to if they are going to make a recommendation and for Mr. Ginsburg to include it in his report, and at that time the House of Delegates will have an opportunity to either approve or reject the report? A resolution offered by Mr. Ginsburg would be out of order at this time.

HALE McCOWN: I was going to suggest that, while I certainly have no objection whatever to the motion as made, the regular schedule of the agenda, to which I called your attention at the commencement of the program this morning, is that at 4:00 o'clock on Friday, the first item that is scheduled is the report of the Section on Real Estate, which is your section, I believe, Mr. Ginsburg.

HERMAN GINSBURG: That is perfectly agreeable to me. It is our understanding that the third report was merely a formal report to announce the election of officers and announce the program that was held. If there will be sufficient opportunity so that we can pass on that at that time, it is perfectly agreeable to the section if it be taken up at that time.

HALE McCOWN: Again may I repeat that I have no objection whatever to Mr. Ginsburg's motion, and in view of what happened last year, I am not too sure about the number that will be here on Friday afternoon.

With the consent of the House, there is certainly no objection to considering Mr. Ginsburg's motion as made.

JOSEPH T. VOTAVA: I object to it. I do not like to pass on something in futura. I would like to see what the report is going to be, and then we can pass on it when we know what action has been taken.

MR. SPENCER: And I would suggest now that the members of the House of Delegates understand that their duties are not concluded until after the session at 4:00 o'clock on Friday, and it is perhaps more important that they be here then than probably at this time.

JOSEPH SVOBODA: And let it be understood that the section on Real Estate, Probate and Trust Law will then make its recommendation.

HALE McCOWN: Exactly.

MR. CASSEM: Further, Mr. Chairman, I think that brings up something else. Evidently there is a lack of coordination between sections of the Bar with respect to legislation. I think the Committee on Legislation of this Association has under its supervision the most important and signal activity of the Association. And if somewhere we are defective in integrating the activities of certain sections and diverting them into the Committee on Legislation as a clearing house and in coordinating the body, then I would suggest that we amend our procedure and set up some practice so that the Committee on Legislation actually is the committee that is in touch

with everything that is being recommended and suggested by any and every section of the Association.

HALE McCOWN: In view of that suggestion, Mr. Kuhns' committee, which is considering the drafting of some amendments to the by-laws, might consider anything that might be involved in that part. It seems there is some question of authority which might be properly incorporated in that. Action will therefore be taken on this matter at 4:00 P.M. Friday.

The report of the Committee on Legislation was presented by Robert H. Downing, a member of the Committee, acting for the Chairman. The report of the Committee, which was adopted by the House of Delegates, follows:

Report of the Committee on Legislation

The Legislature not having been in session during 1956, this Committee had neither opportunity nor occasion to attempt to sponsor or guide any legislation through the Legislature. The Committee was limited to the consideration of matters brought to its attention by members of the bar and the American Bar Association. No matters were referred to it by either the Executive Council or Judicial Council.

There were several matters, however, which were brought to the attention of this Committee which were given careful consideration.

First, it was brought to the Committee's attention that Nebraska has no statute defining the venue of the probate of an original will. We believe that the general practice has been to accept the venue as provided by statute for intestate estates. *In view of this practice, we recommend that the next Legislature be requested to enact a law fixing the venue of the probate of an original will to conform to the present statutes fixing the venue for the administration of intestate estates.*

Second, it was suggested to your committee that Nebraska should have a stronger law dealing with sex deviates. We have learned that this matter is presently the subject of study by the Committee on Crime and Delinquency Prevention. Upon receiving a report and recommendation from such Committee, the Committee on Legislation will take appropriate action.

Third, recommendation has been made to George H. Turner and by him referred to this Committee with reference to (1) abolishing the necessity of transcripts in appeals, (2) the consolidation of the clerks of county courts and district courts into one office called "Clerk of Courts," (3) changing the manner of appeals in compensation matters, and (4) changing the manner of appeals from other courts to the district court. Since these suggestions involve many major changes of existing law, *we recommend these suggestions be referred to the Section on Practice and Procedure for detailed study and consideration.*

Fourth, it was suggested by a county attorney that the offense of adultery as provided in Section 28-902, Revised Statutes of Nebraska for 1943, be changed from a misdemeanor to a felony. This having been a matter of wide divergence of opinion, *it is recommended that the question be submitted to the Committee on Crime and Delinquency Prevention for more detailed study and recommendation.*

Two other matters were submitted for consideration by this committee: (1) that Nebraska enact a law similar to the one now in effect in the State of New York with reference to stock gifts to minors, and (2) that Nebraska adopt the Model Non-Profit Corporation Act prepared by the Committee on Corporate Laws of the American Bar Association. The Committee, after careful study, has taken no action on these two suggestions and makes no recommendation with reference thereto.

The committee found itself in doubt and in some disagreement as to its exact duties and responsibilities. *We recommend that future committees be instructed by the House of Delegates as to their respective functions.*

John C. Gewacke, Chairman
 W. O. Baldwin
 John M. Brower
 Cloyd E. Clark
 J. Cedric Conover
 John C. Coupland
 Robert H. Downing
 Dale E. Fahrnbruch
 George A. Farman, Jr.
 L. Raymond Frerichs
 Forrest A. Johnson
 Joseph P. O'Gara
 Kenneth M. Olds
 Harry B. Otis
 Edwin Cassem

The report of the Committee on Unauthorized Practice was presented by A. J. Luebs, Chairman of the Committee. The report, which was approved by the House of Delegates, follows:

Report of the Committee on the Unauthorized Practice of Law

A complaint was received from the Custer County Bar Association involving a resident of Custer County. He is not a lawyer but has prepared a will, delayed birth registration papers and other instruments of a legal nature for a fee. This has been reported to the Executive Council and authority requested to present the matter to the attorney general for action.

Formal protest has been made relative to representation by non-lawyers in the role of an advocate before the Tax Court of the

United States in cases docketed for Nebraska. All members of the Committee felt it would be premature for this Committee to take action on this without further study and consideration of recent cases and of recent regulations governing such practices. It was also suggested care should be taken not to take a stand contrary to agreements worked out by the American Bar Association or which would be in conflict with studies made or agreements worked out by other Committees of our Association.

Several complaints of a minor nature have been received which it appears can be disposed of through letters pointing out the violation and requesting such practices cease.

A. J. Luebs, Chairman
 Arthur O. Auserod
 Cecil S. Brubaker
 Julius D. Cronin
 John W. Delehant, Jr.
 Francis S. Gaines
 Ralph M. Kryger
 Harold B. Long
 R. E. Lunner
 John W. Newman
 Richard E. Person
 Clarence M. Pierson
 Donald F. Sampson
 Elbert H. Smith

The report of the Advisory Committee was presented by Charles F. Adams, acting for the Chairman of the Committee. The report of the Committee, which was adopted by the House of Delegates, follows:

Report of the Advisory Committee for 1956

During the year now ending, the Association has lost by death two men eminent for their service to the profession in matters relating to ethics, Mr. William M. Ely of Ainsworth and Mr. Clarence T. Spier of Omaha. Each of them served continuously as Chairman of the Committee on Inquiry for his District—Mr. Ely in the Fifteenth and Mr. Spier in the Fourth—for more than eighteen years. Their work was conspicuous because of their fairness, firmness, and sound judgment. The long term of their service is a tribute to the confidence reposed in them by the supreme court and by the members of the profession.

There is now pending before a referee appointed by the supreme court one case in which the Advisory Committee conducted two lengthy hearings attended by all members of the Committee.

The Advisory Committee will soon have a formal hearing on charges recently referred to it by the Clerk of the Supreme Court

following a report by the Committee on Inquiry for the Fourth District.

The Committee reviewed one record which came to it from the Third District and sustained the action of the Committee on Inquiry in dismissing the charges.

During the year, the Committee formulated nine advisory opinions on a wide variety of questions submitted by members of the Association, and, in some cases, by chairmen of local committees. Each opinion was prepared as the result of consideration given to the problem and the exchange of views by all members of the Advisory Committee. The members of the Bar may be interested in knowing the type and character of questions upon which such opinions were rendered. Briefly, and in general terms, they were as follows:

Procedure before the Bar Association when local law enforcement officers decline to act in a case involving alleged criminal conduct by an attorney;

Under what circumstances, if at all, is a lawyer ethically bound to expend his own funds for briefs and expenses of litigation for an indigent client to avoid what the lawyer believes to be a failure of justice;

May a lawyer, employed to prepare a synopsis of laws in a limited area for distribution by the client to lawyers and laymen, properly permit such brochure to show his authorship, the fact that he is a lawyer, and the name and address of his firm;

The extent to which Canon 27 applies to lawyers' professional cards in journals, programs, or other publications of charitable, educational, or civic groups;

Is it permissible for a judge who is a candidate for reelection to supply regularly for newspaper publication news reports giving the name of the judge and, in some cases, a reason for the decision;

What rules apply to the furnishing of appeal, supersedeas, and similar bonds for a client by or on the credit of the lawyer;

May an attorney for a purchaser properly accept a fee from the seller's broker for services performed at the request of the purchaser in connection with the removal of defects in the title to the property;

May a disciplinary agency hear charges against a lawyer based upon non-payment of a debt incurred in a business transaction not related to the practice of law;

Under what circumstances, if at all, may an agency of the State Bar Association hear and determine charges against a lawyer long after he has ceased to be a resident of the state.

In nine of the eighteen districts no charges were made, no meetings held, and no matters are pending. These are Districts 1, 5, 6, 8, 10, 13, 14, 15 and 18.

Minor complaints were dismissed for lack of merit in Districts 7 and 9.

In District 2, one case is now pending and should be disposed of before year-end.

In District 3 (Lincoln), two matters held over were disposed of without formal hearings. Charges were filed in seven matters, five of which were disposed of without hearing. One was heard formally and determined in favor of the respondent, and one case, in which several hearings have been had, is not yet completed.

In District 4 (Omaha), the Committee held five meetings, and informally disposed of seven matters by dismissal or adjustment. Recent charges are under consideration in one case.

In District 11, charges in one case resulted in censure; one matter is pending.

In District 12, investigation in one matter resulted in reference to the Attorney General.

In District 16, complaints against two lawyers of the district were received and informally investigated. One resulted in admonition. There were two complaints involving the other lawyer, one of which was dismissed as being without sufficient foundation, and the investigation on the other complaint against this lawyer is being continued awaiting final disposition.

In District 17, two cases were dismissed; one is pending.

Respectfully submitted,
 Raymond G. Young, Chairman
 Charles F. Adams
 Raymond M. Crossman
 George B. Hastings
 James G. Mothersead
 Lloyd L. Pospishil
 Frank D. Williams

The report of the Special Committee on Expert Medical Testimony was presented by John L. Barton, Chairman of the Committee. The report of the Committee, which was adopted by the House of Delegates, follows:

Report of the Special Committee on Expert Medical Testimony

This Committee has given careful consideration to the subject assigned to it and has reached its decision.

The subject for review and decision was:

Is there a need for legislation authorizing the District Courts of the State of Nebraska to appoint medical experts up to three in number to examine a claimant who has brought suit to re-

cover money damages for personal injuries and to provide that the report of such expert or experts be filed with the Clerk of the District Court, such report to be read to the jury at the trial of the cause?

This Committee took up where the predecessor committee left off, and carefully considered the purposes, provisions, and requirements of a bill prepared by the predecessor committee. This bill is known as L. B. 332. The bill was introduced at the 67th session of the Nebraska Legislature. On April 21, 1955, the Judiciary Committee of the 67th session of the Nebraska Legislature indefinitely postponed the enactment with the comment that "more study on the subject was required."

In the Committee's study, not only was L. B. 332 thoroughly reviewed but there were also reviewed the possible benefits and the known difficulties inherent in such type of legislation.

Each of the individual members of the Committee reviewed the matter from his experience in his own community and weighed the possible benefits against the burdens that this type of legislation would bring upon the courts, the litigants, and the lawyers, if enacted.

The principal questions arising are enumerated below:

1. Is there a present need for such legislation?
2. Would such legislation tend to bring about better and more orderly presentation of the medical phase of personal injury litigation?
3. Would such legislation be too complex, and would the cost thereof be excessive?
4. Since L. B. 332 provided that the reports of the experts appointed by the court could be read to the jury either by the expert or a party, what would be the effect on the jury?
 - a. Would there be a tendency to discredit the testimony of the medical experts called by either party as a witness?
 - b. Since L. B. 332 restricted the objections to such report to its relevancy or materiality only, the jury would be permitted to hear *inferences* arrived at by the examining physician and possibly hearsay statements contained in the report to which the opposing party would not be permitted to raise the proper objection.
5. In other than metropolitan areas in the state, would such experts be available?
6. If such experts were not available locally, would the moving party be required to transport the plaintiff to the locality where competent experts would be available?
7. Would such legislation increase the work of the courts and the lawyers unnecessarily, since statutory authority is now available and in use to accomplish the same purpose? Section 25-1267.40, R. S. Supp. 1955.

8. Would any benefits obtained by such legislation outweigh the difficulties, trouble, and expenses involved?

9. Is it not the fact that the district courts now have the inherent power and also the statutory authority to accomplish the required result?

10. L. B. 332, as written, is not entirely specific on who would bear the cost of one, two, or more experts up to three in number who could be appointed by the court, and, in the event the costs of same would be taxed to the loser and if this happened to be the plaintiff, would the experts go uncompensated?

The Committee is made up of trial lawyers who are exposed to the problems presented here.

One or two members of the Committee have voiced an opinion of approval of some of the provisions of L. B. 332, but suggest modifications. At least one member of the Committee expresses full approval of the provisions of L. B. 332. The majority of the Committee is definitely opposed to any such type of legislation.

Since the majority of the Committee oppose such legislation, the following recommendation is made to the Association:

There is no present need for such legislation.

John L. Barton, Chairman

Earl M. Cline

H. L. Blackledge

Ivan A. Blevens

Lawrence M. Clinton

Thomas F. Colfer

George L. DeLacy

Frederick M. Deutsch

John E. Dougherty

James J. Fitzgerald, Jr.

Robert G. Fraser

Daniel J. Gross

Lyle C. Holland

Fred R. Irons

Vance E. Leininger

L. F. Otradovsky

The report of the Committee on Legal Education and Continuing Legal Education was presented by E. D. Beech, Chairman of the Committee. The report of the Committee, which was adopted by the House of Delegates, follows:

Report of the Committee on Legal Education and Continuing Legal Education

The Committee commends the good work of the Association accomplished by holding institutes during the past year, which included the Federal Tax Institutes held in December, the Family Law and Old Age and Survivors Insurance Institute held in April,

and the Real Estate Titles Institute held in June. The president, Executive Council, and panel members have the thanks of every member of this Committee.

We recommend subscriptions to "The Practical Lawyer," published eight times each year by the American Law Institute, and the full use by members of the bar of all publications of the Committee on Continuing Legal Education of the American Law Institute collaborating with the American Bar Association.

No complaints regarding the training in the Law Colleges of our state have been presented to this Committee. The Committee was asked to consider the advisability of suggesting that all new members of the bar be required to engage in practice in an established law office for a fixed period of time before their memberships are made permanent, this period of practice to be similar to the internship of members of the medical profession. Since this is a controversial matter of great importance and no meeting of the Committee was held for its discussion, *we recommend that the same be studied and considered by future committees.*

E. D. Beech, Chairman
 Lansing Anderson
 Robert V. Denney
 David Dow
 James A. Doyle
 Robert M. Harris
 Frank M. Johnson
 Harold R. Jordan
 William H. Meier
 Milton A. Mills, Jr.
 John E. Newton
 Clifford H. Phillips
 Fay H. Pollock
 James I. Shamberg
 O. E. Shelburn
 Robert Van Pelt

The report of the Special Committee on Oil and Gas Law was presented by Paul L. Martin, Chairman of the Committee. The report of the Committee, which was approved by the House of Delegates, 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:

The members of the Special Committee of last year were instrumental in having several bills passed by the 1955 Legislature of the State of Nebraska which took care of procedural matters which were not covered by the statutes then in effect. This year

there has been no session of the Legislature, and the Legislative Council did not hold hearings on oil and gas problems.

While over the past few years we have been successful in having many matters corrected by Legislative action, there are a substantial number of problems in the oil and gas industry which should be studied and where considered advisable legislation suggested. Among these problems are the following:

1. A special mechanic's lien law covering oil field operators so that suppliers of equipment and services, transportation companies, and employees would have better protection against irresponsible operators and promoters.

2. Statutory enactment definitely determining oil, gas, and other minerals in place to be real estate.

3. Broadening of statutes relative to attachments, executions, and liens upon mineral interests.

4. Clarification of mineral interests of owners of life estates and remaindermen.

5. Procedure providing for ratification of leases by executors, administrators, guardians and trustees.

6. Inconsistencies in the statutes covering procedure for forfeiting of oil and gas leases upon non-payment of delay rentals thereon.

7. This last year has brought to the attention of the oil and gas industry and to the public more forcibly the necessity of an oil and gas conservation law to regulate the improvident operator and to protect the natural resources of the state. A bill will probably be introduced in the next session of the Legislature which will have the general support of the industry. We should study the bill carefully in order to make sure such procedural matters are included to fully protect all parties, such as the manner in which the law is to be administered, the makeup of a commission, rules and regulations before the commission, and the manner of appeal from the orders of the commission.

We recommend that the Special Committee on Oil and Gas Law be continued and that the members of the Committee extend their services to the Legislature in order to assist in the preparation of legislation that will inure to the benefit of all citizens interested in the oil and gas industry in the State of Nebraska.

Paul L. Martin, Chairman
Robert C. Bosley
George B. Dent, Jr.
Ted R. Frogge
Fred T. Hanson
Elmer J. Jackson
Milton C. Murphy
Daniel E. Owens
William S. Padley

Perry W. Phillips
 William B. Quigley
 R. L. Smith
 S. E. Torgeson
 Ivan Van Steenberg
 Archibald J. Weaver
 J. W. Weingarten
 Floyd E. Wright

The report of the Committee on Public Service was presented by John J. Wilson, Chairman of the Committee. The report of the Committee, which was approved by the House of Delegates, follows:

Report of the Committee on Public Service

The Committee on Public Service makes the following report:

The principal activities of the Committee during this year have been:

PAMPHLETS

Distribution of all five pamphlets continues. The demand has been so great that reprinting has been necessary. 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 now has in preparation two new pamphlets to be entitled "Insurance" and "Social Security."

JURORS' MANUAL

The 1955 "Manual for Jurors in Nebraska" was much more attractive in appearance than the one first distributed in 1954. The district court clerks and jury commissioners have been most cooperative in getting these manuals into the hands of all those called for jury service. A copy is included with each jury summons. No change in either form or content was made in the 1956 manual. Copies were supplied to all counties during August.

PAMPHLET DISPLAY RACKS

Members have ordered a considerable number of these racks for use in their own offices or for distribution to banks and public offices within their cities. Several local bar associations have purchased these in quantities and have undertaken to keep them supplied with pamphlets. The Omaha Bar Association recently purchased 800 copies of each of the five pamphlets presently being distributed and five display racks. They are being installed in public places. The Box Butte County Bar Association has purchased and distributed 2,500 pamphlets. They are made available to the public through all of the local banks and in offices in the court house. The original order of racks was soon exhausted but has been replenished.

They are on hand in the Secretary's office, where they may be purchased for \$2.00.

NEWSPAPER ARTICLES

The series "You and the Law" is being continued but has not been as well received by local editors as the Committee had hoped. These articles deal with legal subjects and are designed to make the reader aware of the fact that there are legal complications in nearly every phase of everyday life, but some editors regard them as advertising and reject them for that reason. Since the articles were commenced in September, 1955, they have appeared in 55 newspapers for a total of 255 insertions. Individual lawyers and local bar associations are urged to make a greater effort to see that these articles are carried in their local newspapers.

THE NEBRASKA FARMER SERIES

This has been one of the most successful projects of the Committee on Public Service. Each issue of the *Nebraska Farmer* carries a splendid article on a legal subject prepared for publication by the Committee. With each article, the editors of the *Farmer* carry an appropriate credit to the Association for the preparation of the article and add this caution:

"The purpose of the series is to inform and not to advise. All information contained in the article is general, and should be applied to specific cases only after consultation with your lawyer."

The editors of the *Nebraska Farmer* are highly pleased with the series and have requested the Committee to continue it indefinitely.

TELEVISION PROGRAMS

The bi-weekly programs over KMTV, in Omaha, and the weekly programs on KHOL-TV, at Axtell, are being continued. These consist of fifteen-minute interviews of lawyers on legal subjects by station personnel. At each station, the programs are conducted by very capable young ladies. Marianne Peters is in charge of the KMTV program, and Maurine Eckloff has the one at KHOL-TV. Scripts are prepared in advance under the direction of the Committee, and local lawyers are invited to participate.

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

SURVEY OF ACTIVITIES

During April the Executive Council had an analysis of the public service activities of the Association made by Harry Krusz and Company, public relations organization, of Lincoln. The report of that company to the Executive Council commends the work of the Committee on Public Service and makes suggestions for the continuance of the work. In conformity with one of the suggestions made, the Executive Council has decided against the employment of a full-time public relations director but instead will employ the

services of public relations counsel for particular phases of the activities of the Committee.

The Committee was authorized by the Executive Council to explore the possibility of closer liaison between the Nebraska State Bar Association and the law schools of Nebraska. The Committee felt that, through some plan of cooperation, the Bar Association might aid the students in obtaining a better understanding of the legal profession and the obligations of a lawyer toward his client, the courts, and the public, as well as acquainting him with some of the problems incident to the establishment of a practice. Contact has been made with the deans of both law schools who look with favor upon the proposal. No definite program along this line has as yet been developed.

The Committee, after carefully surveying the field of other possible activities which might be made a part of the public service program of the Association, made several suggestions to the Executive Council which the Council thought should not be undertaken. The Committee feels that its successor should review the recommendations made during this year to the end that, if approved, they may be resubmitted for the further consideration of the Executive Council.

It is therefore recommended that the present public service program, including the distribution of pamphlets and jurors' manuals, the furnishing of newspaper columns to the weekly newspapers and to the Nebraska Farmer, and the production of television programs be continued. It is further recommended that the new Committee on Public Service reconsider all previous recommendations of this Committee, and that the program of cooperation with law schools be implemented.

John J. Wilson, Chairman
John B. Cassel
Thomas M. Davies
Richard E. Hunter
Otto Kotouc, Jr.
William H. Lamme
Charles E. McCarl
P. M. Moodie
Joseph C. Tye
David R. Warner
R. R. Wellington
Walter W. White

The report of the Committee on Tort Claims Act was presented by George A. Healey, Chairman of the Committee. The report of the Committee was amended to include a recommendation that the Committee be continued and, as amended, was adopted by the House of Delegates. The report of the Committee follows:

Report of the Committee on Tort Claims Act

Since no legislative session was held during the life of this Committee, there was not a great deal of activity in which this Committee could participate.

Although past proposals for a State Tort Claims Act have failed in the Legislature, it is the feeling of this Committee that the consensus of the legal profession is that the present system of handling such claims is archaic, and that the claims could better be handled both more economically and more expeditiously by the courts. Several drafts of proposed legislation to accomplish this purpose are in the files of the Committee.

It is the recommendation of this Committee that the House of Delegates again consider the advisability of continuing this activity and the presentation of a new such proposal to the 1957 Legislature.

George Healey, Chairman
Clarence S. Beck
Thomas J. Dredla, Jr.
Hugh W. Eisenhart
Gerald J. McGinley
George A. Munro
George C. Pardee
Richard C. Peck
Harry S. Salter
Arthur C. Sidner
Seymour L. Smith

The report of the Special Committee on Joint Conference of Lawyers and Accountants was presented by James W. R. Brown, Chairman of the Committee. The report of the Committee, which was adopted by the House of Delegates, follows:

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

It has been the practice of this Committee to have a joint meeting with the accountant members during the month of September each year for the consideration of any problems involving the relations of the two professions. Since this report is being prepared prior to the annual meeting of the Joint Conference, it is not possible to report on the business transacted at that meeting.

The lawyer members have reviewed the decisions of the courts involving the unauthorized practice of the law in the field of taxation and the developments with respect to practice before the Treasury Department. They have also given consideration to the obligations of the lawyer in the tax field.

A supplementary report and recommendations may be appropriate after the forthcoming meeting of the Joint Committee.

James W. R. Brown, Chairman
Harry B. Cohen
Lowell C. Davis
John C. Mason
Keith Miller
Marvin G. Schmid
Robert G. Simmons, Jr.
Flavel A. Wright

HALE McCOWN: Gentlemen, we have completed the schedule of the agenda, with the exception of the matter we were discussing immediately before the lunch recess, namely, the responsibility, authority, and division of responsibility with respect to legislation.

It is now open for discussion on that general issue.

Mr. Cassem.

MR. CASSEM: Mr. Chairman, I think there are two things that Mr. Kuhns mentioned, one, the uncertainty of the authority of the Executive Council to speak for the Bar Association. If there is that uncertainty, let's nail it down, get it so nobody can get up in front of a legislative committee and assert the Executive Council acted officially but doesn't speak for our Association; secondly, Mr. Ginsburg raised a question of a couple of bills proposed by a section that they were referred to the Legislative Committee for drafting.

Now then I do not think there ought to be any question about that. The section ought to draft its own bill. It would take a collection of geniuses on the Legislative Committee to draft bills for Real Estate Sections, for the Crime Section, and for the Taxation Section, and so forth. I think that the functions of the Legislative Committee should be largely as Bob Downing suggested, to act as a steering committee, to take the finished product, to act as a clearing house within the sections to see that it had the adequate consideration in the various sections or appropriate section rather than assume its responsibility for preparation to the Legislature.

MR. WILSON: Two years ago this problem came up with reference to the problem of taxation, and sections took care of it before the bills were presented to the Legislature. They had to be approved by the Executive Council.

HALE McCOWN: Is there any further discussion?

MR. SVOBODA: Do we not have this furor that we always have to meet around this time of the year? We do not know what is going to be introduced in the Legislature, and we come up to the Legislature session with the hoppers closed, and miscellaneous lot of bills that we may want to support or oppose. We do not have anybody at the present time to screen those bills.

I have been before legislative committees, and it seems to me what we ought to do as you have suggested yourself, Mr. Chairman; the Legislative Committee should be a steering committee. Un-

doubtedly it should be an originating committee, but I think more than that a screening committee, and that the Committee should be so made up that it represents every one of our districts here, so that they would then speak with some authority. Pursuant to a change in the by-laws, so they could say this is what the Bar Association is for or this is what the Bar Association is against.

HALE McCOWN: Thank you, Mr. Svoboda.

I think that brings up a point. There are two things, I think, you have to consider: one is the question of authority to speak for the Association; the other is a question of responsibility for initiating certain legislation or opposing it; they are actually, I think, two distinct things.

We have a question first of how we are going to get the authority of the Bar Association behind any legislative issues or measures that may be involved, and, secondly, who is to have the responsibility initially for initiating such measures as we ourselves may want to have proposed or opposed, as the case may be.

Is there any further discussion on this general issue?

MR. DOW: Where does it stand?

HALE McCOWN: There is no motion so far. It is merely in connection with the recommendation of the Legislative Committee that the responsibility of the various committees be redefined.

MR. CASSEM: Where is that determined, Mr. Chairman—in the by-laws?

HALE McCOWN: The by-laws merely set up the committees, as I understand it; is that correct?

MR. DOWNING: That is correct, sir. It is also correct that there is a mandate in the rules promulgated by the supreme court that the by-laws define the jurisdiction of the committee.

MR. VOTAVA: Mr. Chairman.

HALE McCOWN: Mr. Votava.

MR. VOTAVA: Mr. Chairman, I think this is too big a body to draft the proper allocation of those duties. I think that Mr. Kuhns is working on something he is to submit before the 4:00 o'clock session next Friday.

I would move that this problem be left to Mr. Kuhns' Committee, and that they draft the proper by-laws to cover the entire subject, both points that you mentioned.

HALE McCOWN: Mr. Votava, do you want to limit your motion to modify the by-laws? It might be accomplished without modification.

MR. VOTAVA: Or appropriate resolution. It would be better by a resolution rather than modifying the by-laws.

HALE McCOWN: I would suggest, if it is agreeable with you, that the motion be modified or amended in that fashion.

Is there a second?

MR. VOTAVA: But I do not think we ought to be in a hurry to draft that motion as to the authority. It is rather important.

VOICE: Second.

HALE McCOWN: The motion is before the House that the matter be referred to Mr. Kuhns' Committee for a report on Friday afternoon for such appropriate action as the Committee may recommend.

MR. VAN PELT: Mr. Chairman, may I rise to speak to that portion? While there was something indicating that there might be a report at 4:00 o'clock Friday, it seems to me it is an undue burden to throw on the president-elect and chairman of a Committee to come in within forty-eight hours redrafting these by-laws. We should not expect the Committee to do that at all, if it is submitted in that manner. I would be glad, in deference to this Committee, to give them as much time as they feel is needed to come in with their report.

MR. VOTAVA: Then leave it to your Committee.

HALE McCOWN: May I suggest that any report of the Committee, unless there is action by Friday, will not be acted on by the House of Delegates at this meeting.

MR. VAN PELT: Well, I am willing to see the Committee report if it can, but I do not see how it can.

HALE McCOWN: Frankly, I am inclined to agree, and, secondly, if I may again exercise my prerogative here, I question whether we may need to amend the by-laws, but might merely, shall we say, recommend additions or recommend certain action by the president with respect to delegation of responsibilities.

I am not too sure it is going to actually require any amendment of by-laws, frankly.

Now at the moment, the motion is that it be referred to Mr. Kuhns' Committee.

MR. VOTAVA: Well, referred to a Committee to draft a resolution to that effect; I will absolve Mr. Kuhns from that.

MR. CASSEM: Well, Mr. Chairman, as long as the Committee is wondering what its functions are to be, it would be an appropriate place to determine what that Committee thought its function was and to draft a resolution accordingly.

HALE McCOWN: Mr. Votava, are you willing to have the committee to whom this be referred be the Legislative Committee?

MR. SVOBODA: The chairman is not even here. I do not think we have a functioning committee.

MR. VOTAVA: Yes, it is, all right.

HALE McCOWN: The chairman of that particular committee is not here.

MR. VOTAVA: Is he going to be?

HALE McCOWN: I assume not.

MR. VOTAVA: Who spoke for them today?

MR. DOWNING: I did.

MR. VOTAVA: Well, why not let the spokesman then be designated as the chairman and take it up?

HALE McCOWN: The motion, as I understand it, is that Mr. Robert Downing be chairman of a committee to consider the proposal covered by Mr. Votava's motion, and that amendment to his motion has been made and seconded. Is there any further discussion?

I think before you vote I should comment that in the event that Committee is unable to come in with a specific or complete report as of Friday, I suggest that all of you be considering the matter yourselves, as to what may be done, because I do feel that some action needs to be determined upon.

There is, for example, the possibility of a special session of the House of Delegates at the close of the twentieth legislative day. You might have a special Legislative Committee appointed to meet at approximately the same time to consider then all the bills and make recommendations and then act as the spokesman of this Association.

There are a number of things of that sort that might be done.

So I suggest that each of you therefore be keeping that in mind.

Very well then, all those in favor of the motion say "aye."

Opposed, the same sign.

The motion is carried.

Is there any further unfinished business on the agenda this afternoon?

If there is no further business on today's meeting, it will be adjourned until 4:00 p.m. Friday.

And may I again suggest that each of you make every effort to be here at that time, not only because of the general reports of the sections which will be made then (but of course you have heard the reports of the preliminary matters of at least one session, which I think are important, and will need to be taken care of) but also because of the matter we have been discussing.

Very well, this House will stand adjourned until 4:00 p.m. Friday.

(Adjournment at 2:45 o'clock P.M.)

NEBRASKA STATE BAR ASSOCIATION

THURSDAY MORNING SESSION

OCTOBER 18, 1956

The opening session of the fifty-seventh 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 Wilber S. Aten.

PRESIDENT WILBER S. ATEN: Gentlemen, if you will come to order, we will get started on our program.

As you all know, this is the opening of the Fifty-Seventh Annual Meeting of the Nebraska State Bar Association.

At this time the Reverend J. N. Brockmann, Minister of Saint Martin's Episcopal Church of Omaha, will pronounce the invocation.

(Invocation by The Reverend J. N. Brockmann.)

PRESIDENT ATEN: At this time we will have an address of welcome by Mr. Oscar T. Doerr, President of the Omaha Bar Association.

OSCAR T. DORR: Mr. President, gentlemen of the Nebraska Bar Association. I think that the title of the address is probably a misnomer. I saw this in a column in a newspaper the other day, and I thought it should serve as a guide to this address.

It has been said that the Declaration of Independence consisted of three hundred words; the Ten Commandments contained two hundred ninety-seven words; and the Lord's Prayer but fifty-six words—so that I think that under the circumstances an address of welcome should not be attenuated, if that is the proper term.

We are very much honored to be the host city of the Nebraska State Bar Association convention, and we, the four hundred members of the Omaha Bar Association, heartily welcome you to Omaha.

It seems that a standard welcome to any group of conventioners includes some reference to traffic tickets and something to the effect that delegates may hand tickets to someone or other—we must just pass this point by—I think most of you have read our newspaper and can understand the omission. Just say that instead, since a very fine program of work and entertainment has been arranged by the officials of the convention and all of the spare moments have been taken care of, it probably would be just as well to park the car in a parking lot.

We hope that you are going to enjoy your stay with us, and that you will come to Omaha often, even when there is no Bar convention, and we hope that you will not hurry home after the convention is over, but that you will spend the week-end here with us.

You have a choice of many items of entertainment over the week-end. If you will stay here Friday night, you will learn who the new king and queen of Ak-Sar-Ben are going to be, or you may see Omaha University team of simon-pure amateurs try to extend their long string of victories when they play that night.

I hope that if you have not seen Boys Town you will take that in and understand why many thousands of people in the United States make this a stopping point in order to go through those premises. There is a beautiful new Student Union building on the campus of Creighton University, and recently there was dedicated the Eppley Memorial Library on the Omaha University campus. Look over these campuses; look over the additions on the campus of the Nebraska Medical University. You can visit our parks and see autumn in all of it most colorful glory without going any long distance away.

Drive in any direction, and you will see the explosive growth of the city of Omaha. Eat some of the Omaha steaks at some of these famous eating places; go through our stores, and if your wives are with you, if they have not already done so, see the beautiful Ak-Sar-Ben displays; and attend our churches on Sunday, and we hope that you will come back soon.

You are all invited to attend the cocktail hour which precedes the banquet tonight, and I hope that you will meet many old friends there and that you will make many new ones. Welcome to Omaha.

PRESIDENT ATEN: I have asked a friend of mine and a person whom many of you know to make response; Joseph C. Tye of Kearney, Nebraska.

JOSEPH C. TYE: Mr. President, members of the Omaha Bar Association, and fellow lawyers. I am a little bit puzzled why Wilber made the introduction that he did with what appeared to me to be a smug expression on his face.

True, I live only thirty or thirty-five miles from him, and perhaps ought not to say too much about him. I see that he refrained from saying anything about me.

I thought you might be interested in one little true incident, however. This summer some of us outstate lawyers got to wearing sport shirts, going without neckties in the heat of the Nebraska summer, and Wilber has been leading the field with beautiful sport shirts.

This summer he tried a case in the district court in sport shirt, no necktie, short sleeves. The court for some reason decided the case against him, and the next day when Wilber saw the judge, he said, "Judge, perhaps I should apologize for appearing in your court the way I did this time; and I wonder if my appearance had anything to do with your decision. I hope you did not decide against me because I did not have a necktie on and because I was wearing a sport shirt."

But of course the jurist said, "Wilbur, I would not decide against

your client because of your personal appearance in court—the fact that you were wearing a sport shirt.”

And Wilber said, “I did not think so, but,” he said, “it seems to me that that would have been a much better reason for beating me than the one you gave.”

Now we outstate lawyers have in the last number of years learned to look upon Omaha as the annual city insofar as the State Bar Association is concerned.

As you know, some of you older fellows, at least, years ago there was something of an alternate; we used to go to one city and then the other, and we even talked about trying to entertain the state bar outstate.

I have been coming for more years than I like to remember, but Omaha just means the annual meeting of the state bar to me, and I know that it does to many outstate lawyers. We of course enjoy your hospitality; we look back every year and reminisce upon the lovely parties that you Omaha bar members have provided for us in the last few years. Some of us have been somewhat burdened with our wives wanting to make it an annual affair, because you gentlemen and the ladies of the Bar in Omaha have provided these beautiful programs for them and made shopping so enticing. And although some of us would like to get away for a bit of relaxation alone, we are finding that difficult, but there may be some gratification some way or other.

The programs have been most educational; the Omaha lawyers have been splendid. Whether or not they fix our tickets this year, we will wait and see about that. I suppose Omaha, moving as rapidly as it does, will find some other means of taking care of those in due time.

But I do want to say to the members of the Omaha Bar that we outstate lawyers sincerely appreciate your hospitality and your courtesy. You have done everything to make these occasions pleasant and comfortable for us and for our wives and ladies.

I hope that it will not be out of place, but I would like to say to the officers of this Association that we outstate lawyers, at least, and I think the Omaha Bar will join in, are grateful for the splendid programs that have been provided for us in the last few years.

The Bar Association really means something to us. True, we renew old friendships, we enjoy our felicitations here, but we feel that the Nebraska State Bar is worth while and is paying off, and we are grateful to our officials.

This, Mr. President, has been the most pleasant job I have had in connection with the State Bar. I do say to the members of the Omaha Bar, thank you.

PRESIDENT ATEN: The only thing that sounded familiar about that story was the fact that the decision was the wrong way.

ADDRESS OF THE PRESIDENT

We are now at the end of another official year for our Association, and this is the fifty-seventh annual meeting. The rules require an address of the president at the next annual meeting following his election. Therefore, I appear at this time, not by personal choice, not by invitation, but in obedience to this mandate of our supreme court. So far as I am concerned, I prefer informality, so I will visit with you for a short time. It is believed that probably the court's intention was for the president to give a report of the activities, affairs, and work of the Association. This I will attempt and ask you to indulge a few personal comments and observations.

I indeed appreciate the honor of having served as your president. I am and shall always be sincerely grateful for the opportunity of accepting the challenge of the experience. It is distinctly a challenge because there is much to be done requiring a great amount of time and effort, an appreciation of the affairs of the Association, of its problems and its impact in the affairs of life today; also the situation of the individual members of the Association must be correlated and understood.

Now that I have had these experiences, I agree with the recommendation that has been made by several of my predecessors. I submit that it is too much to expect a person to acquire all of the necessary knowledge in the short time available and that few possess the speed of orientation which is required. A large majority of like associations avoid this by the designation of a president-elect, who then has a year in which to participate in the work, make necessary personal arrangements and become familiar with the organization and requirements of the association. I recommend this change for your consideration, understanding that our members have several times previously disagreed. We elect a House of Delegates and a Chairman of the House of Delegates, and expect them to handle the business of the Association at its annual meetings. We elect an Executive Council and a president, and expect them to carry on all the other activities and work of the Association, with the limitation that the president cannot be a present member of the Executive Council. Therefore, he is not and cannot be too familiar with the present work of the Association. I understand the reasons for this provision, but I submit that the organization and complexities of the work and activities of the Association have become such that we should be practical and give the president-elect a chance to use his best capabilities, experiences, and knowledge, that by our present process we are actually putting him at a distinct disadvantage and not obtaining the best results for the Association, which, after all, is our primary concern. I say quite candidly that the president needs all the assistance he can possibly obtain.

While we are on this general subject, there is a related matter upon which I have acquired very definite ideas. This proposal is not used, so far as I know, in the form which I am about to propose. It

is my belief that we do not take advantage of the experiences and knowledge gained by those who have been president of our Association. At present, our past presidents have no official connection with our Association. I submit that the Association needs the services, knowledge, and experience of these men. It is true that the immediate past president is a member of the Executive Council for the year succeeding his term, but this is not enough. I believe the past presidents, of which we now have nineteen, and all living in Nebraska and active in the practice or members of the judiciary in Nebraska, except the Honorable Anon Raymond, who is actively practicing in Chicago, should be organized into some sort of a board to which the Executive Council and president could appeal for counsel and advice. Surely experience is the best teacher in life. I suggest we take advantage of it.

It seems that the place of our profession in our complex civilization is becoming more important all of the time. It has been said by the officers and speakers of this Association and many others for the last several years that we live in a troubled and upset world. I submit that it is a way of life, that we made it, and that we had just as well make up our minds to live with it because it is here to stay. The practice of law has changed very materially in the last thirty years. The number of cases tried by lawyers in the courts has very materially decreased in that period, whereas before that time the work load of the courts was steadily increasing. We wonder as to the cause of this situation. Probably it is partly because we have increased our skill in dealing with one another and clients, and the experiences of the profession have increased. We have become cognizant that this highly complicated economic system of ours is dependent on the caprices of human behavior. Our capacity has become more advisory, and we have become more practical.

A few years ago one of our speakers made a comparison between the professional preparation of doctors of medicine and attorneys which was wholly uncomplimentary to the lawyers. This is a sphere wherein great improvements can be made by our profession, and I believe it is the responsibility of our Association, among other responsibilities, to undertake this work. This is not the fault of the law schools; they have all been working toward this goal, but without the support of the profession. I believe that we all would admit that a doctor of medicine, when he is admitted to practice, is much better qualified professionally than an attorney. The doctor therefore immediately takes his place in the economic world and commands the respect of his profession and his patients. This is not true of an attorney. He is not ready to take his place in the trial of a lawsuit against more experienced counsel or to advise fully on complicated economic matters or to deal skillfully with clients and others of the profession. Surely there is some way of remedying this situation. It is believed that this Association, and all in the profession, should work for a solution of the problem, immediately and drastically. This and many other developments show that the Asso-

ciation has not reached the ultimate in activities and work. This is beyond and outside the realm of the continuing education of those already members of the profession.

I very definitely do not believe that this has been a year of brilliant accomplishment for the Association, but I do hope and believe that we have carried on the activities in such a manner that our members are beginning to receive some of the benefits of activities previously commenced by the Association. The committees and sections have done a lot of hard work and accomplished a lot. It is interesting to note that we have six sections and eighteen committees. Many associations have more, some have less. For instance, Florida, which is an integrated bar, has seventy-two committees. It is wholly a question of how complex and detailed it is desired for the work to be.

It was gratifying to know that everyone who was asked to perform a task for the Association graciously accepted the responsibility and performed the work with enthusiasm and in a highly efficient manner. It was appreciated.

INSTITUTES

It was deemed desirable to have institutes this year on subjects in addition to taxation. Accordingly, an Instituté on Fees and Law Office Management was provided at the Cornhusker Hotel in Lincoln on November 11, 1955, by the Junior Bar Section of our Association in co-operation with the College of Law of the University of Nebraska. It was quite well attended and probably resulted in the survey on economic conditions of our profession recently taken by the Junior Bar Section and which is being reported at the meeting of that section on Friday afternoon.

Tax institutes were given in December by the Section on Taxation at Scottsbluff on December 12th and 13th, at Kearney on December 14th and 15th, and at Omaha on December 16th and 17th. These were ably presented and well received. The attendance was very good. This was our Thirteenth Annual Tax Institute.

An institute on Family Law, Old Age, and Survivors Insurance and the new Unemployment Compensation Act was provided at Omaha in April by the Association in cooperation with the Committee on Continuing Legal Education of the American Law Institute collaborating with the American Bar Association. This was well attended, and it was learned that there is a lot of interest of our members in these subjects.

An institute was provided on Real Estate Titles at Grand Island on June 7th, and at Scottsbluff on June 9th by the Section on Real Estate, Probate, and Trust Law. This is a subject that is of great interest to most general practitioners, but it was learned that Lincoln and Omaha lawyers will not go to the bother of traveling to attend our institutes. It was the pleasure of the participants and your officers to attend the forty-eighth annual meeting of the

Western Nebraska Bar Association at the close of the institute at Scottsbluff.

It is believed that one of the important responsibilities of the Association to its members is to help them keep abreast of all changes and new developments in the law, both statutory and the trend of the decisions, thereby serving our responsibility to the public by knowing that the public is getting proper and adequate counsel and advice on its legal problems at all times. It is interesting to note that all of our institutes are given without the charge of any registration fee. This is not true of the associations in all the surrounding states. Some of them are quite costly; for instance, the Iowa Bar Association has a registration fee of twenty-five dollars for its annual tax institutes. This policy is a part of our public relations program. It is quite difficult to understand why any alert attorney would fail to take advantage of these institutes.

PUBLIC RELATIONS PROGRAM AND OTHER ACTIVITIES

It was determined this year that the Association should not have a professional public service director because it was felt that we were not getting value received for the cost involved. The Executive Council had an analysis made of the public service activities of the Association; the report has been received by the Committee on Public Service, which in turn made recommendations to the Executive Council, part of which were approved and part referred back to the committee for further study. This is one of the items of unfinished business which must have the attention of the new administration. The pamphlets on legal subjects for distribution to laymen are a part of this activity. These pamphlets have attracted national attention, and they compare very favorably with the work of other associations; in fact, I believe they surpass most others. These pamphlets, with those from other associations, are displayed at all of the regional and annual meetings of the American Bar Association by reason of the activities of our Secretary as Chairman of the Committee on Coordination of Bar Activities of the American Bar Association, and our thanks are due to him for this work. Display racks, provided by the Association for use in your offices or otherwise have helped materially in distribution, and the distribution now numbers in the thousands.

The juror's manual plays an important part in our relationship with laymen. The Committee on Public Service has been asked to revise the manual so that it is applicable to federal courts and to make it available to those courts, subject to the approval of the federal judges of the District of Nebraska. The series of legal articles in the *Nebraska Farmer* have been very successful, but the articles for local newspapers have not been because some editors believe this is providing free advertising for attorneys. The two television programs on behalf of the Association have received a great amount of favorable comment. These require the participation of one attorney for every program, which means once a week at.

KHOL-TV and its satellite KHPL-TV, and once every two weeks at KMTV. We are indebted to these participants for their time and efforts. I certainly recommend the continuation of these programs, but we will have to be mindful that the program procedures may have to be changed in the near future because of the limitation on the numbers of subjects that can be successfully presented and the lack of available participants. The public service program is wide and complex. The Association needs the help of all its members in this work; and after all, public relations is just what each of us makes it.

The committees pertaining to legislation have not been too active this year because our Legislature is not in session, but they have done a splendid job of preparing for the meeting of the Legislature. It is interesting to note that the Special Committee on Expert Medical Testimony has recommended against the support of legislation authorizing the trial courts of Nebraska to appoint medical experts to make examinations and reports in personal injury cases. I recommend to every member the reading of the reports of the committees as presented in the official program of this annual meeting.

PARTICIPATION IN OTHER ACTIVITIES

At the invitation of United States Attorney General Herbert Brownell, Jr., it was my pleasure to attend a Conference on Congestion of the Courts in May at Washington, D. C. It was believed that, at present, we have no problem of congestion in our courts, with the possible exception of the trial courts of Douglas County, which appears to be a local condition that will solve itself in due course, but that this is an over-all problem with which we should be concerned in order to serve the public properly. These thoughts were conveyed to the conference. Many ideas and suggestions were made to the conference. One of the proposals was the handling of personal injury actions, against which we should be completely apprehensive, in the manner now provided for workmen's compensation cases. I also had the definite feeling that the matter was being approached wholly from the standpoint of the judges and the government, and that the situation of the general trial lawyer was not being considered. Too much haste can make it very difficult for the ordinary practitioner with a wide practice in many different courts.

As part of the duties of president, it is expected that you attend as many meetings of other bar associations as possible. My wife and I attended the annual meeting of the Colorado Bar Association, a voluntary bar, at Colorado Springs in October of last year; the annual meeting of the Bar Association of the State of Kansas, a voluntary bar, at Kansas City, Kansas, in May; the annual meeting of the Iowa State Bar Association, a voluntary bar, at Des Moines in May, at which I participated in a panel discussion; the annual meeting of the State Bar of South Dakota, an integrated bar, in Septem-

ber at Sioux Falls; and the annual meeting of Missouri Bar Integrated, an integrated bar, as the name would indicate, at St. Louis in October. In other words, we attended the meetings of the associations of all the surrounding states except Wyoming, which proved to be impossible for me because of a trial in federal court in Illinois. We were invited to many others, and specifically Minnesota, but found it impossible to attend. We were courteously entertained, for which we are deeply appreciative. I believe these contacts are very much worth while and result in the exchange of many valuable ideas. The policy has been established of inviting the presidents and secretaries of the associations of all the surrounding states to attend our annual meeting, and I have observed this precedent. It has also become the custom, both on our part and that of our neighbors, that the wives be included. This results in much closer relationships between the associations.

We also attended, accompanied by our Secretary and his wife, the Deep South Regional Meeting of the American Bar Association at New Orleans in November and December as individuals.

We also attended the Mid-winter Conference of National Bar Presidents in Chicago, Illinois, in February, at which I participated in a panel discussion. We attended the Annual Conference of National Bar Presidents in Dallas, Texas, in August, at the same time attending the annual meeting of the American Bar Association. I participated in this conference by appearing in a panel discussion. We were royally entertained as guests of the Bar Association of Texas by being flown from Dallas to Austin, where we examined the new building of the Texas Bar Association. It is a wonderful headquarters.

We attended the Rocky Mountain Mineral Law Institute at Boulder, Colorado, in August. This is sponsored by the Rocky Mountain Mineral Law Foundation, of which our Association is a member, being represented on the Board of Trustees by Paul L. Martin of Sidney, who will make a report to the Association. This phase of the law is becoming increasingly important to us because of the oil and gas developments in our state.

I have attempted to improve our relationships with other professional associations. In that connection, I participated briefly in the opening of the Regional Medico-Legal Symposium of the American Medical Association at Omaha in October of last year. At the request of the Governor, I appointed three representatives for the Association, being Lawrence S. Dunmire of Hastings, Joseph C. Tye of Kearney, and Charles S. Paine of Grand Island, to attend the Conference on Education at Grand Island in November of last year. These men graciously accepted this assignment and participated in the conference. They reported that the problems considered were the Nebraska tax structure, buildings, financing, and salaries. Their criticism was that the development of the child was not considered.

Our Secretary and myself, by correspondence and conferences,

tried to obtain the recognition of lawyers as representing applicants by certain district managers of the Social Security Administration.

I was invited to the Tax Clinic of the Nebraska Society of Certified Public Accountants at Lincoln in November of last year but was unable to attend. In February I participated in the selection of candidates for the Root-Tilden Scholarship at the suggestion of Honorable Robert G. Simmons. These are residency scholarships at the New York University School of Law for three years and are awarded on a regional basis and not in every state. Mr. John C. Chappell of Minden, Nebraska, was the successful candidate.

I attended the annual meeting of the Nebraska State Medical Association at Lincoln in May as a representative of the Association. I attended the annual meeting of the Nebraska District Judges Association in June at Kearney and spoke briefly. As a duty of the president I appointed Lumir F. Otradovsky of Schuyler, Nebraska, to fill the unexpired term of our late esteemed friend and Past President (Bob) Robert R. Moodie. On behalf of the Association on Tuesday of this week in the United States District Court for the District of Nebraska, I participated in the memorial services for the late Honorable James A. Donohoe, an esteemed friend and an eminent jurist of this bar. The case of *Wilson et al. v. Marsh* in the Supreme Court of Nebraska relative to the constitutionality of the recently enacted Retirement Act and the status of judges in Nebraska thereunder was successfully concluded, the act was held constitutional, and the status of many of our members in the judiciary was determined. This action has been brought by the Association because of the importance of the questions involved to our judiciary. I have seen fit to call six meetings of the Executive Council during my term, all being held at Omaha except one, which was held at Lexington.

During the year it was my pleasure to be invited to and to attend many of the meetings of district and local bar associations of the state. I enjoyed these occasions very much. They promote good will between members of the bar, lead to a better understanding of local conditions and problems, and practically eliminate the bitterness and antagonism that was so prevalent between local competitors in days gone by. These associations are doing very good work in the field of public relations, and their programs are thoroughly educational and interesting. Many of them compare very favorably with our institutes. This, in my opinion, is a sphere for a lot of work and development for our Association, and I recommend more thorough liaison between our Association and these organizations and that we assist in better development of their possibilities. I was very courteously invited to many meetings which I found impossible to attend. I appreciated all of these opportunities and courtesies.

One of the things that I observed in attending the meetings of other associations was the matter of title insurance. This is

going to come in Nebraska and be handled by private corporations, which might not always prove to be to the best interests of our members, unless we do something about it. As a member of this Association, I have suggested to the section that a study of the subject be made by the Section on Real Estate, Probate, and Trust Law. Some foreign organizations are now active in this field in Nebraska; for instance, the federal government presently requires title insurance in its financing programs. Therefore I respectfully suggest that time is an important element. It is my understanding that the subject is approached in two ways, a trust fund or actual title insurance. The trust fund procedure is used in Florida. As I understand this process, the bar association as a part of its public relations program provides from its monies a trust fund for the protection of all clients to whom an attorney issues an opinion on the title to real estate, and, in the event of mistake or loss, the client is reimbursed for his actual loss from this fund. I am not fully familiar with the operations administratively. This is an integrated bar with some eight thousand members. The title insurance method is used in Ohio. The bar association formed a corporation with the common stock owned by the Association, with preferred stock drawing a fixed rate of interest issued to members who assisted in capitalizing the corporation. They state that the profits will be one hundred fifty times the stock in five years. I do not know the size of this bar nor whether it is an integrated or voluntary organization; also I do not know how the sale of the title insurance is handled. I submit such a matter is of increasing importance in the immediate future to the bar.

Another sphere that has come to my attention is the attempts of the press, radio, and television industries to be permitted to take photographs and report a trial during its progress. The entire subject, together with the Canon of Ethics involved, is under study by a committee of the American Bar Association. Colorado has already decided in favor of permitting the same at the discretion and under the direction of the trial court. If we desire to have a hand in the ultimate decision, we should probably have a special committee to work on this subject and cooperate with the committee of the American Bar Association. I suggest this is worthy of some serious consideration by our Association.

It has become a pleasant custom, which was again approved by the Executive Council for this meeting, to include our wives in our social functions and to provide the wives with special entertainment during our sessions. I suggest that you urge your wife to attend these functions. These matters have been very efficiently handled by a committee, mostly of wives of Omaha attorneys, to whom the Association, and especially Irma and myself, are deeply indebted, and we all appreciate it.

In becoming familiar with bar organizations, another sphere

has come to my attention. This is the matter of our sections, which, of course, are an integral part of our organization. I respectfully suggest and urge that a study be made as to the sections that are needed, and correlation between the sections and the committees. It would appear that the scopes of some sections are wholly unrelated, and that we do not have some sections which we need; also as to the form of organization of the sections, it would appear that there should be more continuity. In my opinion, this should also be considered as to the membership of committees. I believe that this general subject was recommended by President Williams in his address in November, 1953, but that nothing specific has been accomplished. This, of course, is for you to consider and decide, because this is your Association, not an organization belonging to the House of Delegates or Executive Council. This matter could be handled by a council of six members for each section, elected for three-year terms staggered so that two were elected each year, or in some such manner. This would probably tend to increase and broaden the scope of the work of each section, and would very probably increase the financial burdens of the Association.

CONCLUSION

There are probably many things which I should have mentioned in which I have failed. This report is far from being entirely comprehensive and complete, but I hope you will agree that the printed reports of the committees and this report give you some idea of what is happening and of my activities in behalf of the Association for the past year. For me, it has been a delightful experience, and I appreciate the opportunity and honor. I should like to remind you that we are deeply indebted to our friend and your able and efficient Secretary, Mr. George H. Turner. He and his staff are largely responsible for the editing of the *Nebraska State Bar Journal*, which is no small task; they are entirely responsible for all the preparations and details of the annual meetings, the institutes, the Executive Council meetings, and the meetings of committees; he also edits the script and handles the details of the television programs and does many other things for our Association. I submit that there is no one in the country who knows more about the functions, ramifications, organization, purposes, and work of our organization. His counsel and assistance to me have been invaluable and have made my work much easier. I would also like to thank his wife, June, for her help. I am grateful for the assistance, kindnesses, and courtesies extended to Irma and myself by members and by friends we met through bar activities of other states and the American Bar Association. I made no call to service which was refused, which certainly is gratifying and shows the devotion of our members to the profession. I appreciate the help and service of the members of the Executive

Council, the Secretary and his staff, the House of Delegates, the Chairman of the House of Delegates, the members of the committees and their chairmen, the section officers, the participants in the institutes and our programs, and the ladies' entertainment committee, ably led by Mrs. Barton H. Kuhns as Chairman. I wish now to publicly thank each and all of them. I know that next year we will have an able and efficient administration under the guidance of my successor.

It has been an inspiration to know that so many have been willing to show their devotion to the profession by giving of their talents, time, and experience without reward. I know this Association for these reasons will progress in its service to the profession and the public, and will always be an active factor in the improvement of the administration of justice under law. Thank you very much.

PRESIDENT ATEN: As the next item of business, we will have the report of the Secretary-Treasurer, George H. Turner.

GEORGE H. TURNER: Gentlemen, may I preface these reports by reminding you that the Association luncheon will be held in this room at noon. We are honored today to have as our speaker at the luncheon David F. Maxwell, the President of the American Bar Association. I urge you, for the convenience of the hotel, to get your tickets as soon as possible so we will know how many to expect.

The books of the Association have been audited by the firm of Martin and Martin, accountants of Lincoln. Their report shows cash receipts during the year, \$43,269.92; cash disbursements of \$41,230.17, leaving an excess of receipts over disbursements of \$2,039.75.

This figure is reflected in the increase in the cash balance from \$3,307.77, September 24, 1955, to \$5,347.52 on September 30, 1956.

And in addition, by direction of the House of Delegates, \$2,000.00 was invested in United States bonds.

The principal items of cash receipts, of course, are the dues of members. The dues of active members amounted to \$37,630.00 and of inactive members, \$4,960.00.

The major disbursements include salaries and payroll taxes, \$6,253.90; Executive Council meetings, \$1,002.65; officers' expense, \$1,186.07; office supplies and expense, \$1,316.10; the expense of the Family Law Institute to which your President has referred is \$1,097.77.

The Institute on Real Estate Titles, \$1,243.46.

The publication of the Nebraska Law Review, \$4,330.06. I think most of you know the Association bears one-third of the cost of three issues and the entire cost of the January issue, which contains the transcript of proceedings of our annual meeting.

Postage and express \$1,180.93. Expense of the representatives to the American Bar Association House of Delegates, \$1,936.82. The cost of the test case involving the judicial retirement act, *Wilson vs. Marsh*, \$1,724.43. The expense of the Public Service Program, \$4,999.72. The expense of the 1955 Annual Meeting, \$4,310.05. The expense of the Tax Institute held last December, \$2,461.53.

The auditors conclude their report by saying that "All cash receipts were deposited in the bank. Receipts for dues were verified by reconciliation of membership cards issued .

"The bank balances were verified by independent correspondence with banks, and securities were inspected.

"The cash disbursements were verified by an examination of the cancelled checks when feasible by an inspection of the original document supporting the disbursements.

"We conclude by saying that in our opinion the funds of the Association have been properly accounted for during the period under review."

This report was made to the Executive Council at its meeting yesterday and was approved.

PRESIDENT ATEN: As you know, our Association is represented in the House of Delegates of the American Bar Association by Laurens Williams and Clarence A. Davis; my understanding is that Mr. Davis will give the report, and therefore I now present to you Clarence A. Davis, who will give the report of the American Bar Association Delegates of the Bar Association.

Mr. Davis—and the honorable Undersecretary of the Department of Interior.

CLARENCE A. DAVIS: Mr. President, ladies and gentlemen. It has been my privilege to make this report for the last two or three years. My friend Laurens Williams has the happy faculty of wishing the job on me, and it is really a pleasure. I enjoy it because it always gives me a chance to stand here and look over a great lot of friends that I have not seen perhaps since the meeting a year ago. Since I usually know almost everyone in the room by his first name, you can imagine how much real fun it is to have the privilege of standing here.

Now I could not help reminiscing a little while the President was giving that report of the tremendous activities of this Association during the last year. It seems to me that it just grows and grows, and expands and expands into all the fields of law that concern us here in Nebraska to the point where it is rendering a very, very real service to all of the members of the profession in the state.

And I could not help but be impressed with that tremendous list of activities that Wilber read.

Now, if you think that the Nebraska Association has a multitude of activities, does a multitude of things during the year, you

can imagine the complete hopelessness of my trying to report to you on the activities of the American Bar Association during any year, because the scope of the American Bar as the voice of the lawyers of America reaches into all of the fields of the law with which we are familiar, into a great many fields that do not concern us here in Nebraska, into a great many fields which actually involve philosophy, involve legal principles of very far-reaching consequence to all of the people of the United States, things of that nature which have nothing of the bread-and-butter aspect about them, but yet which do tend to shape the form of our society in the future.

When you consider that the American Bar Association includes—I forgot to count them, so I will be inaccurate and subject to correction by the President later—but, roughly speaking, a dozen sections and, roughly speaking, twenty-five or thirty standing committees, and I know not how many special committees, which report, you get some idea of the hopelessness of trying to really report on the activities of that week.

I do not know whether I have said this to you before or not, but you realize that the delegates of the American Bar Association are presented there with a kit of the working papers of the Association. That kit is actually and literally about two inches thick. It comprises the reports of all the sections, of all of the committees of the activities of the Association, the officers, and that sort of thing—utterly impossible, of course, to plow through all of it in any detail during the time the meeting is in progress.

But nevertheless it makes available to the representatives of all of the Associations in the United States the activities of that great organization. Now undertaking to spot just two or three of the highlights that have concerned the American Bar in the last year—and remember, there is a mid-year meeting of the House of Delegates in February as well as the annual meeting which this year, of course, was in Dallas—it is very difficult to spot the things in which you might have some interest.

Number one, I suppose, at the head of the list as far as our actual interest is concerned is the problem of some system or other which will permit retirement of the lawyer under more favorable conditions than have existed in the past.

I notice one of the pamphlets out there on the table says that, in substance, it is a crime to be self-employed, but yet that is about the type of penalty that the lawyer has been incurring.

But, as you know, the social security aspects have been, for the moment at least, taken care of, so that is out of the way. The other proposal which I suspect the President may discuss with you later, the Jenkins-Keogh bill, providing some sort of retirement potentialities for the lawyer, has attracted, of course, a great deal of attention, because the brutal facts of life are that in this day and age of present taxation, an independent practitioner with no cushion

has a very, very difficult time laying aside any very adequate amount of money.

The second thing that has attracted a good deal of attention in the American Bar—and perhaps I am unduly interested in it because of this government job that I happen to be holding at the moment—the subject that the American Bar has spent some considerable time on under the auspices of a special committee is the problem of legal services to the government. As I was saying, perhaps it has affected me a little more than others because of the present connection that I have with the government, but I would just like to point out to you here that while it may seem a long way away to you, actually it is a very important thing for the bar of the United States.

You must remember that in spite of all we may do, and even that Congress may do, these tremendous volumes of federal interpretation of law, these positions which the federal government may take, are the results of studies and of the positions taken by lawyers in government, and, therefore, it is vital in my judgment that we continue to attract and to hold in government, in the legal positions, the very highest type of legal mind that we can get.

It is very easy, you know, for the misfits and the ne'er-do-wells to drift into the type of government employment that some of these legal positions offer, and yet they exercise a tremendous influence on the administrators and ultimately on the position of the government itself. Therefore it is necessary that we maintain a corps of lawyers in government that—I wonder if I could express it this way—that are our kind of people, that is, lawyers who have had some practical experience, who have some conception of what this law business is all about, who have some conception of human nature and human frailties, and who are not entirely wedded to the letter of some regulation, who are not too bookish, who have judgment enough to temper what they do with a grain of common sense.

Now that is kind of a bold statement, but the other night at a banquet I listened to Judge Sobilo, who just finished being Solicitor General, and he went even stronger than that in his expression that it was just vital that we get into government service lawyers who would, as he put it, temper justice with mercy and the letter of the law with a little bit of common sense.

Well, anyhow, that program is under way with a special committee headed by a lawyer in Washington, Ashley Sellers. It is implementing, of course, fundamentally the legal recommendations of the Hoover Report, and while it may look a long way away from you here, it actually concerns you very much because there come these unreadable and unintelligible regulations, and all that sort of thing about which we all complain.

And, incidentally, my fellow delegate Laurens Williams, who, as you know has been in Washington now for two or three years, is doing what they tell me is a magnificent job on these Treasury regulations in the field of taxation in translating them from their

previous existing state into what we would call a common garden variety of English. So if Larry succeeds in doing that so that most of us can read and know what they have said, it will be a monumental achievement.

So the last thing that I will touch on briefly is this drive that has been going on for the last year or more to establish in the American Bar Association a separate section on negligence law. That drive, of course, has grown out of the fact that it is felt that the plaintiff's side of these negligent cases has not been getting the support and the help and the exploration that it deserves. Maybe so. At any rate, as we all know here, that drive has been fostered in the background by some of these rather spectacular plaintiff lawyers who put on a most excellent vaudeville show, incidentally, at a bar association meeting, but who, I understand, sometimes get defendant's verdicts, just like all the rest of us. Those are the ones that we do not hear about.

But that has been going on. It has been proposed this year at the American Bar Association meeting. It served, in my judgment, a useful purpose in that it shook up the insurance section which has always had jurisdiction of that field into taking a second look at itself and the potentialities that it was missing in the plaintiff's side of these lawsuits.

Well, the official action that was taken was simply for the House of Delegates to concur in a recommendation of the Board of Governors that the matter be considered for further study and later recommendation. In the meantime, the insurance section of the American Bar is undertaking to change, and has changed, its name from that of an Insurance Section to a section entitled "Insurance-Negligence and Compensation."

And consequently I would suspect although it is impossible to say definitely, that that section will be broadened to include these things on which many men in this room, I know, are primarily dependent for the bread-and-butter aspects of their law business.

There is one other thing about that that I might say. I hope I am not encroaching on what the President might say later. A committee has been appointed, of whom the chairman is Richard Coburn of St. Louis, to give some consideration to these matters, and you are at liberty to communicate with that committee by addressing letters to the American Bar Center in Chicago, expressing whatever views you may have about the whole affair.

Well now, gentlemen, that is a rather rambling and perhaps inconsequential report, but I am not smart enough to give you in ten or fifteen minutes the proceedings of a week's meeting of the American Bar Association and of an agenda that has upwards of a hundred separate items on it. I can only say to you what I think I say annually and never want to neglect to say: that the drive towards membership in the American Bar must go forward. We must get ourselves in a situation where we have a great national

organization that can speak with authority for the lawyers of the United States. It is only through that type of organization that we will preserve from all of these encroachments the right of the lawyer as officer of the courts to handle the judicial processes of the United States.

So I always bespeak continued membership, continued support in the American Bar Association, whether it means anything immediately to your bank account this afternoon or not, on the theory that it is the least that one can do for the profession which sustains all of us. Thank you very much.

PRESIDENT ATEN: We will next have the report of the House of Delegates by Hale McCown, Chairman of the House of Delegates.

Report of the Chairman of the House of Delegates

The House of Delegates of the Nebraska State Bar Association met on October 17, 1956. The following action was taken by the House:

The reports of the following committees as published in the printed program of this meeting were adopted:

- Committee on Administrative Agencies—Bert L. Overcash
- Committee on Cooperation with American Law Institute—
Lyle E. Jackson
- Committee on County Law Libraries—Lawrence S. Dunmire
- Committee on the Judiciary—C. Russell Mattson
- Committee on Legal Aid—Emory P. Burnett
- Committee on Legislation—Robert Downing
- Committee on Expert Medical Testimony—John L. Barton
- Committee on Legal Education and Continuing Legal Education
—E. D. Beech
- Committee on Oil and Gas Law—Paul L. Martin
- Committee on Public Service—John J. Wilson
- Committee on State Tort Claims Act—George Healey
- Joint Conference of Lawyers and Accountants—
James W. R. Brown
- Committee on Unauthorized Practice—A. J. Luebs

The report of the Committee on Budget and Finance, presented by Theodore J. Fraizer, was approved, with a recommendation to the Executive Council that the Association invest the sum of \$2,000.00 in government bonds as an additional reserve.

The report of the Committee on Crime and Delinquency Prevention, presented by James F. Brogan, was adopted with the following specific additions: that the House of Delegates go on record as recommending that a statewide probation system be adopted,

and that the study of existing and proposed laws with respect to sex offenses and deviates be continued.

The report of the Advisory Committee presented by Charles Adams was adopted, and the House directed that the detailed analysis of action of the Committee be published in accordance with past practice.

The report of the Committee on American Citizenship, presented by Frank Mattoon, was adopted, except for the deletion of that portion of the report based on the 1955 committee report.

The report of the Secretary-Treasurer on receipts and disbursements, showing a cash balance on hand as of September 30 of \$5,347.52 together with \$2,000.00 in government bonds in a reserve fund, was approved.

Upon the unanimous recommendation of the Committee on Hearings by Robert Van Pelt, the House adopted a resolution endorsing Constitutional Question providing for the amendment of Section 4, Article VII of the Nebraska Constitution to give the Legislature power to release or extinguish, or to authorize the releasing or extinguishing in whole or in part, of tax and assessment charges against real property remaining delinquent and unpaid for a period of time as long or longer than that provided by law to authorize the taking of title to real property by prescription.

The by-laws of the Association were amended by correcting the title of the Committee on Public Relations to the Committee on Public Service, The title of the Committee on Legal Education to the Committee on Legal Education and Continuing Legal Education, and by deleting the Committee on Procedure to correspond with the actual practice of the past year or two.

The House adjourned to reconvene Friday, October 19, at 4:00 P.M. to receive the section reports and to conclude any unfinished business which may be presented.

PRESIDENT ATEN: The report of the Judicial Council will be given by Mr. McCown, who is Vice-Chairman of the Council.

HALE MCCOWN: In the absence of Judge Carter, I will read the report.

Report of the Judicial Council

The Judicial Council has met from time to time during the past year, and will meet at least once more before the Legislature convenes in January, 1957. Many procedural matters of importance to the bar have been under consideration. The Council, with the approval of the supreme court, will submit four proposals for procedural changes to the incoming Legislature. Briefly described, the proposed changes are:

1. A provision to be added to Section 25-834.01, R.R.S. 1943, providing that in the event a motion for a directed verdict or dis-

missal made by a defendant is sustained, and the defendant has a counterclaim, the latter shall be docketed as a separate cause and trial had at a subsequent jury, the same as if it had been filed as a separate action.

2. A proposal to amend Section 24-610, Cumulative Supplement for 1955, relating to trusts and trustees, to provide for waiver of notice of hearing upon petitions by fiduciaries for approval of their accounts by known beneficiaries who are competent to waive.

3. A proposal to amend Sections 25-1267.43 and 25-1267.44, R.S. Supp., 1955, to provide for making of application for order to compel answer to written interrogatories and to prescribe sanctions for failure to answer written interrogatories.

4. A proposal to amend Sections 25-1140.03, 25-1140.04, and 25-1140.09, R.R.S. 1943, pertaining to the service, allowance, and settlement of a bill of exceptions where there are multiple parties who are appellants. In substance, the proposal is that such bill of exceptions shall be filed with the clerk of the district court for the use of all appellees.

5. A proposal that the supreme court amend Rules 1 and 15 relating to the docketing of causes, dismissals of appeals, and defaults. The purpose of the proposed changes is to provide the procedure for dealing with multiple appeals and the right to dismiss where more than one party may be interested in the appeal.

The Council has several matters up for consideration which may or may not receive its approval. Two projects of special interest being studied by the Council are the matter of uniform publication notices in the district court to be submitted to the supreme court for approval, and the formulation of a simpler method of preparing, serving, allowing, and settling bills of exceptions.

Plans have been made for publishing the doings of the Judicial Council in the *Nebraska State Bar Journal*. We feel, possibly, that this may generate more interest in the bar in procedural matters coming before the Council for its consideration. We have no doubt that many lawyers find many procedural provisions that are in need of correction or clarification. Our problem has always been to get the members of the bar to report such matters to the Council. I would like to take this opportunity once more to urge the practicing lawyers of the state to call our attention to procedural defects or revisions that may be necessary in antiquated statutes dealing with procedure. The bar owes it to our society to lend its collective intelligence to the attainment of as good a procedural system as can be formulated.

The Judicial Council is an official and continuing agency having for its purpose the seeking of information about the courts, the weighing of the possibilities of more effective administration by the courts, and, where found, offering concrete proposals for improvements in the administration of justice.

We reiterate that our judicial procedures in this state are

basically sound. I do not come before you to say that our system is inefficient or uneconomical, for it is not so. But if we are to maintain the confidence of the public in the administration of justice by courts and lawyers, we must not lag in our efforts to improve the efficiency of the courts by maintaining a simple and effective method of accomplishing its purposes. A failure in this respect can only bring about substitute agencies, with a resulting loss in public esteem for courts and lawyers. If our lawyers and judges do not do an effective job, the business will go elsewhere. As members of the Council, we feel that we have done an effective job as to matters which have come before us. But we could render a greater service if members of the bar would assist by advising us of apparent errors, needed changes, or new situations not dealt with. The Judicial Council should be a clearing house for all suggestions by the bar relating to procedure.

E. H. Carter
Chairman, Judicial Council

PRESIDENT ATEN: We will now have the report on the result of the election by our Secretary, Mr. Turner.

GEORGE H. TURNER: Mr. President, gentlemen. As provided in the constitution, ninety days ahead of the annual meeting, the Executive Council makes nominations of officers to be chosen for the ensuing year, with the provision that within thirty days after the announcement of the nominations, other nominations may be made by petition.

This year in July the Council met and nominated for President Barton H. Kuhns of Omaha; for Member at Large of the Executive Council, C. Russell Mattson of Lincoln; and for delegates to the House of Delegates of the American Bar Association, Laurens Williams and Clarence A. Davis.

No opposing petitions were filed for any of these offices, and so these gentlemen are therefore automatically your officers for the next year.

PRESIDENT ATEN: There is one item upon which we will have a report, and I would like to have Mr. Martin come to the microphone, if he will.

I remarked that this Association held a membership in the Rocky Mountain Mineral Law Foundation. Ordinarily we would submit this report to the House of Delegates, but because of its newness and interest to everyone, I have asked Paul L. Martin, who is on the board of trustees of the corporation, to make his report to this assembly upon this particular subject.

Report of the Rocky Mountain Mineral Law Institute

PAUL L. MARTIN: In the spring of 1955, Mr. C. W. Day, Jr., Division Landman for Sohio Petroleum Company, wrote a number

of attorneys and others in the Rocky Mountain Region, suggesting the establishment of a Rocky Mountain Legal Institute along the lines of the Southwest Legal Foundation in Dallas, Texas. Within a month an informal meeting was held in Denver, and under the chairmanship of Arthur T. Smith of Denver, with special efforts of Dean King and Assistant Dean Martz of the Law School of the University of Colorado, the First Annual Institute was held in Boulder, Colorado, in July, 1955. Over six hundred registered for the first meeting. The excellent facilities furnished by the University of Colorado contributed largely to the success of the Institute.

In view of the success of the first institute, the committee decided to establish a permanent organization for the purpose of conducting an institute on mineral law in the Rocky Mountain Region each summer.

At a meeting in Denver on December 10th, 1955, the organization of a non-profit corporation was completed. Dean Belsheim represented the College of Law of the University of Nebraska, and I attended as a representative of the Nebraska State Bar Association. All state bar associations, mining associations, oil and gas associations, and law schools in Colorado, Idaho, Montana, Nebraska, New Mexico, North Dakota, South Dakota, Utah, and Wyoming and the Section of Mineral Law of the American Bar Association were invited to membership.

The 1956 Institute was held in Boulder, August 2, 3, 4. It was equally successful, with a registration of nearly five hundred. The program was excellent and well received. The Foundation has accumulated funds in excess of \$12,000.00. Any amounts not necessary for the furtherance of the annual meetings will be used for scholarships and other worthwhile endeavors of the Foundation.

The 1957 meeting will be held in Missoula, Montana, August 1, 2, and 3. The Law School of the University of Montana will go all out to show that they have just as fine facilities as the University of Colorado, and they feel that the reputation of Montana as a vacation land will be a real drawing card for a large attendance.

I think the project is really worth while, and I am very happy to have the Nebraska State Bar Association an integral part of the Rocky Mountain Mineral Law Foundation.

PRESIDENT ATEN: I rather believe that your new President will appear before you later.

We will now have the report of the Committee on Memorials by Walter Sadilek of Schuyler.

Report of the Committee on Memorials

Another year has passed, and again we meet in fellowship and remembrance. We join in fellowship with our living companions, but recall in memory those who, during the year just passed, have ceased to be with us in the flesh. They are, however, not absent

from our thoughts. They have long honored our profession with their candor, personal integrity, fairness, and courage. By their acts and their way of life they have encouraged our fellow members to uphold the honor and dignity of our profession. They have shown us that our highest honor lies in our deserved reputation for fidelity to our trust and to our duty as lawyers and as citizens.

It is fitting, therefore, that in this business session we pause to call them to mind, not in sadness nor in mourning, but in a feeling of affectionate remembrance of all who still speak to us by the good influence of the lives they have lived. They have engraved their virtues upon the tables of our memory.

Shall we stand as the roll is read:

George J. Cleary, Omaha
 M. O. Cunningham, Omaha
 Al N. Dafeo, Tecumseh
 James A. Donohoe, Omaha
 Paul W. Eagleton, Tekamah
 Roy F. Gilkeson, Lincoln
 Harvey Hillman, Nebraska City
 Leon L. Hines, Benkelman
 Joseph D. Houston, Omaha
 James W. Karlovsky, Omaha
 L. E. Laflin, Crab Orchard
 Harry D. Landis, Seward
 Gerald E. LaViolette, Omaha
 John A. McKenzie, Omaha
 N. H. Mapes, Fremont
 John T. Marcell, Omaha
 Robert S. Mockett, Lincoln
 Robert R. Moodie, West Point
 James T. Nelson, Brewster, Wash.
 Bernard J. O'Keefe, Kansas City, Mo.
 Joseph Rapp, Omaha
 A. A. Rezac, Omaha
 William Ritchie, Omaha
 Albert L. Schnurr, Harrison
 Clarence T. Spier, Omaha
 LeRoy G. Stohlman, Appleton, Wisc.
 Thomas Swearingen, Lincoln
 John E. von Dorn, Omaha
 Ralph M. West, Carmel, Calif.
 William J. McNichols, Dawson Co. and Hollywood, Calif.

We deem it fitting that we stand silent for a moment in their memory.

PRESIDENT ATEN: Now, gentlemen, I would like to remind you to look at the display board that is out in the lobby that has been arranged showing the activities of our Association. I believe that

it's the first time that that has been done. I think it very effectively portrays what the Bar Association actually does and the activities in which it is engaged.

Please give that your attention, and, I think, you will agree that it's an excellent thing and an excellent job well done.

There again I pay respect to George Turner. I would very highly recommend your attendance at the sections this afternoon and tomorrow, and I would like to remind you that there will be a luncheon in this room by the Association, and that the Honorable David F. Maxwell, President of the American Bar Association, will speak at the luncheon immediately following this meeting at noon.

We will now stand adjourned to 4:30 P.M. tomorrow.

Annual Luncheon of the Association
Thursday, October 18, 1956

PRESIDENT ATEN: Ladies and gentlemen, if we can get on with the program now.

We hoped to have all the chairman on the sections of the Association present here this afternoon. However, we were unable to do that, but I would like to present to you the chairman who are here.

(Presentation of Association section chairmen.)

PRESIDENT ATEN: It is my personal privilege to present the speaker for your luncheon meeting to you. This gentleman is a practicing attorney in Philadelphia, Pennsylvania. He has served on many of the committees of the American Bar Association; he is a Past Chairman of the House of Delegates of the American Bar Association; he assumed the Presidency of the American Bar Association at the termination of the Dallas meeting recently; and I think he would like to talk to you about a contrast of viewpoints for a few minutes.

It is a privilege to present to you the Honorable David F. Maxwell, President of the American Bar Association.

DAVID F. MAXWELL: President Aten, my fellow members of the Bar. Thank you very much for that very gracious introduction.

I am always a little wary about introductions. It reminds me of an experience that the President of the Studebaker Company had in Philadelphia not too long ago. He was down there addressing a women's group and he was given a very flowery introduction. He tried very hard to rise to the occasion and gave what he thought was his most magnificent address.

And afterward the president of the women's organization was congratulating him upon what a fine impression he made and how kind it was for him to come there, and so forth. And at that point up waddled one of our Philadelphia dowagers—there are none from anywhere comparable—and said, "Your address was terrible. It

was too long, and nobody could understand what you were talking about."

Well, the toastmistress was very much upset, and she said, "Oh, Mr. President, Mr. President, please do not pay any attention to her. She's a moron and she only repeats what other people tell her."

I sometimes think that introductions ought to be saved until after the speech, and then you can gauge how much you ought to say about the person, but I am delighted to be with you good people from Nebraska today. I am delighted to be with you because, first of all, it is like coming home.

I was here in 1953 at your regional meeting, which, as you will remember, was one of the most successful the American Bar Association had up until that time. And during my stay at your fair city at that time I was introduced to such lovely spots as the Sparetime restaurant.

I enjoyed every minute of the hospitality that you accorded me, and it is nice to be back again among such friends as George Turner, whom I have enjoyed working with, and, ladies and gentlemen, do no underestimate your hard-working Secretary; he is a power in the American Bar Association, and it is very unusual for a President to be elected who does not have his support.

Now let me say that I am very happy to be again with my very good friends Clarence Davis and Laurens Williams, and also Roy Willy from South Dakota, whom I saw at the South Dakota Bar not too long ago; and my friend Bart Kuhns, who is your incoming President, and of course your hard-working President, whose report I thought was simply terrific this morning, Wilber Aten.

I have not seen Judge Simmons, but I hope before I leave I will have the pleasure of seeing him, and I really do miss seeing my old friend Jim Mothersead. Jim was a power in the American Bar Association for many years, and he was one of the members of the Board of Governors whom you sent to represent you, and represented you ably.

And, secondly, I am glad to be with you because it is high time that the American Bar Association through its official family pays tribute to the Bar of Nebraska for the great contribution you members have made to the progress of the American Bar Association.

About three years ago, you were tapped for contributions for the American Bar Foundation, and you responded nobly. And last year you were hit again for memberships in the American Bar Association, and then again you rose to the occasion with magnificence. And as a result of such efforts as yours, the American Bar Association has grown into the powerful unit it is today as the spokesman in the American Bar, where we presently have eighty-five thousand members, where we have the most gorgeous plant you ever laid your eyes on at the campus of the University of Chicago, worth approximately two million dollars. And if any of you

ladies and gentlemen happen to be in Chicago and you have not seen that edifice, it is well worth a visit. And we have an income today through your generosity and the generosity of the other organized Bars throughout the country of approximately eight hundred thousand dollars, which makes the American Bar Association big business.

So we do, indeed, owe to you members of the Bar from Nebraska a great debt of gratitude, which reminds me of the debt of gratitude that one of our Italian citizens from South Philadelphia thought that a certain judge named Adrian Benelli owed.

He went to Judge Benelli, who is of Italian extraction; this little Italian fellow came in to him one day and he said, "Judge, you wanted to be a magistrate?"

And the judge said, "Yes, I did."

"Well," he said, "I voted for you, I getta my family to vote for you, I get alla my friends to votta for you, and make you a magistrate," and he said, "No?"

"Yes, Tony, that's true."

"And then," he said, "two years later you want be a judge, and so I votta for you, I getta my family to votta for you, and I get all of my friends to votta for you, and now you're a judge."

"Yes, Tony, I'm very grateful for everything you have done for me, and now, what can I do for you?"

And Tony said, "Judge, I wanta be a citizen."

So we in the American Bar Association recognize our debt of gratitude to you and we are very anxious to make you good lawyers citizens to the extent that we can possibly contribute to it.

I recently had the occasion to visit Russia as the visiting member of the delegation from the American Bar Association. There were six of us: the chairman of our delegation was Ezra Campbell, the immediate Past-President of the Association; Bob Story, the former Past-President of the American Bar Association from Texas, whom you probably know, was one of our party; Gene Boyd from Boston, an active member in the Association; Archie Mull, the Past-President of the California Bar Association; and Harry Watkins, the Past-President of the South Carolina Bar, and myself. And while we had no official status in the Soviet Republic, we did go as the representatives of the American Bar Association to observe the system of law in the Soviet Republic in contrast to our own system of law here, and as such we were accorded every possible courtesy; we were permitted to go wherever we chose, we were allowed to interview some of the top jurists and some of the top lawyers in the Soviet Republic, including Attorney General Rodenko. We interviewed the Commissar and his cabinet of the city of Leningrad.

But Russia is an enigma. It has been well likened to an iceberg, with only a fraction of it visible above the surface of the water, and

with the rest of it only known to the eleven men in the presidium of the Soviet Republics.

So we interviewed Ambassador Bolen for about two hours, and he, though he has been there for many years, says that he does not begin to know what is going on today in the Kremlin. How much less, then, we would know or be able to tell you after only twelve days there. However, for what it is worth, I am very happy to give you the benefit of my own personal impressions, as fleeting as they may have been.

What I saw and heard about Russian attitudes toward law and lawyers revealed to me more than anything else the basic weakness of the communist society, and just to set aright your mind that I have been in any way converted to communism, let me say that the happiest moment of my life was when I was born a citizen of the United States, and I hope that I will continue to be a loyal, steadfast citizen of the United States as long as the Lord permits me to be on this earth. We have heard it said many times that lawyers in America play an indispensable part in protecting our liberties. I believe this firmly, and I am sure you do, but I often think people generally fail to comprehend the extent to which it is true. We know, for example, that the lawyers of our country were largely responsible for the Declaration of Independence and our Constitution and that without courts and lawyers these documents of human liberty would be mere words on paper. It is the legal profession, in my humble opinion, the lawyers, who see that the protections of the law as we know it in this country are made available to people, who give meaning to those laws and their constitutional foundations.

The lawyers of America are, in short, the country's best bulwark against communism. Never was this brought home to us more forcefully than on that recent tour of the principal cities of the Soviet Union.

There is no place in a communist state for lawyers, believe me. It was not too many years ago that the communists were circulating in this country various pamphlets and manuscripts in which they denounced lawyers; in which they threatened to exterminate all lawyers; in which they said when they took over this country lawyers would be downgraded. Now that, gentlemen, was no idle threat, because that is exactly what they have done in Russia.

There is no place in that police state for lawyers. They have been shorn of every vestige of independent thought and action. They are nothing more nor less than tools of the state. The lawyers, for example, in Moscow are members of what they call an Installation, which is what we would call a union, and it is not even a lawyers' union. It is called the Government Workers' Union, and that Government Workers' Union is controlled by what is known as a Presidium, consisting of approximately twelve to fifteen men. And those twelve or fifteen men are nominated and elected by the

communist party. Those men hold in thier hands the fate of the lawyers of Moscow. They fix the fees, they send the bills, and they distribute the proceeds of a lawyer's labor. Thirty percent of the fees are retained by the Presidium and distributed as the Presidium sees fit, to pay the president, for 'example, to pay the administrative expense of this Government Workers' Union, and the balance of seventy percent is distributed to the lawyer who handled the case.

Just think of it, in a city of six or seven million souls in Moscow there are only twelve hundred lawyers engaged in private practice, and in all of Russia, for two hundred million people, there are but sixteen thousand lawyers. Contrast that with the two hundred and forty thousand lawyers in the United States as of the end of 1955, or, in your state of Nebraska, I am told today, that there are two thousand active practitioners and eleven hundred and fifty inactive practitioners for a population of approximately one million three hundred thousand people.

But the answer is simple. There is nothing for the lawyer to do in Russia. He may not take a case against the government, because the government, through the Government Workers Installation, is really his employer. The Government, as you know, owns all the land, the Government operates every business, even to the shoe-string vendor on the public highway—and how they keep the books is something I will never know. So the only cases he is in a position to take are the defense of petty criminal actions and perhaps the handling of petty civil suits which arise in the so-called People's Court.

And if time would permit, perhaps you would like to hear a word parenthetically about the People's Court. There are, of course, no jury trials in Russia. The People's Court is a court which handles most of the ordinary crimes, short of crimes of treason and murder and the major crimes, and has jurisdiction over petty squabbles that arise over the use of a bathroom or kitchen. They are very short of bathroom space there, and there are five families sharing the same common bathroom and kitchen facilities.

The People's Court consists of a lawyer who is a permanent member of the court who is selected upon a permanent basis and acts as a chairman of the court, and the other two members are lay persons chosen from a panel of the people in ordinary walks of life, and those two men on the panel serve for ten days and are not paid by the government for that service.

They continue to receive whatever wages they were earning in the factory or in the store or wherever they work in their ordinary everyday line.

The curious part of it is that the lawyer has very little part to play, even in the People's Court, because there a majority of the members of the court control the verdict, so that even there the lawyer cannot as a matter of law, for example, decide the case.

It must be decided on the basis of the facts as shown in the People's Court. We attended a trial in the People's Court and saw it through from start to finish.

I imagine that on the whole a rough kind of justice is done in the People's Court but it is, so far as we could observe, very rough.

During the regime of Stalin there was in effect in Russia a law called the Kirov Law under which indictments had to be returned within ten days from the day the inquiry was begun. The presentment of the indictment for the first time was the day before trial. The defendant was not entitled to the benefit of counsel at the trial, and the sentences of the court were executed within forty-eight hours without giving the defendant the right of further appeal. Due process? Not as we understand it. This law, we were told, has been repealed since Stalin's death, but we found nothing in the present government to indicate that the law could not be reinstated whenever it suited the purpose of the present rulers.

It was that experience in Russia that impressed me with the idea that the American Bar Association should this year do all that it can to strengthen the status of lawyers, in addition, of course, to our traditional activities in the area of public service. So we have adopted the slogan "Service for Lawyers." It seems to me that we do not need to apologize for that. Bar associations throughout the country, as is evidenced by the various reports of your committee submitted at this meeting, are engaged in numerous activities in the public interest. In fact, the business of a Bar association is the public's business. Therefore, I say that it is important in the public interest to maintain a strong organized Bar, a Bar of high economic standards, a Bar of political independence in which every member may express himself fully and courageously.

In Russia the average lawyer's income is eleven hundred to fifteen hundred rubles a month, which, at the current rate of exchange of four to one, is equivalent to approximately three hundred dollars, which is identical also to the salary of the permanent member of the People's Court.

But I might also add that that four to one does not begin to represent a realistic rate of exchange. Some of us were able, despite the so-called purity of the Socialist state or communist state, to buy rubles in the black market at the rate of ten to one.

The Russian lawyer's income is well below that of the average workman in a factory, who earns approximately two thousand rubles per month. So you see the extent to which lawyers have been downgraded in that country, both economically and spiritually. To make certain this does not happen in this country, it is important to maintain both the economic level and the professional integrity of our lawyers on a high plane.

With that in view, we have mapped out a program this year which we hope will benefit every lawyer, no matter where he lives. Our first aim is to raise economic standards of the lawyer

throughout the country to the extent that it is within the power of the American Bar Association to do so. We propose, for instance, to offer group insurance to every member of the American Bar Association, irrespective of his age. As you all know, we have group life insurance now at very low rates for members of the bar up to the age of fifty-five.

William Clark Mason, the Chairman of our Insurance Committee, just before I came away from Philadelphia, advised me that the plans have now been perfected to extend that group coverage at the cheapest rate you ever heard of to members between fifty and seventy years of age, and that the plan will be presented for the approval of the Board of Governors of the American Bar Association at its coming meeting in Chicago on October 26 and 27.

Of still greater importance will be our concerted effort to secure the passage of legislation, the principle of which was embodied in the Jenkins-Keogh Bill which failed of passage at the last session of Congress, and to which Mr. Davis alluded in his address this morning. When I go around the country, as I have gone in the last few months, I am amazed at the number of lawyers who have never heard of the Jenkins-Keogh Bill, in spite of the fact the American Bar has been actively working for its adoption in the past ten years, but I am sure that most of you know that the essential purpose of it is to allow professional people, farmers, small businessmen, and other self-employed people to set aside a certain portion of their income upon which federal income taxes would be deferred until they reach the age of retirement or until they take it down prior to that time. That is no more and no less than is available to practically every business executive and employee and other employed persons through corporate pension and retirement plans. In other words, the purpose of this bill would be to put those who are self-employed upon the same basis as those who are employed and encourage them to save a reasonable proportion of their income for old age, or for their families in the case of their death.

We have already organized the whole country, state by state, on a strictly non-partisan basis to acquaint the members of Congress with the importance of the bill and the benefit it will be to the public generally. Remember, ladies and gentlemen, this is not a lawyer's bill. There are ten million persons who will be affected by this legislation and who would benefit from it in the event of its adoption. This legislation is to be presented again to the 85th Congress in January. Many other organizations representing other professions and groups are joining in the campaign. I met in Chicago just a week ago with the representatives of the medical profession, the dental profession, the realtors, and the accounting profession. We have two hundred and fifty organizations whose members are affected by this bill, and we are acting as a spearhead to consolidate their sentiment and to make it clear to the Congress that it is in the interests of the public that the bill be passed.

In this state we have two very fine men presently at work with your congressional nominees, Fred Deutsch of Norfolk, on the Democratic side, and William Spear of Fremont.

We propose to do all that we can do to procure the passage of the reforms recommended by the second Hoover Commission as implemented by the special Committee on Legal Procedures of the House of Delegates of the American Bar Association.

One phase of this program was touched upon by Clarence Davis in his remarks this morning. I do not know how many of you lawyers have had experience in the administrative field. It so happens that I have had a little, and if you go down to Washington with the naive idea that you can practice before any federal administrative tribunal just by appearing and presenting your credentials as a member of the Bar, you are sadly mistaken. There are about seventy-two agencies in Washington, and of the seventy-two, at least thirty have their own rules and regulations, and they have their own rules for practice.

For example, the Internal Revenue Service has special rules requiring a character examination for every applicant, and your application for admission to the Bar of the Internal Revenue Service is held up until your character is investigated. Can you imagine why a member of the Bar in good standing of the state of Nebraska should be obligated to take a character examination? In the Patent Office you have to take a special scholastic examination. I could give you a list of similar requirements all down the line of many of these administrative boards and tribunals. We subscribe to the idea that if a man is good enough to be a member of the Bar, admitted to practice by the supreme court of his state of Nebraska, he is good enough to practice before any administrative tribunal in Washington. And we propose to have the Congress adopt a uniform rule which will admit any lawyer on certificate of the supreme court of the state in which he is practicing.

The American Bar Association was an important factor in obtaining the description of the Administrative Procedure Act in 1946. That Act accomplished an internal separation of powers within the various agencies, but it did not investigate the judicial functions of such agencies in a court entirely divorced from the agency itself. We think it is important to the maintenance of the principles upon which our Constitution is based that the judicial functions of administrative agencies be entirely alienated from the investigatory and prosecuting functions. And there again, if I may refer just a second to the rule in Russia. Take, for example, the trial of that arch terrorist L. B. Beria, and this, ladies and gentlemen, has been since the death of Stalin. Just to show you the lack of separation of powers in the Soviet Republic, the court which was appointed by the communist party to try Beria consisted of a representative of military, the commissioner of the military, a chairman of the court, the representatives of the communist party,

the representatives of the trade unions, and, last, way down at the bottom of the totem pole, was the judiciary.

So that you see that all of the power in the Soviet Union flows from the base up to the Presidium at the top, a pyramid, and there is absolutely no division or separation of powers.

And that is what we must avoid having happen in this country, and that is why it is so important that the recommendations of the second Hoover Commission providing for the complete alienation of the judiciary from the other functions of the administrative agencies should be sought.

It is proposed that these judiciary functions be investigated in special courts established under Article III of the Constitution. To these courts would be transferred the judicial functions now being performed by the Federal Trade Commission, the National Labor Relations Board, the Tax Court, and such other adjudicatory functions as the Congress may from time to time determine. We are seeking the cooperation of all the members of the Bar, in this and other states, in support of this legislation when it is introduced at the next session of Congress. Time permits me to touch only on the highlights of the special committee's report in this field. It recommends many other reforms, many of which were touched upon by Mr. Davis, in the administrative practice and procedure which will be of great public benefit.

Next, we are stepping up our public relations program, and I am happy to note that you have changed the name of your committee from Committee on Legal Education to Committee on Legal Education and Continuing Legal Education, and I think that is a step in the right direction. It had not happened to occur to me, but that is a step in the right direction.

The aim is to make the public more aware of the essential services lawyers perform, and to make lawyers more conscious of their professional responsibilities and the services they receive from their national association and their state and local associations. We are seeking to combat uninformed and inaccurate portrayals of lawyers and judges and courts, not just in a negative way, but by encouraging the production for television of dramatic and informational programs which picture lawyers and the courts authentically. At the moment we are working in cooperation with the American Medical Association in the production of several films demonstrating the proper roles of judges and lawyers in casualty litigation. I expect to go to the state of Washington later this month in order to give a prologue for the introduction of those films, which will be available for showing soon to bar associations.

Next, we propose to expand the activities of the Unauthorized Practice of Law Committee. At the Board of Governors meeting in Dallas in August, the committee's appropriation was increased to provide for the employment of an Executive Secretary, which should immeasurably increase the effectiveness of this committee

in its efforts to eradicate the unauthorized practice of law. In connection with the work of the Unauthorized Practice of Law Committee, you might be interested in litigation pending in Chicago resulting from the tendency of certain lawyers specializing in employee liability cases to bring suit in the jurisdiction where the highest verdicts are likely to be obtained, irrespective of how far removed from the point where the accident occurred. I do not know whether any of your accident cases here, in employees liability in the field, are removed from the state of Iowa to Chicago or Minneapolis or St. Louis or to other cities where large verdicts have been obtained, but, believe me, it is a prevalent practice in a great many places in the country. The clients represented by these lawyers have for the most part been referred by certain labor unions. Because of these activities, action has been brought by the Chicago Bar Association to restrain them from continuing their present practices. The Board of Governors of the American Bar Association at its meeting in Dallas authorized its Unauthorized Practice of Law Committee to intervene in this matter, and a brief will be prepared and filed. This is just one phase of the work of the Unauthorized Practice of Law Committee which I thought might be of particular interest to you.

Next, we propose to do all in our power to improve the lot of the lawyer in our armed forces. Doctors and dentists have recently received pay increases and promotions in grade without similar emoluments having been afforded to lawyers. So we have appointed a strong committee for the purpose of obtaining comparable professional recognition and benefits for lawyers.

These are only highlights of our all-out program of service for lawyers, but our activities in this direction will not in any way detract from or diminish the work which the organized Bar is continuously carrying on in the public interest. Projects of public import are centered, as you know, in the American Bar Foundation. Your faith in the leadership of the Association as manifested by your generous contributions to the American Bar Foundation has made that great institution possible. The Foundation now has in Chicago a plant worth conservatively two million dollars, and a substantial income both from foundations and from the contributions of the Fellows of the American Bar Foundation. In addition we have an excellent staff at headquarters carrying on the various projects which from time to time are approved by the Foundation's special Research Committee.

There are at the moment three major projects under way. The first and most important is the Survey of the Administration of Criminal Justice, made possible by a gift of the Ford Foundation. I was in New York just two weeks ago, meeting with the officials of the Ford Foundation, and we presented to them an application for further grant of a million three hundred thousand dollars to carry the survey work of that team into seventeen states of the

Union. Pilot studies of the manner in which criminal laws are administered have already been completed in the states of Wisconsin and Kansas, and a similar study has been launched in Michigan.

The second major project presently in progress at the Foundation is a survey of the canons of ethics in the light of modern conditions to which your President alluded in his address this morning, and I wanted you to know that that is the work of the American Bar Foundation and not the work of the American Bar Association.

Now some of you may not think that there are ethical problems around the country today, but I can assure you that there are, in fact. Actually I was attending a meeting of Roy Willey's bar association in South Dakota a month or so ago, and there the Chairman of the Ethics Committee read from a text a report in which an ethical problem was recorded; it's cited in 283 Southwest 266. It involved the trial of an accident case, an ordinary motor vehicular damage suit, in which the plaintiff had sustained very serious injuries.

The lawyer for the plaintiff and the lawyer for the defendant were both esteemed and revered members of the Texas community who have high rating in Martindale-Hubbell. As the trial progressed, the heat developed hotter and hotter, and personalities began to fly, and finally when the independent witness for the plaintiff, who was a key witness in the case, got on the stand and was taken over for cross-examination, the lawyer for the defendant thought he had her trapped.

So he said to her, "So now you have changed your story." And in open court the lawyer for the plaintiff immediately got on his feet, and he shook his fist under the nose of the lawyer for the defendant.

And he said, "She did no such goddamned thing, and you know it, you son-of-a-bitch."

And if you don't believe me, that's an exact quote from the report, and anybody that wants to take it down and look it up, it is 283 Southwest, page 266.

Now what happened as a result of that? The attorney for the defendant immediately got to his feet and moved for a mistrial. The judge dismissed the jury to hear argument on the mistrial, and so then after listening to the argument, the judge fined the lawyer for the plaintiff twenty-five dollars for contempt of court. The jury brought in a verdict for the plaintiff in the sum of fifty thousand one hundred and fifty dollars. And of course the lawyer for the defendant immediately appealed, and it came up before the court of last resort of the state of Texas, and the court in its opinion, and it is a rather interesting opinion to read, allowed as how since the contempt was committed in the presence of the trial judge, if the trial judge felt that the contempt had been purged by a fine of twenty-five dollars, it was quite all right with them, and they sustained the verdict.

Another instance of an ethical problem cropped up at the regional meeting in Spokane recently. There one of the top men from NACA, and I will not repeat his name (he comes from the state of California) had the temerity to get up before the regional meeting and say that he felt that the canons of ethics should be revised so as to permit a lawyer representing a plaintiff to support the plaintiff on a weekly basis from the time he got the signature on the dotted line of a power of attorney until the jury's verdict was sustained.

There have been many developments in the practice of law which indicate that the time may be ripe for a revision of the canons, and it is hoped that when this study is completed under the auspices of a special committee headed by Judge Philbrick McCoy of Los Angeles, we will have the basis for an intelligent decision as to whether modification is indicated, and if so, in what areas, particularly with respect to Canon 35, which we are presently referred to, which would provide for televising and photographing of court scenes.

The third project with which the Foundation is concerned at the moment is the annotation of the Model Corporation Code and Model Non-Profit Corporation Act with reference to constitutional and statutory provisions, bibliographies of texts and law review articles, and discussion of leading cases. The study will embrace provisions of corporation statutes in the forty-eight states and the District of Columbia. Funds for this purpose have been raised by the Section of Corporation, Banking, and Business Law from among its members.

There are many other services being rendered by the Foundation to lawyers and to the public. Typical of these is the compilation of state and local statutes, agreements, and statements of principles in the field of unauthorized practice, including the preparation of a compendium of recent complaints, answers, decrees, and opinions in such cases. Also in preparation is a survey of judicial and administrative procedures in the various states in areas relating to the mentally ill. The purpose of this study will be to ascertain whether the rights of life, liberty, and property of the mentally ill are adequately protected.

Available at the Foundation also is a duplicating service by which any lawyer engaged in the preparation of a brief on a particular question of law can get at cost copies of any Law Review article bearing upon the subject. Recently the Foundation has completed a survey of all the lawyers in the country which indicates that as of the end of 1955 the lawyer population of the United States is approximately two hundred forty-one thousand. The total number has been divided geographically, broken down into age groups, and in other particulars indexed, showing such communities as have an over-abundant supply of lawyers and those requiring additional services.

This, in brief, is our program for the ensuing year. It is a program in which, we believe, every lawyer has a vital interest. Its effectiveness will depend in part upon the continued support and cooperation of the more than fifteen hundred Bar associations in the United States, and of individual practitioners. We invite that cooperation and welcome your suggestions.

It has been a very great privilege for me to have the honor of being with you today, and I appreciate your attention.

SECTION PROCEEDINGS

Thursday, October 18, 1956

SECTION ON REAL ESTATE, PROBATE AND TRUST LAW

Herman Ginsburg, Esq.
Chairman

“Improvements in Conveyancing Procedure”.....Paul E. Basye, Esq.
Professor of Law, Hastings College of Law,
Burlingame, Calif.

Title Standardization Committee Report and Proposals as to
Title Standards.....Walter R. Raecke, Esq.
Chairman

IMPROVEMENT OF CONVEYANCING PROCEDURE

Paul E. Basye*

Those of us who may occasionally visit a modern power plant are inclined to look with pride upon its vast and complicated equipment, recognizing it as the product of twentieth century technological progress. But if we look critically at one of our legal systems with which we deal every day, we cannot with the same pride view its machinery as having kept pace with all the developments of our age. The vital need for improvement of our conveyancing procedure is a subject that merits our reflective consideration. In our very efforts to improve the existing system, we have discovered that there are certain features in its basic machinery which render it unable to serve us efficiently either today or, especially, in the years ahead. For some time now our method of marketing land has been the subject of mounting dissatisfaction. The public increasingly reacts to its feeling that transfers of real estate are unduly complicated, too time-consuming, and unnecessarily expensive. At one time many thoughtful persons believed that the universal adoption of the Torrens system would furnish a solution to this problem; but after more than a quarter of a century, it has not been widely utilized in this country. Furthermore it is unlikely that legislatures will be inclined to adopt such a system any time in the near future. However, since our present system, with the increased load to which it will be subjected in the years ahead, cannot live up to public expectations, it is not unthinkable that some form of governmental control could come to supplant this system. It is my belief, and it is the thesis

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of this paper, that the needed improvement and preferred solution is quite possible within the framework of our existing system, and that we should do our utmost to make this possibility a reality.

All of us are aware that our method for marketing land is dependent upon two institutions: the Statute of Frauds and the recording system. The former requires written evidence of certain transactions concerning land. The latter says that even written transactions may be void or their benefits lost unless placed of record. If a prospective purchaser *B* wishes to buy a piece of land from *A*, he need only take a deed from him and record it. That deed, if in proper form, will operate as an effective transfer, and the timely recording of it will preserve for *B* the interest which he received by it. But *B* is not interested merely in receiving from *A* an instrument of conveyance. He also wishes to be sure that *A* owns the interest which he purports to transfer to him. That interest is what he pays his money for. He wants to know that *A* is actually transferring to him an interest in land and that by that conveyance he will fully succeed to *A*'s former ownership and thereby become able to market it himself later on. He can ascertain this only by examining the recorded evidence of all transfers up to and including the one by which *A* acquired title from his predecessor. Thus the recording system serves us in two capacities: (1) it performs a conveyancing function; and (2) it preserves the written evidence by which we are enabled to appraise titles.

Our present system, rooted in the American tradition, is predicated upon the assumption that a prospective purchaser can determine whether a seller has a good title by examining its history from the public records. Actually this is not completely possible, but the assumption is one upon which we must necessarily rely if we are to do business at all. Exactly what is a marketable title? Some courts have said that it is an unbroken chain of title entirely deducible of record. Others have said that it is one which a reasonably prudent man is willing to accept. Regardless of the precise definition which we may employ for appraising marketability of title, its functional meaning is very clear. A purchaser of land wants a title which in all probability will not be contested and, if contested, can be successfully defended. He also wishes to know that the title which he acquires will be readily accepted by a purchaser from him if he should choose to sell the land in the future.

A title examiner is expected to give forthright answers to these questions. If the same person examined a given title each time a transfer took place, doubtless we could expect consistent appraisals. This is not the case, however. Each purchaser employs his own title examiner who reexamines the same chain of title, with the result that different examiners do not invariably entertain the same opinion with respect to the same title. Let us consider for a moment the reasons for these variations of opinion.

First, examination of titles back to a government grant is

customary in many states. In the Eastern states this is impossible. Even in certain Midwestern and Western states it is impossible in certain communities, notably in Chicago and San Francisco, where fires or other catastrophes have destroyed the public records. Even where actually possible, a full examination would be unnecessarily expensive and consumptive of time. It is quite common, particularly in the East, for examiners to limit their period of search. Here again the period of search must depend upon individual judgments, which may well differ among different examiners. Any abbreviation of search will entail some risk, but variations in periods of search may also give rise to different appraisals by different examiners.

Second, appraisals of title require the making of certain presumptions. An examiner presumes that all deeds properly executed, acknowledged, and recorded were in fact delivered. This presumption is essential to any kind of appraisal, even though it is not conclusive. The examiner must also indulge in a presumption as to the marital status of each grantor in the chain of title, both in cases where one who purports to be a spouse joins in a deed and also where the marital status of a grantor does not appear at all. Evidence outside the record in the form of affidavits may or may not be acceptable. Authority of corporations to execute deeds is another illustration. The variety of situations to which different presumptions may apply is almost endless. The age of particular instruments may well have a bearing upon the acceptability of various forms of evidence. Thus we see that different examiners are likely to observe different standards in passing upon various situations encountered in common practice.

Third, certain defects are inherent in almost every title. What is their net effect upon the title? They may be slight or serious or of any intermediate gradation. Whether they leave an outstanding interest in anyone will depend upon the circumstances of the individual case and the seriousness of the defect. Whether statutes of limitations bar the outstanding interest with certainty may depend upon adverse possession by the owner or owners since the occurrence which gave rise to the defect. But the fact of adverse possession cannot ordinarily be recorded. The examiner in such a case must exercise a practical discretion or judgment based upon probable adverse possession and the running of the statute of limitations, or he must accept the statements of adverse possession contained in an affidavit, if such may be recorded under local law. It is not surprising that judgments of successive examiners do not fully correspond in every instance.

Fourth, that different examiners may hold varying opinions concerning marketability may seem like an anomaly to the layman. To the lawyer, however, this does not seem so strange, although he may nevertheless deplore the resulting conflict. There are several reasons for this phenomenon. Legal norms are seldom absolute.

and inflexible. Many are phrased in terms of generality. In the very nature of things, a title examiner is applying a general standard of marketability to specific, concrete facts. That he does not always come out with absolute certainty of opinion should not, upon mature consideration, astound anyone.

In exercising a judgment or discretion in each of these cases, an examiner cannot lose sight of the fact that another examiner will ultimately be called upon to review his work and pass judgment upon the same title at a later date. The latter may take a dimmer view of the title, with the result that the present relation of confidence and respect which the client of the first examiner has for him may be impaired. The result is that examiners tend to construe against titles, demand the correction of every conceivable defect, and exercise a practical judgment or discretion only as a last resort. Each appraisal of title tends to err on the side of caution and conservatism, with the result that trivialities are magnified and overemphasized. Thus the entire process tends to become dominated by overabundant caution and ultra-meticulous judgments. "Unlike water, all conveyances seek the highest level" is the picturesque way one writer describes this legal phenomenon governing the behavior of title examiners.

From the foregoing, we can see several reasons for the present inefficiencies in our system of land transfers throughout the nation generally. They may be enumerated as follows: (1) the increased burden of search; (2) the economic waste in repetitive examinations; (3) the development of overmeticulous title examiners inherent in the system itself; (4) the failure of statutes of limitations to accomplish their intended purpose; and (5) the lack of effective legislation to redefine and promote marketability in reasonable ways. Let us analyze each of these matters individually and then consider specific proposals by which genuine improvements may be made in our conveyancing system.

(1) *The Increased Burden of Search*

As ownership of land passes from one person to another, not only does the period of title search become greater but the number of instruments and proceedings which constitute the chain of title also increases. Both factors add progressively to the burden of search; both factors increase the possibility of error resulting in unmarketable titles. Each transfer in the chain of title tends to make the job of the conveyancer more difficult and burdensome. We see the recording system slowly but inevitably bogging down of its own weight.

(2) *The Economic Waste in Repetitive Examinations*

Probably none of the pioneers who had a hand in originating our recording system envisaged the monumental task that title examiners would face after the passage of just one century of transfers. Every time that land is bought and sold, it becomes

the burdensome task of some examiner to trace the title back to its origin and pass judgment anew upon each link in the chain. How much longer can we continue to justify this practice? How insurmountable will be the complications half a century hence, or even a quarter of a century hence!

Our recording system from its very beginning contemplated that a person having a permanent or long-term interest in land should be able to preserve that interest by merely recording proper notice of it. In addition to complete ownership, interests of this kind include easements, leases, mortgages, and also all kinds of future interests. Purchasers of land normally understand that they must take subject to these outstanding interests because they appear somewhere in the record history of the title. But we must not lose sight of the fact that their present existence can only be determined by a search of the whole title throughout the entire period of its history. We have previously felt that owners of interests of this kind should be able to protect themselves by one recording, especially if the interest is of a nonpossessory kind. Repeated examinations thus become endlessly necessary under our existing systems.

(3) *The Overmeticulous Title Examiner*

Each title examiner owes a duty to his client to advise him truly and conscientiously as to whether he believes the title which he intends to buy is a marketable one. On the subject of marketability an individual examiner is likely to advise the purchaser not only as to what he believes concerning its freedom from attack as a practical matter but also as to what a future examiner may say concerning it.

Until a few years ago, no attempt was ever made to set up any standards to be followed by title examiners. Gradually it was felt that if certain standards could be laid down in advance, they could accomplish much to dispel fears that opinions of future examiners would be at variance with present appraisals. Knowledge as to how others will treat certain commonly recurring problems will increase the confidence with which present opinions can be rendered. The resulting certainty with respect to situations frequently encountered will aid materially in eliminating picayunish objections and in promoting similar or uniform treatment by those engaged in a common task. Thus far, real estate title standards have been adopted in twenty-three states on a statewide basis and in several communities elsewhere on a county or city level. Inquiries of lawyers in these states bring unhesitating replies of their value in promoting cooperation and support in following them. If our conveyancing system is to be maintained at all in the years ahead, mutual understanding and cooperation are essential.

(4) *Shortcomings of Statutes of Limitations*

Many persons honestly believe that adverse possession and

statutes of limitations will bar all old interests and ancient title defects. Statutes of limitations were originally intended to be statutes of repose, to quiet titles which had been consistently asserted by possession. Three factors, however, have become obstacles in the complete achievement of this purpose. First, statutes of limitations do not run as against minors and other persons under disability. Second, they do not apply as against the state and federal governments. Third, they do not operate as to future interests. Merely because one person has been in possession of land for the statutory period does not necessarily mean that he has acquired title by prescription. The possible existence of persons under disability, of an outstanding title in some governmental unit, or of a future interest may insulate one or more persons from the effects of the statute and from its purpose in quieting titles.

Nebraska has some very excellent legislation applicable to two of these traditional exceptions: (1) its Marketable Title Act operates as to persons under disabilities whose rights arose more than twenty-two years ago; (2) it applies to some future interests.

(5) *Marketable Title Legislation*

The orthodox definition of marketable title is one free of all reasonable doubt, one which does *not* contain a defect, outstanding interest, or claim which may conceivably operate to defeat or impair the owner's title. This negative concept of marketability has become an implied invitation for courts to declare a title unmarketable if an examiner has entertained any doubt whatever in his mind with respect to it. We have long needed to replace this negative approach by a positive one which will make marketability of a title depend upon its condition during a recent interval of time rather than upon absence of technical defects which may have occurred some forty years or more ago. Not until recently has any attempt whatever been made to revise our notion of marketability so as to render outcast these ancient defects and irregularities insofar as marketability is concerned.

The most important single piece of legislation which has given positive form and a modern meaning to marketability was that adopted by Michigan in 1945, borrowed by South Dakota and Nebraska in 1947, and by North Dakota in 1951. These acts were part of comprehensive title legislation enacted in these four states. They were drawn to accomplish two basic functions: (1) to bar and extinguish all claims and interests having an origin prior to a certain date or period of time, and (2) to define the marketability of an owner's title in terms of his record title during a specified recent period of time. In one step they constituted drastic statutes of limitations; in another step they created a new conception of marketability. The acts in all four states declare that one having an unbroken chain of title during a certain recent period of time and being in possession of land shall be deemed to have a marketable title of record. One very good feature of some of these acts is the

provision that the fact of possession of property may be shown by affidavit. We can thus see some far-reaching efforts toward promoting effective marketable title legislation.

Methods of Improving Our Conveyancing System

It is possible to point to numerous but isolated improvements in our conveyancing system, but much more must be done on a broader scale if it is to survive. It is my sincere belief that there can be a genuine modernization of our conveyancing system to make it function according to twentieth century standards. Casting aside this foundation of our existing system and starting over again at this time is almost unthinkable. Our present system can be made to satisfy public needs, and it is here that we should focus our greatest attention. Thoroughgoing improvements and revisions are not only possible but have even attained a substantial measure of reality in a few states. Steps already taken in certain communities throughout the country are sufficiently beyond the experimental stage to convince the thoughtful observer that our recording system can be genuinely overhauled to serve present-day needs adequately and efficiently. If this is the realistic solution to our problem, what are the avenues of approach?

In the light of our American experience in transferring ownership or real property, it is very clear that there are four essentials which an efficient conveyancing system should include: (1) It should enable an owner of land to make prima facie proof of his title readily by reference to the public records; (2) it should constantly facilitate the correction and automatic cure of outstanding defects which arise out of errors and mistakes of conveyancing; (3) it should eliminate the necessity for repeated examinations of titles all the way back to their inception; and (4) it should declare and define marketability of title in such a way as to make it reasonably simple of application. Specifically, what can be done to accomplish these objectives most effectively?

(1) Some simple device is needed to preserve testimony which can be used to explain apparent defects or irregularities. Evidence as to the identification of parties, marital status, descent, heirship, family history, and the like should everywhere be made available in the form of affidavits or recitals in deeds without the necessity for cumbersome procedure of an action to quiet title. That dangers and risks are involved in placing reliance upon recitals in deeds and statements in affidavits is not to be denied. They can, however, be minimized. Further efforts in this direction call for encouragement.

(2) There is great need to facilitate the correction and elimination of outstanding defects and claims which are not real or substantial. Defective acknowledgments, the lack of a corporate seal, or a failure to recite the marital status of a grantor in a deed are typical examples. Curative acts have proved effective to re-

move such defects. In some instances these acts could be made more comprehensive and also made progressively effective after the passage of some specific short period of time. Their periodical reenactment would then be unnecessary.

(3) If we are to eliminate the necessity of the customary title search all the way back to a government patent or some other origin, several kinds of legislative action will be necessary. Most of these proposals are not new—they are already in existence in many states.

First, statutes of limitation should be made to *extinguish absolutely* ancient interests, after some fixed period of time, not merely *bar* their enforcement. To do this they must be made to apply to minors and persons under disability also, with some additional period of time, if thought necessary to satisfy local policy. More than half the states have already passed legislation limiting protection to the legally disabled beyond stated periods in gross ranging up to thirty years. This method of quieting titles and promoting land marketability reduces hardship far more than it creates hardship. Actual losses should be very rare indeed, for provisions are universal for the appointment of guardians who can act to protect the interests of legally disabled persons. Nebraska has such a provision in its Marketable Title Act.

Second, statutes of limitations must be made to apply even to the state and lesser units of government. A few states have already taken the initial step in this direction, notably in their Marketable Title Acts.

The problem of nonpossessory interests requires special consideration. One reason for prolonged and repetitive title searches is the indefinite duration of certain interests in land which, because of their nonpossessory character, are unaffected by traditional statutes of limitations. Once recorded, we have notice of them forever or until they expire by their own terms. The nature and social utility of these interests are so varied, however, that we must consider each of them separately.

In the first category are such interests as judgments and mechanics' liens. They have always been understood to have a duration limited to a very short period in gross. In the same category should be placed tax liens, interests arising from notices of lis pendens, recorded contracts of sale, option contracts, and simple notices of claimed interests.

Mortgages and deeds of trust may justify separate treatment. Nevertheless, an unreleased ancient mortgage should not be permitted to impair marketability forever. The recent tendency for persons to finance their purchase of property by means of long-term mortgages is economically and socially desirable. Mortgages extending beyond twenty years would be exceptional. It would appear not to be unduly burdensome to require mortgagees to re-

record notice of their mortgages after twenty years to give them validity for a longer time.

Easements and profits also are socially useful. They may be of indefinite duration and therefore require extended search to ascertain their existence. Easements such as roads, streets, and utility rights of way present little or no problem, since the use authorized by each of them is visible and constitutes notice of a claim of right. Other types may not be apparent and so may justify a requirement of periodical rerecording.

Long-term leases are another example. Generally they could not present serious problems. The tenant in possession would be estopped in his claim of ownership by his payment of rent. His occupancy would be notice to third parties. Here also rerecording could be required to insure legal notice for the protection of either lessors or lessees.

Rights of entry, possibilities of reverter, and covenants restricting the use of land form another category. None of these interests are estates, and none are affected by the rule against perpetuities. They are not affected by adverse possession prior to breach, and they may be of indefinite duration. If title searches are to be kept within reasonable limits, some restrictions must be imposed upon these interests. Two solutions are available here. One is to limit the duration of these interests to a period not exceeding the period of record search. This can be and has been done, though it has been recently held by the Supreme Court of Florida not to be valid when given a retroactive effect. Another method of attack is to require rerecording as a condition for their continued existence. This is done by some of the Marketable Title Acts.

Rights arising out of the marital relationship form still another category. These include dower, curtesy, homestead, and community rights. These rights may be partially justified by the policies supporting them, but in their present form they may continue for a full generation without being subject to statutes of limitation. A simple solution here is to require a nonjoining spouse to record, and to rerecord if necessary, notice of his or her claim to land transferred by the other spouse alone. This has been done in a small group of states already.

The last and probably most difficult problem is that produced by conventional future interests, such as remainders and reversions. Since the former are nonpossessory, they could continue for the greater part of a generation, far beyond the period of reasonable record search, and thereby prevent the realization of our objective. One possible solution would be to require periodical rerecordings as is done in the Marketable Title Acts. It has been objected that this is not entirely satisfactory because undue hardship may be imposed upon those in whom the interests may ultimately vest, if contingent interests are involved. If unborn persons are in-

volved, a doubt exists in the minds of some as to the constitutionality of such a requirement. It is generally believed, however, that this legislation satisfies the requirement of due process if someone may record notices on behalf of unknown or unascertained persons.

(4) Legislation should declare and define marketable title in a way which will make for reasonably simple application and the elimination of each purchaser's having to make an independent examination all the way back to the beginning. The Marketable Title Acts generally may be said to accomplish this most effectively.

The requirements outlined are essential to preserve our existing conveyancing system. They are minimum requirements. None of their lines of action is entirely novel or untried. Each of the four methods in whole or in part has already been put into effect by more than one state, in some instances by many states.

This program cannot be realized automatically. In the first place, local Bar Association sections or committees empowered to deal with such problems as these must be organized wherever they do not presently exist. Two tasks will require intelligent understanding and execution by these local Bar Association committees. First, there is need for improvement of conveyancing practices on a local level and on the basis of existing law. This means, first, a study of the over-all task of revising legislation to accomplish as nearly as possible the objectives which have been enumerated. Second, there must be adoption and constant revision and extension of real estate title standards.

Within the framework of the recording system, the limits within which individual discretion must operate in the treatment of specific title problems loom quite large as a factor in the total effort involved in appraising marketability. Title standards having official sanction constitute a group point of view which can become a welcome guide to an individual examiner, for he knows that it has the backing of group consideration and that a subsequent examiner may be expected to take the point of view expressed in those same title standards. On doubtful questions and on problems which have not been thoroughly considered by the Bar generally in the light of local decisions, title standards have already become a tremendous force for uniformity, common understanding, and a more liberal attitude in applying general rules to specific problems.

Since title standards can perform much useful service in appraising titles, what subject matter do they embody? What is their coverage? Surveys of standards thus far adopted indicate at least five areas of application. First, several states have a general standard suggesting attitudes and relationships between examiners and between examiners and the public. For example, the first standard in Iowa is in the form of a question: "What should be the attitude of the attorney in examining abstracts of title as

to the making of objections and requirements?" The standard reads: "Objections and requirements should be made only when the irregularities or defects actually impair the title or reasonably can be expected to expose the purchaser or lender to the hazard of adverse claims or litigation. Many attorneys are over-critical in examining titles and appear to have in mind the making of every possible objection and requirement. The Committee recommends a more realistic attitude with respect to title defects." Then follows this comment: "Although the following Standards have been in operation for more than ten years, it is still found necessary to remind attorneys that the system of land conveyancing by the 'Abstract-Attorney' method is under increasing criticism. Business interests and persons engaged in real estate transactions maintain that the expense and delay caused by technical objections to title requires that some better system be developed. The Committee has made exhaustive studies of the systems of Registered Titles and Title Insurance, and is convinced that for land transactions in Iowa, the present system is the best, but that better abstracting and more competent Title Examiners are urgently needed if our system is to continue satisfactorily to serve the public." Mention has already been made of the part which individual judgment plays in appraising titles. Similar standards of several states recommend that "When an examiner finds a situation which he believes creates a question as to marketable title and has knowledge that another attorney handled the questionable proceeding or has passed the title as marketable, the examining attorney, before writing an opinion, should communicate, if feasible, with the other attorney and afford an opportunity for discussion." These recommendations, if followed both in letter and in spirit, can accomplish much to promote desirable objectives.

A second purpose of title standards concerns a common agreement as to the duration of search. This type of standard has been adopted in only a few states, notably in those where searches back to the government are impractical. To make this standard genuinely effective, there should be some investigation as to the existence of matters in the history of local titles which would warrant the limitation of search. Generally instruments and other items which have created future interests or claims which would extend back of the suggested period of search are known to the local Bar. Hence this kind of standard usually functions satisfactorily as a practical matter.

A third function of title standards is to declare the effect of the lapse of time upon formal defects. Certainly an unwitnessed or defectively acknowledged deed ought not to impair the title indefinitely. Marketability of land is much more important to society than maintenance of an assumed needed protection to a grantor who has failed or forgotten to observe every minutia of conveyancing, especially when his deed has unquestionably dis-

closed his intention. A very large number of title standards have concerned themselves with matters of this kind and with highly beneficial results.

A fourth purpose of title standards is to indicate the presumptions of fact which should ordinarily be applied by examiners. What presumption shall be applied to the marital status of a grantor who executed a deed sixty years ago without disclosing it in the deed? What presumption shall be applied to a corporation deed executed ten years ago as to authority of its officers to execute it? These and numerous other presumptions comprise subject matter in many title standards.

Fifth and finally, title standards have reviewed and declared the law applicable to commonly recurring situations. In many instances, examiners have given opinions without consulting their own statutes or decisions and cast the burden upon the seller to satisfy him on a point of law of which he is not certain. In other cases, local law has been uncertain. Recent decisions, legislation, or comprehensive analyses have sometimes clarified a previously existing doubt. When this has been true, title standards have properly called these matters to the attention of examiners.

It should not be concluded that title standards alone can be the means of revitalizing our conveyancing system. They have an important but limited utility. Except in Nebraska, they are not law and have no binding force or effect. Nevertheless they have had a salutary effect upon appellate court decisions in several instances. There is also a danger that focusing attention upon title standards alone may lead us to overlook the need for broad statutory reform in certain areas of property law which are most essential to the preservation of our conveyancing system. So far the awareness of our need for legislative reform has been most apparent in the same states which have progressed furthest in the development of title standards. It is well to remember that legislation and title standards are both necessary concomitants of a successful program to preserve our conveyancing system from disintegration.

If this program is to succeed, cooperation and support of local committees and the legal profession generally is extremely important, for their leadership and support in obtaining adoption by their legislature will be most essential in bringing about the improvements which are urgently needed by the public and the title profession generally. The values to be derived from a streamlined conveyancing procedure are clearly understood; but a specific program should be forthcoming within a relatively short time. The goal is large, but its successful achievement is vital to the public welfare generally; and it is unlikely that we overestimate the benefits to be derived from a comprehensive and carefully planned program.

The Section received and discussed the Report of the Standardization Committee. The following amended report was unanimously adopted as the action of the Section:

**REPORT OF STANDARDIZATION COMMITTEE OF THE
REAL ESTATE, PROBATE, AND TRUST SECTION OF THE
NEBRASKA STATE BAR ASSOCIATION**

Since the annual meeting of the Nebraska State Bar Association last October, the Title Standardization Committee has actively pursued its work. There have been several meetings of the committee as a whole, a number of sub-committee meetings and considerable work by correspondence. Some of the members of the committee actively participated in the presentation of an Institute on Real Estate Titles at Grand Island on June 7, 1956, and at Scottsbluff on June 9, 1956. These institutes were well attended, created a great deal of interest in title matters, and were actively participated in by a large number of those attending.

The committee has carefully reexamined all of the existing Title Standards and has considered a number of proposed new standards and considered and discussed quite a number of questions which have been submitted to it with a view to the adoption of additional standards.

There is still a difference of opinion among the members of the Bar as well as among the members of our committee as to the wisdom of having caused some of the standards previously adopted to be enacted into law. It is the opinion of the committee that new standards which may be adopted, which are not existing statutory standards, should not be enacted into law. However, it is also the opinion of the committee that the statutory standards should not be repealed unless they have become obsolete.

We now submit herewith the following recommendations:

I.

That the existing Title Examination Standards numbered 1 to 47 inclusive, with the exception of Standards 11 and 20, be approved as previously adopted, with certain changes to be made in the comments to some Standards as hereinafter provided.

II.

Standard No. 1—That the last paragraph of the comment under Standard No. 1 be revised to read as follows:

That the principle back of the rule or Standard is that reasonable certainty of identity of parties is all that can be required.

III.

Standard No. 2—That the following sentence be added to the comment on Standard No. 2, to wit:

The use of any other standard abbreviation for words indicating incorporated status should not require any record proof of identity.

IV.

Standard No. 11—That Standard No. 11 should be amended by deleting the words “or release of mortgage.”

V.

That a new Standard be adopted to read as follows:

A release of mortgage, mechanics lien, judgment lien, or other encumbrances executed on behalf of a corporation by the President, Vice-President or an Assistant Vice-President of the corporation under corporate seal should be passed without calling for any showing as to the authority of the officer acting for the corporation.

VI.

That a new Standard be adopted to read as follows:

A deed of conveyance to real estate executed on behalf of a corporation under corporate seal by its President should be passed without calling for any showing as to the authority of the officer to act for the corporation, unless statutes authorizing the incorporation of the particular type of corporation specifically require prior approval by the Board of Directors or other governing body before any conveyance of real estate can be effective.

VII.

Standard No. 20—That Standard No. 20 be amended to read as follows:

Where no execution has issued on a judgment for five years, other than a judgment for child support alone, or alimony alone, or a judgment for child support which is accompanied by a judgment allowing alimony, or a decree of foreclosure, the judgment ceases to be a lien and should not be treated as a defect of title.

Comment: See R. S. 1943, Sec. 25-1515; *Rich v. Cooper*, 136 Neb. 463, 386 N. W. 383; *Nowka v. Nowka*, 157 Neb. 57, 58 N.W. (2d) 600; *Lippincott v. Lippincott*, 152 Neb. 374, 41 N. W. (2d) 232.

Of course the judgment may be revived within ten years under R. S. 1943, Sec. 25-1420, but the lien of the revived judgment commences only from the date of the order of revivor, *Glissmann v. Happy Hollow Club*, 132 Neb. 223, 271 N. W. 431. Thus the abstractor should certify that any dormant judgments appearing on the records have not been revived.

This Standard has no application to decrees of a foreclosure. *St. Paul Harvester Works v. Hackfeldt*, 96 Neb. 552, 148 N. W. 153.

VIII.

That a new Standard be adopted to read as follows:

Foreclosure—No Order of Sale on Decree—Where no order of sale has issued on a decree for foreclosure of real estate taxes within ten years from the date of the decree, or within one year from April 14, 1953, whichever event is later in point of time, the decree ceases to be a lien and should not be treated as a defect of title.

Comment: Cum. Supp. 1953, Sec. 77-1911. There is no limitation of lien of a decree of foreclosure other than a decree for foreclosure of real estate taxes.

IX.

Standard No. 23—That the first paragraph of the comment on Standard No. 23 be amended to read as follows:

As used in this standard, the term “conveyance” includes mort-

gages, leases of land for more than a year, oil, gas or other mineral leases, and assignments and releases thereof.

That the following two paragraphs be added to the comment on Standard No. 23:

Real estate includes land, tenements and hereditaments, and embraces all chattels real except for leases for a term not exceeding one year. Section 76-201, R.R.S. 1943. It includes "mines, minerals, quarries, mineral springs and wells, or oil and gas rights, and privileges pertaining thereto." Section 77-103, R.R.S. 1943. An interest in minerals is an interest in real estate. *Fawn Lake Ranch Co. v. Cumbow*, 102 Neb. 288, 167 N.W. 75. The term "deed" embraces every instrument in writing by which any real estate or interest therein is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, except last wills and leases for one year or for a less time. It therefore appears that execution of an oil and gas lease, an assignment or release thereof must be joined in by the spouse of the owner of the interest being leased, assigned or released, in the absence of nonresidence. The same proofs as to nonresidence, and requirements in the case of nonresidence apply, however, as to any conveyances affecting oil, gas or other mineral interests, and other leases of land for a term exceeding one year as in the case of other conveyances of real estate. The word "wife" as used in the standard should be treated as interchangeable with the word "spouse."

X.

Standard No. 26—That Standard No. 26 be referred to the Legislative Committee of this Section to review and to attempt to prepare an appropriate curative act to make the items therein considered progressive in dates and that such curative act be submitted to the Legislature for enactment.

XI.

Standard No. 28—That the following paragraph be added to the comment on Standard No. 28, to wit:

Section 25-202, R.R.S. 1943, establishes a period of limitation for action upon a cause of action for foreclosure. Section 76-239, R.R.S. 1943, provides a notice section for the benefit of subsequent purchasers and encumbrancers for value. It should be noted that it is possible to have varying periods of time within which a mortgagee may bring an action for foreclosure as against a mortgagor, upon the actual accrual of a cause of action, and the period of time within which the record of a mortgage constitutes notices as to subsequent encumbrancers and purchasers for value. The effect of Sections 25-202 and 76-239 is to accomplish this result. Providing a specified period of time within which record of a mortgage, where no maturity date is stated in or ascertainable from the mortgage, may be deemed notice of its currency, will assist in providing certainty of titles and in simplifying conveyancing.

XII.

That Section 25-202, R. S. 1943, be referred to the Legislative Committee of the Nebraska State Bar Association for review and to consider an amendment by which the period of time within which a cause of action for the foreclosure of a mortgage shall be deemed to have accrued if no date for any maturity be stated therein or ascertainable therefrom, from the existing twenty years

from the date of the mortgage to a term not to exceed ten years from the date of the mortgage for the assertion of a cause of action as against subsequent purchasers and encumbrancers for value. This would assist certainty of titles and eliminate the discrepancies between Section 25-202 and Section 76-239.

XIII.

Standard No. 29—That the comment on Standard No. 29 be amended by striking therefrom the following sentence:

No competent abstracter would omit items showing probate records involving the land, and no competent attorney would pass the title without an examination of such records.

That there be added to the comment on Standard No. 29 the following paragraph:

Likewise, Section 38-902, R.R.S. 1943, provides for recording a certified copy of the order of appointment of a conservator in the office of the Register of Deeds of each county in the State of Nebraska in which the person for whom the conservator is appointed is possessed of real estate. Such recording in the county in which the conservator proceedings have been had should not be required, as the original order is filed in the probate court, and recordation of the order of appointment in the journal of the probate court operates as constructive notice, upon the same analysis as in the case of recording as to copies of wills, certified copies of decrees of distribution.

XIV.

That a new Standard and comment thereon be adopted as follows:

Grantees—Relationship and Identification—The failure to identify or state the relationship of plural grantees in a conveyance is not a title defect if such identity or relationship is otherwise satisfactorily established from subsequently recorded instruments or affidavits in the chain of title.

Comment: The most usual example is found in the case where John Doe and Mary Doe take title, and, in a subsequent conveyance in which they are grantors, they are identified as then being husband and wife. In the absence of record evidence to the contrary, the title examiner is entitled to presume that the grantees in the first conveyance are identically the same persons as the grantors in the second conveyance and it is not necessary to furnish an affidavit that at the date of the first conveyance the grantees were then husband and wife. The principle here is the same as that involved in the comment to Standard No. 1.

XV.

That a new Standard and comment thereon be adopted as follows:

Marketable Title Act—Quitclaim Deed—An unbroken chain of title, within the meaning of the Marketable Title Act, may originate in a quitclaim deed.

Comment: A quitclaim deed is a "conveyance or other title transaction" which "purports" to create an interest in the grantee within the contemplation of Sec. 76-289 R.R.S. Neb. 1943. While originally quitclaim deeds were used to release the interest or claim of the grantor to one who already had an interest in the land, in modern times they are commonly used as primary conveyances to

a stranger to the title. See, H. H. Foster, "Covenants for Title," 1 Neb. Law Bul., No. 1, P. 50. A quitclaim deed has been held to be a "conveyance" protected by our recording acts. *Schott v. Dosh*, 49 Neb. 187, 68 N.W. 346; *Bannard v. Duncan*, 79 Neb. 189, 112 N.W. 353. See also: 16 Am. Jur. 447, 627, 628; 45 Am. Jur. 518; 44 A.L.R. 1266; 162 A.L.R. 556.

XVI.

That the following proposed new Standard and comment thereon be presented to the Real Estate, Probate and Trust Section of the Nebraska State Bar Association for discussion and consideration, but without recommendation by the Title Standardization Committee, to wit:

Certificate as to County Court Records—It shall be proper for a title examiner to require the certificate of the abstractor to reveal a search of the records of the County Court of the county in which the real estate is situated for any proceedings the nature of which may affect the title to real estate.

Comment: Although the county court does not have jurisdiction in civil actions in which title to real estate, or mortgages or contracts relating thereto are involved (Section 16, Article V, Constitution of Nebraska; Section 24-502, R.R.S. 1943), it does have exclusive jurisdiction of the probate of wills, administration of estates of deceased persons, and guardianship of minors, insane persons and idiots. (Constitution, Section 16, Article V; Section 24-503, R.R.S. 1943). The county court has jurisdiction to determine the facts, upon which some question of title to real estate may be dependent, although it does not have jurisdiction over question of perfecting title to real estate itself. *Fischer v. Sklenar*, 101 Neb. 553, 163 N.W. 861. For example, the county court can determine the fact of the validity of a will and the fact of heirship. The title to real estate is not through the determination of the county court, but pursuant to the will or pursuant to the statutes of descent and distribution. The county court determines the facts upon which the will and the statutes operate.

Therefore, proceedings in county court for the administration of estates of deceased persons, probate of wills, and guardianship of minors, insane persons and idiots, as well as for conservatorship, may determine facts which facts may affect title to real estate. The only statutory provisions for recording of probate records in the office of the Register of Deeds are those for the filing of attested copies of wills and certified copies of decree of distribution in probate estate, and the filing of an order for appointment of a conservator. Cf Standard No. 29.

In addition, the county court has jurisdiction to determine inheritance tax, which proceeding may affect the determination of the existence of a lien upon real estate for inheritance tax. Section 77-2013.01 — 2013.03, R.R.S. 1943, as amended. There is no statutory provision requiring recording of any of the papers affecting determination of inheritance tax, excepting a permissive section authorizing issuance of a receipt from the County Treasurer which designates on what real property, if any, of which deceased may have died seized, tax has been paid, and by whom paid, and whether or not it is in full of said tax, and the recording of the receipt in the Clerk's office of the county. Section 77-2036, R.R.S. 1943.

The title examiner is not justified in demanding more recording upon the real estate records than the statutes provide. Cf Standard No. 29.

XVII.

That the following proposed new Standard and comment thereon be presented to the Real Estate, Probate and Trust Section of the Nebraska State Bar Association for discussion and consideration, but without recommendation by the Title Standardization Committee, to wit:

Unreleased Forfeited Oil and Gas Leases—Where the positive affidavit of the record owners of the mineral interests in real estate stating that the delay rentals under an outstanding oil and gas lease have not been paid and that there has been no development on the land in accordance with the terms of said lease together with an affidavit of an executive officer of the depository bank named in said lease of the nonpayment of said rentals is shown on the abstract, the title examiner is not justified in requiring that proceedings under Chapter 57-202 through 57-204 for the cancellation of said lease be conducted.

Comment: Your committee believes that it is not necessary to follow the statutory provisions to eliminate the outstanding oil and gas lease on making the above showing. A purchaser or encumbrancer for value always acquires property with notice of possessory rights therein. Ordinary inquiry into these possessory rights should reveal performance of oil, gas or other mineral lease requirements as to drilling and operations to keep a lease effective. This investigation coupled with an affidavit of non-performance executed by the depository bank and by the owner of record of the lands should be sufficient to establish forfeiture of the lease where there have been no operations sufficient to continue the lease and the lessee has defaulted in delay rental payments, thereby forfeiting the lease.

XVIII.

That upon the adoption by the Real Estate, Probate, and Trust Law Section of any amendments to existing statutory Standards, the necessary bills be presented to the Legislature for the purpose of enacting such amendments into law.

XIX.

That the Standards and Comments as approved by the Section be printed in permanent form, bound in the form of desk book for lawyers, preferably with a loose-leaf binding, and kept up to date as Standards or Comments may be amended or revised, or additional Standards and Comments adopted, and with current annotations.

XX.

That the Title Standardization Committee be continued to carry on the work of reviewing, revising, and preparing Standards and assisting in the interpretation of title questions, as the development of statutory or case law may from time to time require.

XXI.

That the Legislative Committee of this Section be requested to consider the preparation of a bill for presentation to the Legislature which would provide that where all or part of an adjoining street, avenue, or alley has been duly vacated with the result under then-applicable statutes that all or a portion of such vacated way re-

verted to the owner of the adjoining platted lot, and where a deed or deeds covering such platted lot have been of record more than ten years, and where there has been filed of record no instrument purporting to establish a contrary intent, then when all of the foregoing three conditions are met, the deed or deeds to the platted lot without mention of the vacated way shall be irrevocably deemed to constitute a conveyance of the platted lot together with the reverted vacated way.

XXII.

That a new Standard and comment thereon be adopted as follows:

Failure to Determine Heirs: When Not Objectionable—In proceedings for the probate of a will, where there has been no determination of the heirs of the deceased testator, if an affidavit appears of record showing that no child was born to the deceased testator after the making of the will, or such fact can be determined from the pleadings in the proceedings for the probate of the will of the deceased testator and other instruments of record, no determination of heirship with respect to the deceased testator need be required.

Comment: Under Section 30-225 R.R.S. 1943, it is essential in each case of probate of a will to determine whether or not any children were born after the making of the will, unless the requirements of that section are otherwise met within the will. See *Gillespie v. Truka*, 104 Neb. 115, 175 N.W. 883; *C B & Q R. Co. v. Wasserman*, 22 F 872. In many cases, however, the proceedings for the probate of the will do not disclose whether or not there was any after born child. In many proceedings for probate of wills, particularly in years gone by, there has been no determination of heirship.

Determination of the necessary facts appears essential in the examination of title to real estate. Where, however, there has been no determination of heirship, but the essential facts can be established through affidavit together with probate and other records appearing within the chain of title, no further showing that there were no after born children should be required.

If this fact cannot be established through affidavit and other records, proceedings for determination of heirship under Sections 30-1709 *et seq.* would appear proper where there has been probate of a will, but no determination of heirship.

Respectfully submitted
 Walter R. Raecke, Chairman
 John W. Delehant, Jr.
 George Farman
 John R. Fike
 Maurice S. Hevelone
 Earl J. Lee
 Alexander McKie
 Paul L. Martin
 Earl J. Moyer
 Clement B. Pedersen
 Franklin L. Pierce
 Clarence M. Pierson
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Archibald J. Weaver
Floyd E. Wright

SECTION ON PRACTICE AND PROCEDURE

Lowell C. Davis, Esq.
Chairman

Hon. Edmund Nuss

Judge of the District Court, Tenth District

“The Preparation and Presentation of Photographic Evidence”....

.....Charles C. Scott, Esq.
Kansas City, Mo.

“Trial Procedure from Judicial Standpoint”

A Panel Discussion

Moderator

Lowell C. Davis, Esq.

Chairman of the Section

Members of the Panel

Hon. John W. Yeager

Judge of the Supreme Court of Nebraska

Hon. Harry A. Spencer

Judge of the District Court, Third District

Hon. John H. Kuns

Judge of the District Court, Thirteenth District

LOWELL C. DAVIS: The meeting will come to order. This is the meeting of the Section on Practice and Procedure.

I am deeply grateful, as chairman of this section, and I am sure that you will all be after you have heard this program, to the individual members of the Executive Committee of the Section. They are C. Russell Mattson of Lincoln, Raymond E. McGrath of Omaha, Fred Deutsch of Norfolk, Bob Hamer of Omaha, and George Healey of Lincoln, all of whom have worked hard in getting this program arranged for your enjoyment.

Now, since this program is of necessity quite lengthy, and in order to permit the fullest coverage possible of the subjects which will be presented, we will have no program intermission. At the end of the first part of the program, you will be requested by voice vote to elect two new members of the Executive Committee. The following names have been placed in nomination by the Executive Committee. Lester Danielson of Scottsbluff, Milton Murphy of North Platte, Jack Devoe of Lincoln, and Lowell Davis of Sidney.

At this time I wish to present Ray McGrath of the Omaha Bar, who will introduce the first speaker on the program.

RAYMOND McGRATH: Mr. Chairman and fellow lawyers. Our speaker is Charles C. Scott of Kansas City, Missouri. He is a document specialist, an attorney, a law teacher, and a legal author.

Mr. Scott is the leading authority today on the use of photographs as evidence in courts of law. He is not just a theoretical expert but a practical man as well, for he himself makes daily use of pictures in connection with his work as an examiner of questioned documents. Using large photographic exhibits to illustrate the reasons for his opinions, Mr. Scott testifies in courts all over the nation as an expert on the identification of handwriting and typewriting and the detection of forgery. He is one of the very few nationally acknowledged experts in this fascinating field. Always interested in photography and an experienced photographer himself, while in law school Mr. Scott noticed that lawyers were not making sufficient use of photographs as evidence, and often were unable to determine whether or not a picture was a good reproduction of its subject.

Mr. Scott decided that something should be done, and he wrote many law articles on the subject and gradually developed an extensive knowledge of the why's and wherefore's of photographic evidence.

In 1942 the Vernon Law Book Company and the West Publishing Company published Mr. Scott's monumental work *Photographic Evidence*, a large textbook, moulded from the white heat of experience; the book soon became a standard work on the subject.

Mr. Scott was born in Kansas City, Missouri, on the first of September, 1911. His father was a native of Tennessee and his mother of Kentucky. He was graduated from the University of Kansas City Law School in 1935, and admitted to the Bar in Missouri and the federal courts in that same year.

Mr. Scott was in the Navy in World War II, and he spent over sixteen months in the Pacific. He is a member of the American Bar Association, Missouri Bar, Lawyers Association of Kansas City, and the Kansas City Bar Association. For several years he has been serving on the Advanced Legal Education Committee of the Missouri Bar.

It is my genuine pleasure to present to you our very distinguished guest speaker.

CHARLES C. SCOTT: Thank you very much, Mr. McGrath.

Ladies and gentlemen of the Nebraska Bar. First a word about how we will proceed here during this period, and in order to explain that, just one story.

Old Pat was about to die and his dear wife Mary was sitting by his bedside. She said, "Well now, Pat, is there anything you would like to have eat before you die?"

Pat thought for a minute, and he said—he was too weak to talk—but he said, "Well, Mary, if you don't mind I'd like to have a slice of that fine Virginia ham that you've got cooking out in the kitchen."

"Oh, no you don't, Pat, that's for the wake."

Well, that's the way I begin my introduction about this apparatus, that is, after I have become a little acquainted with you. Giving an illustrated lecture is about the hardest thing that a man can attempt to do, because afterwards nobody even knows what you look like.

So I try to talk for a few minutes extemporaneously before turning out the lights, so you can see me and I can see you.

We will discuss many types of photographs during this period and try to demonstrate how they can be used effectively in lawsuits, and also how you can sometimes detect photographs that are not as accurate as they should be.

I do not know whether you have thought of it or not, but photography is actually a type of language, as language is a sign of an idea, or signs of ideas compose languages. Language started out originally as pictographs, and then of course in time the alphabet was developed, originally a sort of a picture alphabet, and then it eventually became very much in the nature of symbols.

Since the invention of photography, there has been a trend in the other direction, and people today, your jurors, your judges, the triers of fact, are pictorially minded as they never were before.

The sight of a little seven-year-old boy sitting in front of a television screen one foot away with his eyes glued to the picture is the sign of the times. People do not want to listen, they want to look; and that is just as true in court as it is in any group that you will meet.

Now a lawyer has three types of language to reach the trier of fact; he has the written word, he has the spoken word, and he has the picture, a third type of language. The written word he has, of course, largely in the sense of documentary evidence. In some jurisdictions it may be instructions. The spoken word is the testimony of the witnesses and the arguments of counsel, and in some jurisdictions the instructions of the court.

And then the third and the most important type of language, in my opinion, often may be the picture, because a picture smashes an image into the brain that cannot be retouched or altered, and will remain with the jury or the trier of the fact throughout the remainder of the trial. Today photography is important; tomorrow it will be essential.

Now our courts often refer to photographs as silent witnesses. Your Nebraska supreme court has actually referred to photographs in that language—silent witnesses, virtually personifying them.

And why is this done? Because in many instances we think of a photograph as itself testifying. Of course we know the rule of law that a photograph must have its testimonial sponsor, as Dean Wigmore said many years ago, that there must be some human wit-

ness who can speak for its accuracy. But there is a tendency to accept every photograph as absolutely accurate and to think of photographs as silent witnesses.

Now we are not dealing in the main today with showing fake photographs. Photographs are easily faked, but fake photographs are easily detected. And this silent witness, like the human witness, usually is not a downright perjurer. It is relatively rare that we are dealing with that in human witnesses, and so it is with the photograph.

But like a human witness, I would like to have you bear in mind, a photograph may well, shall we say, just try to do a little better for the side of the case for which it is presented than the facts warrant. In other words, like a human witness, a photograph may exaggerate, it may minimize, it may leave things out, it may add things to, it may turn things around, right to left. And in a few rare instances it may constitute an optical illusion, that is, it may have illusions just as a human witness may have illusions.

Now all through this presentation, especially this first part which deals largely with traffic accident scenes but covers other types of general photography, we will be noticing those things, the things that a photograph can do, just as a witness can do, that it can exaggerate, that it can minimize, that it can leave things out, that it can add things to, that it can turn things around, and that it can constitute on optical illusion.

Well, so much for the introduction, now for the demonstration.

(Showing of movie film during the remainder of this talk.)

CHARLES C. SCOTT: A picture may be an optical illusion, as I have said. This is an extreme example of that which we sometimes run into even with photographs. This is a picture that may be seen either as a very old woman or as a very young lady, depending upon what catches your eye the first time.

If you see it as a young lady, she is almost turned around, and just the tip of her nose and her eyelash show, and her ear is right here, and she has a band around her neck.

If you see it as an old woman, she has a very large nose, and what was a band around the young lady's neck is her mouth; she has a shawl over her head. That's an extreme example of the optical illusion.

This is the illusion of the face, or the facing silhouette. Not quite as spectacular as the last one, but you can see that you can either look at that as a face of some kind or you can see two profiles in a silhouette, depending on how you look at it.

You also have in photographs the illusion of misstatement of size. B and C are actually exactly the same size, but because B is adjacent to a much larger circle, it appears to be much larger than C. That is a very common illusion, even in photography.

This is another illusion, the illusion of the concentric circles. Actually that looks like a spiral to anyone, but it is composed of concentric circles, and no matter where you start, you'll always end up the same place, showing that we cannot always believe what we see with our eyes. There's no way to get to the middle of it. The camera and the human eye are often compared, and possibly that is the reason why we have the term "the silent witness." Like the human eye, the camera has a lens, and it forms an inverted image at the rear of the instrument, just as the camera forms an inverted image on the film. And like the human eye, the camera lens is never absolutely perfect, but usually it can be corrected to a degree impossible with the human vision.

Like the human eye, the camera lens has a diaphragm which expands and contracts as the operator chooses, and it serves somewhat the same purpose as the diaphragm in a human eye. So there are reasons for comparison.

The camera lens has several defects; we will not refer to them at length, but merely mention that they exist. A good camera lens, the type that should be used in preparing photographic evidence whenever possible, will have these defects reduced to what the manufacturers says is the irreducible minimum. Usually those lenses are called anastigmats, and it is the type of lens that should be used in legal photography.

If a cheap box camera lens is used to make a picture, the result will be a picture, but it will not be accurate. For instance, this is a document photographed under perfectly ruled glass squares, but with the cheap box camera lens that was used, there was what we call "barrelled distortion" at the edges, and there is a falling off of illumination at the edges, and a loss of definition.

The anastigmat lens gives an image that is rectilinear, that is, sharp all over, and shows no falling off of illumination at the edges of the field. At the top is your box camera picture, and at the bottom is the picture made with your good corrected lens.

I would say that a box camera, of course, should never be used in any type of legal photograph. It should only be used for such pictures as are obtained accidentally, that is, for instance, by amateurs that happen to be at the scene of an accident or the scene of a crime.

Now one term that we will have to use a great deal in the next few minutes in showing how cameras and photographs can exaggerate and minimize distances is the term "focal length," so it will be necessary to define that term. "Focal length" may be defined as the distance from the back of the camera to the lens when the camera is focused on a distant object. When the camera is focused on a closer object, the lens is extended, and this distance from the lens to the film is no longer the focal length.

When it is focused on an object that is actually lifesize, the

camera is extended twice, and so there again that is not the focal length. But if you measure the distance from the film to the optical center of the lens when it is focused on a distant object, you have its focal length. And as a rule, for reasons that will be explained in a moment, a photograph should be made with the lens of what we call normal focal length, and that is the lens that would have the focal length that would be about equal with the diagonal of the picture area.

For instance, in a four-by-five press camera, the diagonal of that area is six inches, and that is the focal length that would be used with that. With your Argus or with your Leica camera, the diagonal of the picture area is approximately two inches, and that's the normal focal length lens.

Now before going into the discussion of the effect of focal length, let's go into the discussion first of what can be done or what to watch for in taking pictures for use in court in a way of avoiding leaving something out. Usually pictures should be made from several angles, for a picture from only one position may be grossly misleading.

Here is a church, for instance, damaged by windstorm. Here is a photograph of the same church. It's easy to see how the first photograph standing by itself would create an entirely misleading impression, but of course taken with this one it would give you the true picture.

Here, another example of the same thing. That red pointer is pointing to the side of that building, and looking at this picture, it looks as if the building on the extreme right creates a blind intersection. The lawyer and the investigator should always be familiar with the scene of an accident, for we see that actually that building is so constructed that even though it's a tall building, it has a filling station on the ground floor, and it does not create a blind intersection. That's the error of the photograph which consists of leaving things out, not telling the whole story, the truth and the whole truth.

Here again, is this an aerial picture of a coast of Alaska, or just what is it? Actually it is merely an accumulation of dirt on a sidewalk involved in a fall-on-a-sidewalk case. When we see it standing by itself, that close-up detail might be misleading, not that it would not be useful if taken together with the lower picture, which gives us something for scale; the car and the stone fence help to give us an idea of the size of the objects that we are looking at.

Now what does this represent? At first glance it may appear to be skid marks, but here too we have left something out, and I imagine there are at least three-fourths of the people here that know what that is.

Any volunteers?

VOICE: Shadows.

CHARLES C. SCOTT: I think I heard it—it's shadows of telephone wires.

But seen standing by itself, especially with a little underexposure so that there was not detail in the shadow, such marks might be mistaken for skid marks.

Another important reason why some investigator at least should know the scene from every possible angle. Sometimes it's desirable to use a comparison object in a picture to give the idea of the scale or size.

Does this Coke bottle help give you an idea of the size of this sidewalk defect? Well, you know the Coke bottles come in different sizes, so you should always be sure that the comparison object is one that can be identified and brought in court. Actually, that first picture was made with a miniature Coke bottle not more than two inches tall.

Generally, a ruler makes the best comparison object; but there again it should be a ruler that can actually be produced in court, if necessary.

Now on the subject of perspective or the effect of different distances and focal lengths upon your legal photograph. As a rule your picture should be made with a normal focal length lens, because that would tend to make the photographer assume the correct position in relation to the subject.

Now in a series of several different types of examples, here we are going to show how using the improper focal length would cause the picture to exaggerate or minimize distances.

This is the correct picture, and just for reference, suppose we have a question of what a witness could see from this window in the background. An accident has occurred at this intersection.

When the picture was made with a wide-angle lens, the distances are exaggerated, and it appears that the witness would not have nearly the view of the accident that he might have had from the actual position.

By the way, here is a good time to say something, I think, worth remembering. No photograph is to substitute for measurements; no photograph takes the place of a yardstick, a measuring tape, or a measuring stick. All measurements should always be made by a witness who is in a position to verify them.

Now the reverse condition. The telescopic effect is created by the long photo lens or telephoto lens. Now it appears that our witness from this window is in a very much better position to observe the accident than he actually was. So here we have had one example of exaggeration and minimization.

Now take this, for example. Here we have a small bridge, and an accident occurred on this bridge. Two cars collided midway. It is important, of course, to give the jury and the trier of the fact

a correct impression of the size of that bridge, and it can usually be done taking a picture with a normal lens, normal focal length, as I have said.

Now let us see what happens in the next picture when we use a wide-angle lens on this same bridge. Immediately its size has been enhanced.

It appears to be much bigger and much longer than it actually is, in fact, because a wide-angle lens tends to make the foreground objects look too large.

Now we have changed to a telephoto lens, and it does just that; it telescopes the scene, flattens it out, minimizes the distances between objects. So you see that, contrary to the general impression, a photographer can almost draw with his camera.

Another example. This is a railroad crossing, and there is only one warning sign. You will observe that there is no other warning sign between the crossing and this sign. This picture was made with a normal-angle lens, let us say, a two-inch lens on a Leica camera.

Now we have the wide-angle lens which exaggerates the distance between the sign and the crossing and makes it appear that the warning of the crossing was given far sooner than it was in fact. There again, no intervening sign; that is the same sign.

Now suppose a telephoto lens is used. The scene has collapsed; the distances are minimized, and one who has never seen that scene, the average juror, let us say, obtains an entirely misleading impression of the location of that sign in relation to the crossing.

Or, skid marks, for example. The skid marks that we are concerned with at this time are these marks. This is the normal-angle picture. When taken with the telephoto lens, the marks will be extended or appear to be extended longer than they are, in fact. Of course you should always have measurements of the lengths of skid marks. And that will help to determine whether or not a photograph is accurate.

A telephoto lens collapses or telescopes the marks, making them appear much shorter than they are, in fact.

Or, take a car. When photographed with a normal focal length lens it will look about like this. Many pictures of this type of course are used in cars involved in accidents. When a wide-angle lens is used, the car is, of course, distorted, and this type of distortion usually is pretty obvious. But it does show what a wide-angle lens can do.

The telephoto lens, on the other hand, tends to shorten the appearance of the car and make it appear a smaller model than it is in fact.

In real property photography, again we have an illustration of perspective, the use of the wrong focal length lens. As a rule, how-

ever, in real property photography, let us say an action involving a condemnation action of some kind, it would not exactly be a real property action, but it would involve a real property picture, you would want a picture of the building.

Now a wide-angle lens would make this particular building look about like this. Actually this normal focal length picture is a better representation of that building.

Frankly, however, usually in large cities it is necessary to use wide-angle lenses when making real property pictures for the reason that most buildings are not so located that you can get back far enough. This particular building was. And we have a rule in all of our courts that wide-angle pictures can be used when they are explained and when it is explained that they are necessarily distortions to the extent that they exaggerate size.

Perspective can also be involved in photographs of people, identification pictures. Do you think that you could identify this man from his picture?

Well, this picture, I will tell you, was made with a wide-angle lens from a very close position. Here is the same young man photographed from a greater distance with a normal focal length lens. The picture on the right is the wide-angle picture, and the lower view shows how close he was to the camera. That is the reason that these pictures that the kids have made in the dime store are such terrible distortions because that booth uses a wide-angle lens. As a rule, an identification picture should be made from a portrait lens from a greater distance, as shown on the left.

Now this is the last illustration in the series on perspective, and there is only one, and I have to tell you something about it so that you can interpret that picture. Believe it or not, it is necessary to know how to interpret photographs. The University of Indiana now has a three-hour course on the interpretation of photographs.

I can tell you, for instance, that these men are standing on top of a building looking at a parade, that is, these three men. Here you see the people in the street below, and here is the parade.

Now, how tall is that building upon which they are standing? We have nothing but this one photograph to base your judgment. Well, I would have to tell you some additional facts. It was made with a telephoto lens from a fifteen-story adjacent building.

That tells us something. We know then that it minimizes distances, that it flattened the scene out. Actually, these three men are on top of a five-story building, and these people are on the ground five stories beneath them, which shows the extent of flattening that you can expect in photographs.

Here is an example of another type of picture that frequently must be made with a wide-angle lens. This is not a series, just one picture.

But here you can see that in this narrow hall, unless you used a wide-angle lens, you could not photograph the body of this victim, and although it exaggerates his height, it does tell the story, his position, at the time he was found.

Now sometimes it is important that a picture show the view of a particular witness, let us say, as he approached the scene of an accident. And when that is true, of course, it is of vital importance that the picture be taken from the eye level of that witness as he approached the scene of the accident. Here the camera is set up to photograph this intersection at about the eye level of the driver of a car, a particular car involved, at least. And that creates this impression, which is a proper impression of the view that driver would have of this particular obstruction.

If the camera were placed near the ground, obviously it would create what we would call a worm's eye view, and the stone hedge at the right would appear to be taller than it actually is.

If a cameraman stands upon the ladder, he may obtain the view of a driver of a Greyhound bus, but he is not going to be able to obtain the view of a driver of a 1957 Ford, let us say. This, of course, would be the impression created by such photograph.

Now it has been my experience that this type of, let us say, manipulation, is the type most frequently encountered in court, that is, there are instances when the photographer does tend to place his camera too low or too high.

Here is another illustration of it. A driver runs into a safety zone, and this would be the normal view of showing these buttons about as they appear to a driver approaching that zone. But too often when such pictures are made, the photographer wants to help out a little bit, and he places the camera on the ground. So you see, he exaggerates the height of the obstruction. There actually are pictures in our appellate court record that obviously were taken from too low a position, but yet apparently no one caught the error.

The top is the view of the driver, and below is the worm's eye view, as we call it. The too-low position may also make it impossible to show what is on the street itself. The low position at the top does not reveal the presence of the speed zone in this particular instance. The lateral position or side-to-side position can also be important when you are showing what a certain person saw at the scene of the accident. This picture made from the parking makes it appear that the boulevard sign obstructs the view of the stop sign. Actually we see that the stop sign was not obstructed when the picture was taken from the viewpoint of the driver.

Or, again, can you tell from this picture whether or not the man is standing in the safety zone? Well, actually, at the time this view was made, he was standing in the same position as he was in this picture, but because in the other picture we were trying to show the thing in perspective or depth, the idea was not correctly

reproduced. Sometimes it is possible to take a picture of an accident scene by placing the camera in the car and actually, of course, using a car of the same make and model or the same car involved, and actually showing what the driver could see from his car. Usually you will get what you have here, underexposure in the car, but the view of the street will be more nearly correct.

Now we have a very important subject in photography and in legal photography which we cannot spend too much time on, and that is the subject of filters. In black-and-white photography, as a rule, photographs should be made on what is known as panchromatic film, and today that film can be used without any filter. Fortunately today even the amateurs are using panchromatic film such as this Verichrome, and we do not have the distortion of color values caused by the film itself, but little color or filters are available which will produce different effects upon a photograph.

Now sometimes these filters have a proper use, but at other times they may produce misleading pictures. The red filter, for instance, if it were photographing a red brick, would make the brick appear light or white.

In other words, a filter always makes an object of its same color appear white. At the other extreme, the blue filter would stop all of the red rays, and it would make the brick appear black. In other words, a filter of a complementary color always tends to make the complementary color appear black.

Now let us see how that might work out in black-and-white photography at the scene of an accident. Let us observe first what would happen when we looked at this scene through a red filter, and observe first the red stop sign and the red no-parking sign. We can see that the effect of a red filter is the elimination of the color and the elimination of the reading matter on the stop sign of a no-parking sign. We see the natural photograph in a minute of just how that works.

On the other hand let us see what a blue filter would be expected to do, and in doing that, let us observe in particular the railroad sign and the slow sign, and we would expect the reading on the railroad sign and on the slow sign to disappear.

Now let us see how that works out in an actual case. The top picture was made on panchromatic film without a filter, and this sign is red reading matter on a white background. When a red filter is used over the lens, the reading matter on the sign would completely disappear, or, again, this is a yellow "Careful—Children" sign. Now the top picture was made through a blue filter. There is no shadow over that sign; it is merely that the blue filter obstructed the yellow rays and the sign photographed black.

These are illustrations, of course, of improper use of filters, but sometimes they have a proper purpose. For instance, this is an accurate photograph, technically speaking, and we will talk a little bit later about the value of color photographs; this is actually an

accurate black-and-white picture of some black skid marks on a red pavement.

But where are the skid marks? They do not show because of the fact that the red and black happen to photograph exactly the same shade in black and white. But if a red filter is used over the lens, it will lighten the color of the bricks, and the skid mark will become visible. And that is a proper use for the filters.

Even the mere matter of lighting can be of vital importance in the accuracy of a picture, especially in black-and-white photography. In two-dimensional photography, we need shadows to give us the idea of a depth of a picture.

Now is this an accumulation of gravel on a street, or is it a deep rut in the street? With the cloud over the sun, it almost appears to be an accumulation of gravel. A few moments later the cloud has passed from in front of the sun, and we obtain a far more accurate representation of the rut in the street. Here, of course, we are not trying to represent it as it appeared to the driver, but just trying to show its physical dimensions.

There is another filter of some use called the polarizing filter, which has nothing to do with the polaroid camera, by the way; but it cuts down on glare. Now these tire tracks are not skid marks, but are tracks in the gravel road, somewhat obstructed by the glare, and quite a little improvement is obtained by the polaroid filter, which cuts down on the glare and makes the tire tracks more visible.

Even the matter of the time of year can be important, obviously, and yet our courts almost uniformly hold that a photograph is admissible in evidence even though it is taken in a different season of the year.

But let us see how radical that change can be just by practical experiment. Here we can see a car very plainly behind this shrubbery. But in the summertime from the identical marked spot nothing is visible. It is usually, of course, very desirable to obtain pictures as soon as possible after an accident for this reason.

Now to mention another way in which the witness, the human witness, or the silent witness, the photograph, can mislead, and that is by turning things around. Here are two pictures of a skid mark, and in one of them, of course, the direction is opposite of the other. It so happens that if a photograph is turned around when it is printed, of course, right and left will be reversed. And if any of you are amateur photographers, I am sure that you will agree with me that it is easy to do this by mistake. Do not always be sure that somebody is faking something when a reversed photograph is presented, because it is the easiest thing in the world to do through carelessness.

Now this car appears to have been sideswiped on the side opposite the driver. But merely by turning that around, the opposite

impression is created, that is, it would look like it was the driver's side that was obstructed, or that was sideswiped. Another example of turning things around.

Very important in homicide cases is this matter of turning things around.

This is actually a case of suicide, and it is of course very important to know the location of the wound; but if through carelessness the picture is reversed in printing, it would make it appear that it was the left side in which the entry wound was made, and that of course might mean the difference between life and death to the defendant.

Now a short series of pictures showing how important it is always to take more than one view at the scene of an accident. Here, for example, I can tell you that there is a drop-off in this road about at this point where the shadow is; but if we merely went out and took one picture from the viewpoint, let us say, of a driver approaching it from this direction, we would not see it. Actually this is the same scene looking up the road the other way.

And now we get an accurate picture of the drop-off. Or, again, let us take a hole in a country road. In this case, a person on horseback was injured when the horse stumbled in this hole. Now this one picture tells us a little bit about it, but it does not tell us the whole story.

If we place a yardstick beside one of our pictures, we can tell the approximate distance from the side of the road. A yardstick with large numerals on it will help us show the width of that hole. That's the last picture of that series, so I will turn it around. And that is the type of turning around, and I say that is easy to do carelessly.

Now this picture tells us something about the depth of that hole, something that you could not get from the photograph alone, and you actually see it as you see it; it is about eighteen inches deep, and quite a defect in a country road.

Now I will take just about a minute or less to change the magazine, and we will show next a series of pictures involving questioned documents, and then the third series will emphasize the use of color, although you'll notice that I have been using color all along. I have not even been saying much about it. I think that about all you can say is that color should be used. I think it is a highly desirable type of picture.

We can illustrate by questioned documents how photography can reach its highest plane in legal work. The photography of accident scenes can never be entirely accurate, because you are reproducing small objects, that is, you are reproducing large scenes upon a very small scale. But in document photography, for instance, you may be enlarging the document itself, and a document photograph can be highly accurate and extremely valuable.

The questioned documents involve one of the sciences of identification—only one of them—and it will illustrate that the same principles will apply to fingerprints, ballistics, and many others. These sciences of identification are based upon the fact that every object in nature is an individual and can be distinguished from every other thing. The old saying “alike as two peas in a pod” is ridiculous; no two peas in a pod are alike, if you photograph them and enlarge them enough.

Even the hair on a man’s head is different from the hair of all other species. Here are photomicrographs that illustrate that. They show how that could even be used in court. For instance, the hair of a man has a smooth appearance because of the arrangement of its pigment cells. The hair of a dog, when magnified to the same extent, two hundred and fifty diameters, has an inner portion resembling the bones that every dog likes.

The hair of a rabbit has an inner portion resembling a chain. The hair of a cat when seen in the photomicrograph has an inner portion resembling patches of fur. So the hair of these species is as distinguishable as the actual photographs of the animals themselves.

Not only is each man an individual, but so also is the product of his hand, his handwriting, for instance. For instance, on the Declaration of Independence, the words “John Hancock” to this day stand for putting your signature on a document. Some people do not know that they can be identified by their handwriting. Here is a bad check, for instance, in which the forger had a certain amount of bravado, calling himself “Solon Fox,” inferring that he was a very wise and crafty person. Another bad gang of bad-check-writers boldly call their passers “Oliver Passmore.” But despite this dead giveaway, unwary merchants cashed their checks. To some people, a document examiner is a Dick Tracy type of character, who goes around with a miniature camera no larger than a match box, taking pictures of important documents anyplace.

Actually, in addition to photographic equipment, microscopic equipment is required, ultraviolet light equipment, and, of course, special cameras for photographing documents in a large form.

He may use a portable camera, but it is not of the match-box type. It is an instrument that has built-in lights and can be put directly on a signature to obtain a life-sized picture.

Whenever possible, the documents are sent to the laboratory where they can be photographed accurately with a large document camera. The negatives are developed under the supervision of the document examiner, printed under his supervision in the laboratory in the office, and the final result may be an exhibit such as this, which shows a questioned signature, which, by the way, was genuine at the top, and the exemplar signatures underneath it.

In other words, the point I want to get across here is that,

while most of the signatures I am going to show you are forgeries because they are more interesting, actually we spend a great deal of our time in testifying as to signatures that we are of the opinion are genuine.

You will note now that, for instance, the exemplar signatures bear dates close to that of the questioned signatures, the reason being that the person's signature changes through the years.

As proof, take for example, the signature of George Washington. When he was a lad of twelve he wrote in the old English round hand; by the time he was seventeen, he had greatly modified his signature in several respects; by the time he was twenty-five he adopted, however, a signature which remained his until the end of life.

Sometimes the mere knowledge of how to photograph with visible light can make the difference between presenting a case in court properly and not doing so. You will also see in a moment how both infrared and ultraviolet can be used.

Take, for example, however, an erasure on a figure. Here we have an erasure of the "8" and "9," but this is an ordinary flat-lighted picture like you would have in a photostat, and, while you might be able to see that there is an erasure there, it is not obvious.

But when those same figures are photographed by strong side light, nothing special about it, just light from the side, the light catches in the little crevices made by the erasure, and the fact of erasure is obvious.

It is always desirable, I think, in presenting cases in court to assume that the man with the best vision on the jury has about 21/100 vision. This shows how we can enlarge signatures, for example, and demonstrate whether or not they are genuine. Here, for instance, by the marvel of photography, in this room with perhaps two hundred people in it, all of us, if we had time, could study these two signatures in detail. Actually this top signature is a very poor tracing, and one of a series of tracings made by a secretary who by this means managed to obtain some thirty thousand dollars by merely forging her boss's signature on checks.

Here is another one from the same series. And if there were time to talk on questioned documents themselves, we would point out the differences, for instance, in what we call the line quality of this forged signature and of the known genuine signature.

Here is another example. Only by photographic evidence can this audience or can a court learn to follow the expert line by line, letter by letter, as he explains the differences between this disputed signature and the genuine signature.

I will not go into great detail, but observe, for instance, how easily this entire room can see the radical difference in the formation of the "b" in the standard signatures and in the questioned

signature. Note how readily by means of photographic evidence you can see that this "t" has a patched-on ending.

And those differences can be pointed out to a jury, just as easily in court as they are here.

This is the type of document problem that also lends itself to photographic evidence, proved by photographic evidence. The anonymous letter, the type of problem that we frequently have. This particular letter was involved in a murder case and was used as evidence to show motive, because the man was accused of murdering his wife, and this letter was received by another woman.

Now when the writing of the defendant was placed side by side with writing taken from that anonymous letter and some twelve exhibits of this type were used showing many, many words, it became obvious, I think, that the man might as well have placed his fingerprints upon that document.

You notice, for instance, this abbreviation, as we call it, of the letter "n" in "and" and in "stand" and in "husband" and the formation of the "g," the terminal "g"'s and also the matter of using a printed "s" to form plurals.

Another one from the same series showing another series of letters, a demonstration that could not be made, of course, without photography.

This is the type of anonymous-letter problem, however, that I never discuss with audiences that are not legal audiences, because it might give somebody an idea. This particular individual went to magazines and newspapers, and different ones, and clipped out words until she spelled out the message that she wanted to send. The people that do these things usually are stupid in one step, at least, and this particular individual apparently got tired when she had spelled out her message, and she turned around and addressed the postal card in her own normal handwriting. I guess experts will only exist as handwriting experts, document examiners, as long as the forgers, and so on, are more stupid than we are.

Little things sometimes can mean the difference in photographic evidence. Now this is a series, and from this distance you will not see the point for a minute perhaps, but here we have two checks dated approximately four months apart, and the question is whether or not there is a possibility that they were actually written on the same day.

In examining these checks I noticed a very little thing: two little smudge marks on the back of the February check, and with any document you always wonder, "What does this mean—what do these little smudge marks mean?"

I also observed that the man's name, of course, being Anderson, on the June check, there was a little peculiar hook on the end which was not found in some two hundred of his genuine signatures. Why, if he did it, did he place that hook on the end?

Then I observed by placing them close together and side by side, and we will see an even closer view by help of photography in a minute, that on the back of the February check, these smudge marks actually were made by contact with the June check before it was dry. So that this smudge mark is actually the smudging of the end forming this hook, and this little mark is the mark of the "s."

Now by the magic of enlarged photography, we can see that even closer, and I think that you will observe that this is an offset of the June check before it was dry, and here is a blot in the "s" of the June check before it was dry. Just a little thing, but it helped to prove that those two signatures were actually written consecutively and at the same time.

Sometimes a photomicrograph will help us to determine whether or not an ink line is written before or after a paper is folded. If a line is written before the paper is folded, it will crack at the fold. After the paper is folded, the line will run out on the fold.

Now this is a demonstration picture. Here is one from an actual case, not quite as dramatic, but it demonstrates the point conclusively. This letter "s" was retouched after the paper was folded, because you will see the running out of the ink on the fold, and you will see on the lower and upper line that the ink cracked at the fold.

Now that can actually be demonstrated by such photomicrographs of the print being identified by photography. I do not have time to go into great detail, but here is an example of how it was proved that three envelopes were printed at the same time, and actually we used comparisons of every letter in the printing. Here you see a defect in the "and" sign in all three of them, and here you see a little particle of lint, indicating that the type was not clean between the press lines.

Then let us see how infrared can be used in photographic evidence in document cases. Infrared rays are just like light rays, but are of slightly longer wave length. Here are some figures that were raised from 31 to 89, and this is an ordinary photograph.

Now you may say that you can tell that it is a raised figure; you can see how it was changed from 31 to 89; but, remember, not everyone on your jury can see that. This is an infrared picture of the same raised figures, and now we observe that because the forger was only able to match the color of the ink and not their chemical composition, the infrared photography showed up the fraud. The top is the ordinary photograph and the lower one the infrared picture.

Or take, again, checks upon which signatures had been obliterated by bank stamps. It seems that bankers for some unknown reason are always stamping over a signature that is later questioned. But sometimes that does not stop us, because it so happens that

bank stamp inks are made with analyn dyes, and they are perfectly transparent to infrared, and if the signature below it happens to be made with an ink that is not an analyn dye ink, it will appear as at the bottom, and the bank stamps will be completely eliminated. Or take, for example, a document charred by fire. Here is an ordinary photograph that would be very difficult to read, perhaps impossible. Notice these little cracks, because you will see the next infrared photograph of this document after it was burned. By means of infrared we are able sometimes to photograph such charred documents as if they were not involved in a fire.

At the top is the ordinary photograph, and at the bottom the infrared picture.

Now ultraviolet rays also can be used in photographic evidence, and here, for example, is a case in which the amounts on appearance bonds were changed, that is, a person, not the person whose name appears there but another clerk in this court, defaulted by obtaining funds and then altering the appearance bonds to satisfy his purpose.

Now this is an ordinary color picture. Now let us see how this looks under ultraviolet, and we see that an erasure is immediately made apparent, that he erased the figures "13-2," and he obtained some thirty-eight thousand dollars over a period of time in small amounts.

To show it to you again, here is the ordinary photograph, and here is the ultraviolet photograph. It shows the erasure. Sometimes two sheets of paper that look alike to the eye will obviously appear to be different under ultraviolet rays.

This is a will case in Topeka, Kansas, in which it appeared at first that the will was one long sheet of paper folded at the top. Actually this ordinary photograph would more or less support that contention, but an ultraviolet photograph showed the entirely different reflectance of the two sheets of paper, showing that a new first page had been substituted. Actually there was a difference in the thickness of those two sheets of paper, and actually a small difference in the width, and other factors.

Well, when confronted with this evidence, the proponents of the will withdrew it from probate, and a trial was not necessary.

Now a short series on color photography and how it will become more important in your legal practice. Dealing with the phenomena of color, either in photographs or witnesses at the scene of an accident or crime, we should always at least find out whether or not the witness is color-blind. Women very seldom are color-blind; but about eight percent of the men or one man out of twelve, and that of course is a significant figure, is color-blind.

This is a test that you can apply yourself. If you are not color-blind, you should see "29" vaguely in square "A," "45" in square "B," "26" in square "D," and nothing in square "C." On the law

of averages, there should be at least approximately ten people in this room who are color-blind.

Now the type of color photography that will be used in the future will involve color negatives like this one. This is a color negative. That is probably the future type of color pictures, and you will get used to seeing color negatives.

If you do not believe that there is such a thing as a color negative, stare for a moment at this star. And then I will flash on the white screen, and if you have been looking intently at that star, you should then see an image of the American flag in colors.

Now I work on the principle that you probably just barely saw it that time. Let us try it again, and this time stare intently at this square. You can blink, for that matter, but look at it intently. Now that is a demonstration of the principle of color negative.

Another phenomenon that we have to deal with in color, not just in pictures, but anything where you have to deal with identification of colors—it is nothing derogatory to color photography—and that is that the apparent color of an object will depend upon its background. These greenish-blue squares are identical in color; because they are on backgrounds of different colors, they appear to be of different hues or shades, rather. And of course we know that a scene may appear different to a witness or in a photograph, a color photograph especially, depending on the time of day. Here we have started with dawn and gone on through the day to sunset.

But the most important thing about the value of color photography is not that it makes a beautiful picture but that it increases your recognition value. I contend, and I think I am right, that the most inaccurate color photograph is far more accurate than the best black-and-white picture. So there should not be much objection to them.

Now in this picture, for instance, there is a red truck that can be seen about at this point—can anybody in front see it, at least? I do not know whether by using a different lens we can make everyone see that or not—you may be able to see the red truck near the house. Well, that is just a pinpoint. That is why color photography was used in the war, and that is one illustration of why it can be important in a legal case.

Or take, for example, the yellow line marking a spot where you should not pass. A color photograph would show that unmistakably. But let us translate that color photograph to black and white, and you see we have lost something. By merely using a monochrome filter we have destroyed about three-fourths of the evidential value of that picture.

Or take, for example, a railroad crossing with a red light. Color photography will show that approximately as it would appear to a driver. Well, let us see what the black-and-white photograph does to it. It is almost as if we put out the light. We cannot show it.

In black and white we have decreased the evidential value of the picture. Incidentally, I would like to give you the citation of the Nebraska supreme court case holding that color photographs are admissible in evidence, and it's *Beads vs. State*, 71 Northwestern 2nd 86. I do not have the Nebraska citation; it may not be out yet; it is 1955. *Beads vs. State*, 71 Nebraska 2nd 86. It is a very interesting case. A very long objection was made to the use of color, and it was overruled, and the picture was held admissible.

There is no reason why color photographs should not be used, because they are more accurate.

Here is another example. Suppose you have an action against a fertilizing plant for damages of the property of an adjacent farmer by the noxious fumes, and you want to show that in evidence by photograph. A color photograph will enable you to show at least the color of those fumes and present that story in a way that no black-and-white picture ever could.

As you see, when we convert it to black and white or monochrome, the smash of the picture is lost, and it no longer tells the story.

Or take a car that is involved in more than one accident. By a color photograph you can see that some of these dents are rusty and that they actually did not occur at the same time as the others. In black and white that will be completely lost. Or at a scene of an explosion, an idea of the general appearance of the scene is enhanced by color; in black and white we lose a lot.

The objection that color photography is not absolutely accurate is certainly ridiculous, when it is far more accurate than the black-and-white pictures that we have been using for years.

There is another value of color photography. Color photographs are very difficult to fake by the use of filters, and you can be pretty sure that they are very accurate. Now you know we talked about how you could use a blue filter on a black-and-white picture to make that slow sign or a "careful—children" sign appear dark.

Now this is a color picture. Suppose you use a blue filter with color film in your Leica or Argus camera and place a blue filter over the lens. This is what you get. And the fact that a blue filter is used is perfectly obvious. Take, for example, a red stop sign. We said that a red filter in black-and-white photography would cut out the reading on the sign. Suppose we take a color picture and use a red filter over the lens. That is what we come out with. The fact of the distortion is apparent to everyone, so you have an added guarantee of accuracy with color pictures.

By means of color photography in a document case, I was able to enlarge an area of typewriting only about a fifth of an inch wide to the size of this screen so that it could be used to point out facts concerning whether or not that is a case of typing over ink or the case of a signature written over typing.

Here is another of the same series. Incidentally, for those interested, these were made with a small 35-millimeter camera, and show the extent to which you can go in color photography today.

Now we have a very short series, and then I want to take about five minutes to show some large exhibits, and in this series, by the way, some of the photographs are gruesome, and they are medical-legal pictures, and if any of you are affected by that, you can close your eyes. They will only last about a minute.

This is a picture of X-ray dermatitis. A dentist was injured and obtained this burn, and we see how with black-and-white photography we have very little of value, but in color we can tell the whole story.

This is the part of the intestines of a man who received fatal injuries through X-ray diathermy, and there you notice how the doctor has used a ruler to give an idea of scale.

This is the typical cherry-red discoloration of carbon monoxide poisoning. It is under the armpit of the victim, and it is a typical thing which can be shown only, of course, with color photography, because in black and white we would lose that color differentiation.

This is a hot-water burn on an infant which resulted in a death. Of course it is graphic evidence of carelessness.

Here is a brain. It would take a long time to explain what this shows, but it had to do with internal hemorrhages and whether the fatal injuries were the result of a fight or a previous injury.

And color photographs of this type have been admitted in some ten states, including Nebraska.

This is the entrance wound of a bullet, and it also can be used by a doctor to point out other things: for instance, the blacking of the eye, which is a typical result of the internal explosion of gases from a closely fired gun.

This is a shotgun wound, virtually in the chest, or upper abdomen, anyway.

This is another shotgun wound in the chest, and here is a chest wound, the same chest wound from a more distant viewpoint.

And finally a hand mangled in a railroad accident.

Now about five minutes for the large exhibits. It would be true of any type of photograph, and I will, if I can, leave them here so that you can look at them for the rest of the afternoon when you have time; and that is a picture of this type, which is the typical picture we see in court today and is entirely too small.

Now there are extremes. There are people who are contending that we ought to go in court with big exhibits, about twelve feet wide and nine feet tall, and leave them up before the jury to hold the trial.

I contend that it is an extreme position, but I do think that there is a happy medium, and I do think when you have exhibits, if they

are accident scenes or whatever they are, and they are about this size, in the average jury room you have a photograph that speaks in a loud clear voice and says something and looks a little bit important. It looks like it was worth working on and worth presenting, whereas this is rather insignificant.

Others of these pictures will show you, for instance, how photography enables us to compare writings close together, side by side, and the extent to which we can actually make enlargements of small portions of letters, if we desire.

There was a contention, and it is still sometimes made, that photographs should not be marked. But I do not always agree with that. I think that occasionally marks make a photograph virtually a talking picture. You will notice this exhibit in which there are ten points in the questioned signature and in the non-genuine signature, all pointed to in each case. And it almost makes that picture speak.

And thought can be given to such presentations that will make the photographs far more valuable.

This is the recent Missouri case of *Hurst vs. Crook*, just decided by the Supreme Court of Missouri, and illustrates the signatures in greatly enlarged form. We actually used six of these. We used one for each two jurors, and we used one for each set of attorneys—that would make eight—and one for the witness to hold. That was nine that we used. And that way the point was presented to that jury so that everyone could see it.

VOICE: Is that genuine (indicating)?

CHARLES C. SCOTT: No; actually of course in the actual case we would use some ten or twelve exhibits.

Well I think it is a great mistake to make pictures too small. I think that it is an important item.

This one, for instance, will show you the extent that we can magnify if necessary to show under the question of whether or not the same pen was used throughout the document. There are virtually no limits.

Here is a chart that shows us that an attesting clause was added at a different time, ruled typewriter plate used over it.

Showing of typewriting under ruled squares to determine whether or not the same typewriter was used. Here a study of individual letters.

I think that about concludes my presentation. Thank you.

ADDRESS BEFORE SECTION OF PRACTICE AND PROCEDURE

John W. Yeager, Judge of Supreme Court

In order that as much time as possible shall be made available for discussion of the subjects presented by the panel, I shall be as brief as an intelligent presentation will permit.

Four points have been assigned to me for presentation. The first is "Time and place for preserving assignments of error." The second is "Mechanics of appeal—suggestions." The third is "Diversity of appeals in the same case." And the fourth is "Limitation of evidence in bills of exceptions."

As an introduction to a more extended discussion of these points, I desire to state that a little time spent in the examination of the Rules of the Supreme Court and the statutes and decisions relating to procedure will furnish clear and definite answers to the questions inherent in points one, two, and four. The rules are available without cost to all lawyers. Moreover, the Clerk of the Supreme Court keeps at hand and current a collection in brief of musts relating to mechanics of appeal, the information from which is always available on request.

In this light I am constrained to say that when a lawyer runs into a situation whereby upon procedural grounds he is denied the right to have a case reviewed on its merits, the blame must rest upon his own inattention.

As to the first of the assigned points, subject to the power of the Supreme Court to consider plain errors unassigned, the assignments of error must appear in the brief. This is, however, the final rather than the basic step in the preservation of error.

There are so many things which may be the basis for assignment of error that only a few may be mentioned here. Attacks upon pleadings must be made and exceptions to adverse rulings thereon preserved before or by answer or they are waived, and thus no error may be predicated. The exception to this is that the pleading attacked fails to state a cause of action or defense. In both law and equity actions, error may not be predicated on the the admission or rejection of evidence not objected to at the time. This is true as to all claimed errors of law committed at the trial.

In law cases, claimed errors as to legal questions requiring reference to the evidence for determination must be presented to the trial court by motion for new trial in order to have a review by the Supreme Court.

It has been suggested that the opinion in *Krepcik v. Interstate Transit Lines*, 151 Neb. 663, 38 N. W. 2d 533, contains language which amounts to a departure from this rule. Casual reading of the opinion might so indicate. A careful reading of the opinion, however, does not lead to any such general conclusion. It is true that an exception to the general rule is announced. The exception, however, is responsive solely to an act of the Legislature passed in 1947 and to reasons stated for the exception.

In that case there was a review of an order sustaining a motion for judgment notwithstanding the verdict. Complaint was made that the appellant had filed no motion for new trial. The Supreme Court held that none was necessary.

Of course a review of the evidence was necessary to a determination of the question involved. The court held a question of law as distinguished from one fact was presented, and under the act of 1947 no motion for new trial was necessary. Whether or not the reason given for the decision was sound may be questioned, but certainly the decision was sound for at least one other reason. The appeal could not be regarded as anything more than a resistance to the motion of the opposing party with specifications of grounds for rendition of judgment notwithstanding the verdict. A motion for new trial would only have been a negation of the specifications upon which the judgment was based.

In equity cases the rules are more liberal. They will not be discussed except to say that under them assignments of errors of law occurring at the trial are not properly reviewable in the absence of a motion for new trial.

This much should be sufficient to illustrate the necessity for careful attention to details in the preparation and trial of a case from beginning to end. It should point to the conclusion that failure in these respects may be disastrous.

The next point is mechanics of appeal. As to this, I do not deem it advisable to say much in addition to what has already been said.

There are eight basic steps in presenting an appeal in a civil case and keeping it alive for ultimate consideration and determination. These are provided in part by statute and in part by court rule. There are five in criminal cases. It would serve no useful purpose for me to repeat them here. They would not be remembered, anyway. Further, no careful lawyer will rely entirely on his memory as to these matters. He will check to be sure. However, I have attached to this statement a condensed outline of these essentials. A copy has been placed in your hands.

There has been insistence by lawyers who have failed to become informed of these rules, whose appeals have suffered in consequence, that for their purposes they should be disregarded. Simple answers for refusal are that the courts no more than any other phase of organized society may function without rules. These rules have been established by the Legislature and the Supreme Court, mainly at the behest of the legal profession itself, to facilitate the administration of justice. The courts have the right and duty to proceed on the assumption that they were promulgated to be enforced and not to be ignored.

If you are going to use this outline instead of the statutes and rules of court, I urge that you check it regularly against the laws enacted at each session of the Legislature and the rules and modifications of rules as they shall become current.

I shall consider next the fourth point. Seldom have cases come to

the Supreme Court wherein the bill of exceptions has contained less than all the evidence adduced at the trial. In most instances, I think, this has been desirable and perhaps even necessary. There are areas, however, wherein much expense and time may well be saved by limitation of the bill. I shall not discuss this further than to present an illustration.

Quite frequently damage for personal injury cases come to the Supreme Court wherein there is no question of the amount of damage in case liability has been established, but only the question of liability. In all cases which I am able to recall, notwithstanding this, all the evidence descriptive of the injury, together with the medical testimony, has been found in the bill. This, of course, is useless, and if it is reasonably separable from the other evidence, it would seem that it should be omitted from the bill.

The third point deals with diversity of appeals in the same case. At the present time, the question presents to the lawyer uncertainties and difficulties. The uncertainties reside in the inability to know what under all circumstances should be done by common or cross-parties to protect the right to a review on appeal. The difficulty may be demonstrated by the simplest possible illustration, the case of one party plaintiff and one party defendant.

An action of this kind is tried, and judgment is rendered. The losing party in due time takes the necessary steps to perfect his appeal. The opposing party desires to cross-appeal. He, of course, may take the same steps as the adversary to perfect his appeal, or he may wait and present his appeal in his brief. The logical thing to do is to present his cross-appeal by his brief.

Waiting, however, has serious dangers. If the original appellant withdraws his appeal, the right to present the cross-appeal has been destroyed. In order to avoid such consequences as are embraced in this illustration, often numerous appeals are docketed, with the attendant waste of time and expense. If there are numerous parties, the number of appeals in a single case are multiplied.

The situation requires correction. A committee of the Supreme Court is working with the problem, as is also the Judicial Council. What will come of it I do not know for certain. I apprehend, however, that one result will be that notice of appeal by one party will preserve the right of all other parties in that case against the present consequences of dismissal of appeal by the original appellant.

It should not be understood that this will avoid the necessity of filing a motion for new trial in time in the district court in a law action in order to have a review of facts or in an equity action in order to have a review of errors at law committed at the trial.

These brief remarks do not cover in full detail all matters which deserve attention in becoming informed of Appellate Practice

and Procedure. They do not even cover everything embraced in the four points to which attention has been directed.

I hope, however, that enough has been said to make clear that to the lawyer practicing in the courts an adequate knowledge of the statutes, rules of law, and rules of court relating to Appellate Practice and Procedure is at all times imperative.

SUPREME COURT OF NEBRASKA

Procedural Steps

CIVIL CASES

1. File notice of appeal in district court and pay \$20 docket fee to clerk of district court within one month from date of order from which appeal is taken. (Sec. 25-1912)
2. File transcript in Supreme Court within one month from filing notice of appeal. (Sec. 25-1912)
3. Cost bond (if judgment not superseded) filed in district court within one month from overruling of motion for new trial. (Sec. 25-1914)
4. Supersedeas Bond — File in district court within 20 days after final order. (Sec. 25-1916)
5. Bill of Exceptions — Prepare within 40 days from filing notice of appeal. (Sec. 24-342 and Sec. 25-1140) — Trial judge may allow one extension of 40 days for preparation — Further time may be allowed by Supreme Court (Sec. 25-1140.07) upon showing made in conformity with Supreme Court Rule 7c. A bill of exceptions which has been properly settled within time and has been filed with the clerk of the district court and his certificate attached thereto may be filed in Supreme Court at any time before submission of the case (Supreme Court Rule 7d).
6. Brief Day of Appellant — 70 days from filing of notice of appeal — except compensation and unemployment compensation cases — in these brief day is 20 days from filing of transcript.
7. Extension of Appellant's Brief Day — Automatic extension if time for preparing bill of exceptions is extended — extended to one month from date to which settlement time has been extended — may also be procured on motion or by stipulation.
8. Brief Day of Appellee — 1 month from service and filing of appellant's brief except compensation and unemployment compensation cases, in which the time is 20 days.

CRIMINAL CASES

1. File petition in error and transcript with Clerk of the Supreme Court and pay \$20 docket fee to Clerk of the Supreme Court (Sec. 29-2306) within 1 month of final order (Sec. 25-1931) fee not required to be paid if poverty affidavit filed (Sec. 29-2306).

2. Transcript must accompany petition in error. (Sec. 25-1905).
3. Application for suspension of sentence should be included in petition in error (Supreme Court Rule 6b).
4. Bill of Exceptions — Prepare within 40 days from filing of petition in error (Sec. 24-342) — Subject to same extensions as in civil cases.
5. Briefs. Plaintiff in error to file within 70 days from docketing of appeal — State within 1 month from service and filing of brief of plaintiff in error (Supreme Court Rule 10a3) — Same extensions as in civil cases (Supreme Court Rule 10a3).

ADDRESS BEFORE

SECTION OF PRACTICE AND PROCEDURE

Harry A. Spencer, District Judge

I have been assigned four points for discussion, with the suggestion that they be covered in twelve minutes. The points are: sequestration of witnesses, motions for mistrial, motions for dismissal or directed verdict, and motions for jury to view premises. It is readily apparent that a full discussion of the subjects would necessarily require more than the allotted time.

Sequestration of Witnesses

This subject is not statutory in Nebraska, except as to examining magistrates who are given the right by 29-505 of the Revised Statutes of Nebraska for 1943. Nebraska is in line with most American jurisdictions, which follow the early English rule that sequestration of witnesses is not a matter of right but rather is one of discretion on the part of the trial court.

In the early case of *Binfield v. State*, 15 Neb. 484, a prosecution for murder in the second degree where the request of the defendant to sequester was denied, we find the following:

Upon this subject the law is thus stated by Greenleaf in his work on Evidence, sec. 432: "If the judge deems it essential to the discovery of truth that the witnesses should be examined out of the hearing of each other, he will so order it. This order, upon the motion or suggestion of either party, is rarely withheld; but, by the weight of authority, the party does not seem entitled to it as a matter of right." In this also agree all of the cases which I have been able to find, except in the cases where the matter is regulated by express statute.

In *Johns v. State*, 88 Neb. 145, a prosecution for burglary and grand larceny, the district court, over the defendant's objections, permitted the witnesses to remain in the courtroom during the trial. The court, holding that the matter was one within the sound discretion of the trial court, found that there was nothing in the record

to indicate that this discretion was abused but did suggest that it was their thought that the better course would have been to separate the witnesses.

In *Roberts v. State*, 100 Neb. 199, a prosecution for murder, we find the following:

The separation of the witnesses in a criminal trial is ordinarily a matter within the discretion of the trial court; but when requested, especially in a trial for felony, it is seldomly denied. When the witnesses for the prosecution are near relatives or are or have been recently so associated that it is not improbable that some of them may be under the influence of another witness who is interested in the prosecution, it is erroneous to allow such witnesses to be present and hear each other's testimony against the objection of the defendant.³

In *Jordan v. State*, 101 Neb. 430, where the defendant was convicted of murder in the first degree, the defendant requested that witnesses for the state be excluded from the courtroom during the trial. This request was granted, with the exception of the sheriff, who was a witness. As to him, the court refused the request unless the defendant file an affidavit of prejudice. This was not done, and the court, in the exercise of sound legal discretion, refused to exclude him, he being an officer of the court. The Supreme Court held that this was not an abuse of discretion.

The question sometimes arises as to the effect of a witness violating the rule. In *Fouse v. State*, 83 Neb. 258, where the defendant was convicted of first degree murder, the third syllabus point reads:

It is within the discretion of the trial court to permit a witness used by the State on rebuttal to testify, even though all witnesses were ordered excluded from the courtroom and said witness had not obeyed the rule.

In *Treppish v. State*, 126 Neb. 21, the court said that where witnesses, without the court's knowledge, remain in the courtroom through misunderstanding of the extent of the court's order, they may be permitted to testify unless the defendant's rights will be prejudiced thereby.

In *Swartz v. State*, 121 Neb. 696, the court held that error cannot be predicated on the failure of the trial court to keep witnesses segregated until all have testified, where no showing of prejudice to the complaining party appears.

Motions for Mistrial

The cardinal rule on motions for mistrial is to be sure that the motion is timely. As soon as the event occurs on which the motion might be predicated, if you feel the jury will not give your client a fair trial, make a proper objection, and then move for mistrial. Our court, in re *Estate of House*, 145 Neb. 670, held that merely making an objection to the alleged misconduct is not enough. The party wronged must also move for a mistrial. There are many Nebraska decisions, such as *Long v. Crystal Refrigerator Co.*, 134 Neb. 44, and

Millslagle v. State, 138 Neb. 778, which give the rule that it is incumbent upon the party to make the objection and then to move for the mistrial at the happening of the event complained of.

Our court has said many times, as it did in *Segebart v. Gregory*, 160 Neb. 64, that a party is not permitted to proceed with the trial without objection and speculate on the outcome of the jury verdict, and, if unfavorable, contend that a mistrial should have been declared, when he did not ask for the same at the time.

In *Dunn v. Omaha C.B. St. R. Co.*, 139 Neb. 765, where an attorney was guilty of misconduct, the court said:

One may not complain of misconduct of adverse counsel, if, with knowledge of such misconduct, he does not object thereto and ask for a mistrial, but consents to take the chances of a favorable verdict.

Sometimes the question arises as to whether a motion for a mistrial may be withdrawn. In *Pope v. Tapelt*, 155 Neb. 10, improper evidence was adduced by the plaintiff in cross-examination of one of defendant's witnesses. The defendant moved for mistrial. The court took the motion under advisement. The plaintiff made no objection at the time but later sought to join in the motion. The defendant thereupon withdrew his motion and expressly waived any error in the reception of the evidence. The trial court permitted the withdrawal and held the plaintiff's motion came too late. The Supreme Court affirmed this action, holding that a litigant may withdraw his motion for a mistrial because of the admission of prejudicial evidence at any time prior to the court's ruling thereon.

Motions for Dismissal or Directed Verdict

On the subject of directed verdicts, since 1947 we have been controlled by the provisions of 25-1315.01, 25-1315.02 and 25-1315.03 of the Revised Statutes of Nebraska. 25-1315.01 provides:

A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made.

A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for directed verdict shall state the specific grounds therefor.

25-1315.02 provides:

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party within 10 days after the jury has been discharged may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a judgment was returned the court may allow the judgment to stand or may reopen the judgment and either

order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

25-1315.03 in substance provides that any order in 25-1315.02 is an appealable order.

In re *Estate of Kinsey*, 152 Neb. 95, holds that under Section 25-1315.02, a motion for a directed verdict is an absolute prerequisite to a motion for judgment notwithstanding the verdict, and the trial court cannot, either upon its own motion or upon motion for judgment notwithstanding the verdict, set aside a verdict and enter a judgment notwithstanding the verdict, where no preliminary motion for a directed verdict has been made. If you should be caught in this situation, don't forget that it is possible, however, to move for a *new trial* on the grounds that the verdict is not sustained by sufficient evidence or is contrary to law, as provided in 25-1142 of the Revised Statutes of Nebraska for 1943.

Pahl v. Sprague, 152 Neb. 681, holds that a party is required not only to timely make the motion for a directed verdict, but thereafter to timely file a motion for judgment notwithstanding the verdict.

In re *Estate of Coons*, 154 Neb. 690, holds that whether a judgment will be directed or a new trial granted under the provisions of Section 25-1315.02 involves a judicial discretion based upon the record. In other words, it is a judicial discretion and not an absolute one that is lodged in the court.

In re *Estate of Fehrenkamp*, 154 Neb. 488, holds that 25-1315.03 vests the power in the Supreme Court on appeal to review the action taken by the trial court in any action under 25-1315.02 and to enter the judgment in favor of the party who was entitled to judgment in the trial court.

In some jurisdictions, in an equity action, the defendant cannot test the sufficiency of the evidence without either resting or presenting his own case. In Nebraska, however, the defendant is entitled to test the sufficiency of the plaintiff's evidence without the risk of penalizing himself. This is the rule found in *Peterson v. Massey*, 155 Neb. 829. In all of these situations, however, the rule of construction is found in *Corbitt v. Omaha Transit Co.*, 162 Neb. 598: A motion for dismissal at the close of the plaintiff's evidence or for a directed verdict at the close of all of the evidence must, for the purposes of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. And as was also said in the same case: Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination.

I believe the rule is well stated in *Cook Livestock Co., Inc., v. Reisig*, 161 Neb. 640: In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

It is error, however, for the trial court to direct a verdict for either of the parties on an issue of fact on which the evidence is conflicting. Such issue should be submitted to the jury for its determination. As the court said in *Griess v. Borchers*, 161 Neb. 217, "In negligence cases the trial court should sustain a motion for directed verdict or for judgment notwithstanding the verdict, only when the evidence, viewed in the light most favorable to the party against whom the motion is directed, fails to establish actionable negligence."

With reference to motions for directed verdicts, there are still some folks who forget the effect of this motion on a counterclaim. The Nebraska law is stated in *Harbert v. Mueller*, 156 Neb. 838, in which the defendant pleaded a counterclaim, and, upon the conclusion of the plaintiff's evidence, moved for and procured an order of the court directing a verdict for the defendant upon the plaintiff's cause of action. Our court held that the defendant, by moving for a directed verdict and obtaining a favorable ruling thereon, waived a hearing on his counterclaim when the counterclaim was not withdrawn by him before final submission of the cause, as required by statute.

Motion to View Premises

These motions are covered by 25-1108 of the Revised Statutes of Nebraska for 1943 in the following language:

Whenever, in the opinion of the court, it is proper for the jury to have a view of property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body, under charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person other than the person so appointed shall speak to them on any subject connected with the trial.

However, as our court said in *Carter v. Parsons*, 136 Neb. 515, this section is merely confirmatory of power generally recognized as existing in a trial court apart from any statute.

The question has been raised as to whether or not a trial judge has the same power to view the premises as a jury, and if so, whether such inspection is entitled to the same effect in both cases. These issues were decided in the affirmative in *Birdwood Irrigation District v. Brodbeck*, 128 Neb. 824. Whether a view shall be permitted does not depend upon the consent of the parties but is a matter

solely for the discretion of the trial court. This rule is announced in *Alberts v. Husevetter*, 77 Neb. 699, and also in *Carter v. Parsons*, 136 Neb. 515, where on a trial without a jury the court said that a judge, in the exercise of his discretion, may view the premises without the consent of the parties. It has also been held that the refusal of the trial court to permit the jury to view the premises involved in the litigation is not reversible error in the absence of an abuse of discretion. (*Peake v. Omaha Cold Storage Co.*, 158 Neb. 676)

While it is ordinarily customary for the jury or the court to view the premises after the evidence has been adduced, our court, in *Alberts v. Husevetter*, 77 Neb. 699, held that the viewing of the property may, in the discretion of the court, be made before all the evidence has been adduced.

There has, in some states, been a question as to the effect of viewing the premises. In *Chicago, Rock Island & Pacific Railway Co. v. Farwill*, 59 Neb. 544, our court held that a view of the premises in this state is evidence and not merely a means of enabling the jury to construe and apply the evidence adduced in court. Judge Sullivan in that case said as follows:

Upon the question in controversy judicial opinion is divided, the greater number of adjudicated cases supporting the theory that impressions gathered by the jury in making an inspection are not evidence. This court, we think, is committed by *Carroll v. State*, 5 Neb. 31, and *Omaha & R V R Co. v. Walker*, 17 Neb. 432, to the doctrine that a jury may take into account the result of their observations at the *locus in quo* and make it, *in connection with other evidence*, the basis of their verdict. This is the rational rule; by its adoption a fact is recognized and a fiction abolished. In whatever capacity men act they will not reject the evidence of their own senses; and it is futile and almost foolish to direct them to do so.

On the question of appeal, our court, in *Peterson v. Thurston*, 157 Neb. 833, held that where an inspection of premises is made by the trial court in relation to issues involved, such inspection becomes a matter of evidence to be considered by the Supreme Court on appeal. And also in *Carter v. Parsons*, 136 Neb. 515, commenting on inspection of the premises, our court said, "Such fact is entitled to consideration and weight on appeal, although the record itself must contain competent evidence to support the trial court's findings."

ADDRESS BEFORE SECTION OF PRACTICE AND PROCEDURE

John H. Kuns, District Judge

Since the topic of Special Verdicts was assigned to me as a member of this panel, the latest issue of the *Nebraska Law Review* has been distributed, containing a lead article upon the same subject. In his excellent article, Mr. Gerald Matzke, of the Nebraska Bar, now practicing at Sidney in my district, has analyzed exhaustively

the Nebraska statutes and all cases in this state in which the subject has been treated. He has added comments, conclusions, and recommendations which are cogent and well reasoned. It is not necessary in this discussion to add to the material which he has used. For this reason, my original manuscript was discarded, and I shall proceed without specific reference to the statutes or to the cases. For purposes of study and research, reference should be made to Mr. Matzke's article. I intend, therefore, to discuss some aspects of the use of special verdicts based upon my own rather limited experience.

So there will be no misunderstanding, I wish to make it clear at the outset that I am not urging discontinuance of the use of general verdicts. I am not suggesting that there is anything wrong per se with trials in which a general verdict is returned by the jury. General verdicts are required in criminal cases, and there are many civil cases in which such verdicts reflect an intelligent and adequate set of findings by the jury. I believe that there are some types of cases and some situations in which special verdicts can be used to advantage, benefiting both the trial and review of such cases.

The increasing use of discovery methods and the attempts at simplification of the issues through pre-trial conference poses a problem relative to the presentation of the case to the jury. The attorney naturally is concerned with the extent to which the jury might appreciate and apply those matters which have become settled outside the courtroom and which are not covered in the oral testimony. In his desire to insure that the jury will use such matters in arriving at their conclusions, trial attorneys often elect to lengthen the record by the presentation of the proof which is not actually necessary. When the court can supply the answers to the issues so settled, much time should be saved both in presentation and argument of the case without ill effect to either side.

Lawyers also find that the findings submitted can aid them in checking their record before resting so that nothing is overlooked. In the same way, the organization of arguments, especially the opening, is simplified. Each side should be furnished with a list of the findings which will be submitted as early during the course of the trial as possible. Usually this can be done at least in tentative form soon after the opening statements have been made. Another feature is that special findings serve to define more precisely the areas of conflict in the testimony, and the situation is avoided of appearing to try two different lawsuits at the same time. It is likely that there is a handicap to the trial technique of attempting to cover weakness by elaborate and cumulative proof of the strong features of the case.

The preparation of special findings and the instructions thereon

should be somewhat simpler for the court. It is still necessary to make the same analysis and statement of the issues, even though the statement appears in different form. In the remaining instructions, the primary task becomes more a matter of definition than of expounding the law and of explaining the various ways in which it may be applied to findings of fact. It is possible to omit the frequent hypothetical statements, which often cause general instructions to read like a complicated intelligence test. Greater clarity can be attained in the placing of the burden of proof as to each separate issue, and the court would have some leeway in arranging the order in which various issues will be considered and determined, irrespective of whether such issues are a part either of the original cause of action or the defense. Questions must be framed carefully so as to secure categorical answers settling the ultimate facts in issue. It seems preferable to phrase questions so that an affirmative or definite answer will be returned when the burden of proof has been carried. A negative reply would then cover both the even balance of the evidence as well as a finding of untruth of the allegation.

Questions of law often arise during the course of the trial which are difficult to settle with certainty before the submission of the case to the jury. When the court is doubtful about the effect or application of a rule, it becomes possible to reserve the question for later determination, while securing the necessary finding of fact. The jury's finding might make later decision unnecessary, or time becomes available for further briefing and argument by counsel. In this way, the court has an opportunity to avoid real or apparent error.

In entering judgment upon the special verdict, the court, with the aid of counsel, can utilize special training and ability to make the necessary computations and appropriate applications of the law to the findings. I am sure that it is simpler to apply the comparative negligence statute to findings, to ascertain whether a recovery is justified and, if so, the amount, than to explain satisfactorily to the jury how the process should be carried out. All mathematical computations should be more accurate.

It is impossible to learn the exact process by which a jury reaches a verdict in any case. The use of hidden microphones in deliberation rooms is frowned upon; later individual interviews are unsatisfactory. The rating of verdicts usually depends upon a person's point of view and interest in the particular case, but while many verdicts appear to be reasonably sound, others leave us wondering how such a conclusion might have been reached. The special verdict directs the attention of the jury to the essential question of "what happened?" rather than to "who wins?" as in the general verdict. This should tend to minimize the effect of any prejudice which may have developed. The special verdict

shows upon its face the systematic and orderly determination of all the issues in the case. The jury cannot disregard the process required for a complete determination and simply fill out a general verdict expressing their sentiment whether supported by reason or not. In fairness it should be pointed out that confusion on the part of juries may well be the result of confused presentation or arise from a justifiable inability to follow intricate but correct statements of the law in the court's instructions. Jurors return the best verdicts they are able to formulate because they were sworn to try the case, but they have an understandable reluctance to report confusion. Accordingly, it seems that sometimes they fill in a verdict and hope for the best. I am confident that jurors attempt to be conscientious and fair, and that a deliberate failure to give proper consideration to the issues occurs only rarely.

From the standpoint of review either in the trial court or upon appeal, special verdicts seem to offer definite advantages. It is not necessary to resort to the assumption that each separate issue was resolved consistently with the general finding. It can be very important to know precisely whether the jury in a comparative negligence case found negligence against both parties or only the defendant, and whether damages were mitigated on that account. Sometimes juries compromise uncertainty about liability by reducing the amount of damages awarded; such verdicts are bad because they constitute an invasion of a field which should belong exclusively to the litigants. The Supreme Court can determine with greater certainty whether errors during trial had a prejudicial effect. When prejudicial error is found and the case remanded, the scope of the retrial can be limited accordingly. This can result in a saving both of time and expense, especially when some witnesses testified only as to special matters, and not generally both as to liability and damage. Settlement prospects are often not impaired but may even be improved after a reversal, since each side can see which features of their case have been shown to be strong or weak, either as to the evidence or as to the law.

I have attempted to set out some of the more desirable possibilities arising from the use of special verdicts. We should all be familiar both with the strength and weakness of the general verdict. The decision to use special verdicts lies entirely within the discretion of the trial judge; such a decision may depend upon a large number of considerations, especially the time available for the preparation of the findings, and the confidence of the judge in his ability to make clear the issues and the law in general instructions. The use of special verdicts merits consideration, not as a new, but as a revived, method of securing an intelligent and complete determination of the issues by the jury. In some cases, better verdicts might be secured. If the bench and bar can obviate any of the criticism of the operation of the jury system, we should try to do so.

SECTION PROCEEDINGS
FRIDAY, OCTOBER 19, 1956
SECTION ON INSURANCE LAW

James N. Ackerman, Esq.
Chairman

- "Some Problems of Subrogation in Workmen's Compensation".....Joseph P. Cashen, Esq.
Omaha
Formerly a judge of the Nebraska Workmen's Compensation Court
- "Legal Problems in Disability Insurance".....J. Edward Day
Newark, New Jersey
Associate General Counsel Prudential Insurance Company of America

SOME PROBLEMS OF SUBROGATION
IN WORKMEN'S COMPENSATION

Joseph P. Cashen, Esq.

The discussion of the problems involved in compensation subrogation will have particular reference to the State of Nebraska.

The original concept which gave rise to such legislation, providing for liability of the employer without regard to fault on his part, did not lose sight of the fact that ultimately, whenever possible, the true wrongdoer or third party should not be relieved of his liability to the injured employee. This is certainly in conformity with the general theory of law. The liability of the employer is fixed by statute, but the liability of a wrongdoer or negligent third party is determined only by the extent of damage assessed by a court or jury. In view of this disparity as to the amount of liability between the employer and the negligent third party, many questions arise in connection with civil actions at common law against third parties either by the injured employee or by the employer.

The modern normal third party subrogation pattern, adopted by most states, provides for the reimbursement of the employer and retention of any sums expended in the event of recovery by the employer with the excess to the employee or his dependents. In two states no third party statutes prevail; and in these instances, it has been held that the employee may retain all of the proceeds of the third party action even though compensation has previously been paid.

The following is an example of what problems may arise where there is no statute providing for subrogation, such as in the State of Ohio.

Assuming a situation where a third party is a supplier of equip-

ment for an employer's business and as a consequence of defectiveness of the equipment, the employer's employee is injured. The failure to furnish safe equipment was a breach of the third party's contract with the employer. If everyone, under this situation in Ohio, pressed his rights to the utmost, it would result in the employer paying compensation, then recovering from the third party his added premiums, because of experience rating increasing such, thereby coming out approximately even. The employee would recover compensation from the employer and then bring an action and recover from the third party in tort, keeping for himself the proceeds of both actions, with a consequence that the third party would be paying once to the employee for tort and once to the employer for a breach of contracts. The statutes of other states, which have adopted a similar third party action subrogation pattern, have various clauses, the details varying as to the range of persons who are third parties, who has the primary right to bring the action, and times within which such actions may be brought. These various provisions would entail a rather lengthy discussion even to attempt to generalize on the various provisions. It will be my intention, therefore, to confine my remarks as nearly as possible to those cases interpreting the provisions of Section 48-118 of the Nebraska Workmen's Compensation Law and other pertinent Sections of the Act.

From the very first Nebraska Workmen's Compensation Law, passed by the twenty-third session of the Legislature (1913-1914), the law has provided for subrogation of the employer or his insurance carrier in the event a third person is liable to the employee or to his dependents for injury or death. The original Section 18 of Chapter 198 of the Laws of 1913 is set forth below:

Where a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents would have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting expenses and making such recovery, shall be paid forthwith to the employee or to the dependents, and shall be treated as an advance payment by the employer, on account of any future installments of compensation.

It will be noted that the original act gave to the employer the rights of the employee as against a third party who was liable for the injuries or death. There appeared to be no right given the employee to bring an action in the event the employer failed to do so. In *Muncaster v. Graham Ice Cream Co.*, 172 N.W. 52, 103 Neb. 379 (1919), plaintiff, an employee of an ice machine company, was injured by the negligence of a third party while in the course of his employment. He brought an action against the third party when his immediate employer, who had settled with him under compensation, refused to bring further proceedings. It was held that the em-

ployee had a right to bring the action when the employer who had paid compensation failed and refused to bring the third party action. The majority opinion seemed to indicate that the right of action against the third party was a statutory right arising under the compensation act. The concurring opinion indicated that the right of action was one not created by statute but a common law right of action which had been preserved. The view of the concurring opinion was subsequently adopted by the court in *Rehn v. Bingaman*, 36 N.W.2d 856, 151 Neb. 196 (1949), wherein the court examined the 1929 amendment to Section 48-118 and pointed out that, had the cause of action been established by statute, it would not survive the death of the third party, but as a common law right the same would survive.

Under the original statute, it was held that where an employee was injured through the wrongful or negligent act or omission of a third party the employer was subrogated to all the rights of such employee or those of his dependents against such third person, and that until the employer neglected or refused to bring the action against the third party, the employer's right to do so was exclusive. It was necessary for the employee to allege and prove that his employer had refused or neglected to bring the action. *O'Donnell v. Baker Ice Machine Co.*, 114 Neb. 9, 205 N.W. 561 (1925).

In order to dispense with the problems involved in alleging and proving the refusal of the employer to bring the action, the section was amended in 1929 by Chapter 135 of the Laws of Nebraska 1929, Page 489. The Proviso which was added is set forth below:

Provided, however, that nothing in this section or Act shall be construed to deny the right of an injured employee or his personal representative to bring suit against such third person in his own name or in the name of the personal representative based upon such liability; but in such event an employee having paid or paying compensation to such employee or his dependents shall be made a party to the suit for the purpose of reimbursement, under the provided right of subrogation, of any compensation paid.

The above-quoted amendment is the only change that has been made in the section since the passage of the original Act in 1913-1914.

In General

Initially, in the event of injury, a question of fact to be determined is the relationship of the injured party to the person whose negligence resulted in such injury.

Persons not engaged in the same enterprise or having no connection or contractual agreements with the immediate employer of the injured employee fall within the class of third persons without giving rise to many difficulties. Where the relationship between the party causing the injury and the injured person is that of fellow employee or when the injured party is engaged in the same enterprise under different employers, questions arise as to whether or not such persons are third parties within the meaning of the sec-

tion. In order to determine this question, standard tests are usually applied to determine the existence or nonexistence of the relationship of the employer and employee.

Generally speaking, a third person under the Act is one to which no liability for the injury would attach under the provisions of Section 2 of the Nebraska Workmen's Compensation Law. The term "employer" is defined in Section 48-114 of the Nebraska Workmen's Compensation Law, and in Section 48-115 the "employee" and "workman" are defined.

One other provision which has been construed on many occasions in connection with actions under Section 118 is Section 48-116, which is set forth in Sub-section B of Part 2 of the Act. This section provides:

Employers; evasion of law; what constitutes; exceptions. Any person, firm or corporation creating or carrying into operation any scheme, artifice or device to enable him, them or it to execute work without being responsible to the workmen for the provisions of this act, shall be included in the term "employer," and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for and be subject to all the provisions of this act. This section, however, shall not be construed as applying to an owner who lets a contract to a contractor in good faith, or a contractor, who, in good faith, lets to a subcontractor a portion of his contract, if the owner or principal contractor, as the case may be, requires the contractor or subcontractor, respectively, to procure a policy or policies of insurance from an insurance company licensed to make such insurance in this state, which policy or policies of insurance shall guarantee payment of compensation according to this act to injured workmen.

Where an owner, contractor, or subcontractor fails to insure the risk under the Compensation Law and liability is imposed under Section 48-116 upon the remote employer as distinguished from the immediate employer, the remote employer is said to be a statutory employer. Similar results are obtained in most states having statutory provisions differing somewhat from those of Nebraska.

This section has been construed to mean that where liability would not attach if employment was direct, proviso constituting, as employer, person using scheme, artifice, or device to escape responsibility, does not apply. *McConnell v. Johnson*, 139 Nebr. 619 298 NW 346 (1941). The test to be applied then to determine whether one might be termed an employer under the provisions of Section 48-116 is to ascertain whether or not such person would be liable had they hired the injured person direct. The same tests are applied in this instance as are applied to determine the relationship of employer-employee under Section 48-114 and 48-115 of the Act. An example of the extension under Section 48-116 is set out in *Sherlock v. Sherlock*, 112 Nebr. 797 201 NW 645, wherein it was held that an employee of a painting contractor engaged in painting a wholesale drug building was an employee of the drug corporation where the immediate employer had failed to secure insurance. The court contended the painting of the building housing the wholesale drug corporation to

be work within the usual course of the trade, business, or profession, as upkeep, maintenance, and repair are a part of the regular business.

The construction of Section 48-118 in conjunction with Section 48-116 has given rise to several Supreme Court decisions.

Contractor, Subcontractor, and Owner

The first time the Nebraska Supreme Court was called upon to determine the issue of whether or not a contractor might be liable to the injured employee of a subcontractor where both the contractor and subcontractor had complied with the requirement of insuring the risk under the Compensation Act was in *O'Donnell v. Baker Ice Machine Co.*, 203 NW 635 (1925). In this instance, the plaintiff, an employee of the subcontractor, sued the prime contractor for injuries sustained as a result of the prime contractor's negligence. Both the contractor and the subcontractor had secured insurance. The court held that where both the contractor and the subcontractor had secured insurance and where the employee had already received benefits of that insurance and compensation under the schedule provided by the Act, he was not entitled to recover again from the owner or the original contractor for the same injury. This decision followed the trend which was then followed and which is currently followed in many states that all those persons engaged in a "joint enterprise" or "common employment," that is, the contractors' employees and the subcontractors' employees, are grouped within the provision of the Compensation Act such that they cannot be third parties. A rehearing was granted in this case, and the first opinion was withdrawn. *O'Donnell v. Baker Ice Machine Company*, 114 Nebr. 9—205 NW 561 (1925). The same problem was again presented the court in *Boyd v. Humphreys*, 117 Nebr. 799, 223 N.W. 658 (1929). In this instance, an owner entered into a construction contract with another, who in turn sublet a portion thereof. Both the prime contractor and subcontractor had complied with the Compensation Statutes with reference to insurance. An employee of the subcontractor was injured in the course of his employment without fault on his part but by and through the actionable negligence of the prime contractor. It was contended in this instance that the contractor, subcontractor, and the employees of both should be grouped as engaged in a "common enterprise" and as such could not be third parties. The court examined the law and indicated that it dealt primarily with the immediate employer and his employees and that the statute did not warrant a grouping of all those interested in the enterprise within the term "employer" to the extent of excluding them as third parties under the statute. *The contractor was held liable to the subcontractor's employee in the Common Law action.* When the injured employee's employer is an independent contractor and such employee is injured as the result of the negligence of the contractor, the court indicated that the contractor did not fall within the definition of the word "employer"

as used in the statute, and that such does not include an owner who requires his contractor to take out compensation insurance, and neither does it include a subcontractor who sublets and requires his subcontractor to take out insurance. The contractor is not an employer of the subcontractor's employee, and neither is he liable to them as such. *Mathew v. G. A. Crancer Co.*, 117 Nebr. 805, 223 N.W. 661 (1929).

The court in construing the applicable sections has generally held that the owner of property, as to the employees of his contractor, is a third person as the term is used within the meaning of Section 48-118, and that such contractor is, as to the employees of his subcontractor, a third person within the meaning of said section. As a consequence of such relationship, the owner is liable at common law for any and all damages sustained by his contractor's employees, caused by his actionable negligence, and likewise the contractor is liable to his subcontractor's employees who sustain injury as a result of his actionable negligence. In *Tralle v. Hartman Furniture and Carpet Co.*, 116 Nebr. 418, 217 N.W. 952 (1928), the proximate cause of the injury was held to be the failure on the part of the owners and lessors to have provided an overhead guard on the elevator on which the deceased, a subcontractor's employee, was working at the time he sustained accidental injury and death. The lessee of the building, Hartman Furniture and Carpet Co., was dismissed, as they had secured compensation insurance to cover its employees, as had the subcontractor. Here the owner was held liable for injury to subcontractor's employee.

In *Sloan v. Harrington* (1929), 117 Nebr. 809, 223 N.W. 663 certiorari denied 50 S. Ct. 65, 280 U.S. 516, 74 L. Ed. the City of Omaha contracted with Keystone Pipe and Construction Co. to construct a sewer. The pipe company in turn sublet a portion to the defendant, Harrington. Sloan, an employee of the pipe company, was injured as a result of the negligence of Harrington, the subcontractor, and his employees. The court held that the subcontractor was a third party and liable to the employee of the contractor. The contractor alleged that there was a surrender of the rights of the injured employee to bring an action at Common Law for his injuries. Section 48-111 sets out the effect of electing to be bound by the limited compensation afforded by the act and states:

Such agreement or the election provided for in section 48-112 shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in Sections 48-109 and 48-147, and an acceptance of all the provisions of said sections, and shall bind the employee himself, and for compensation for his death shall bind his legal representatives, his widow and next of kin, as well as the employer, and the legal representatives of a deceased employer, and those conducting the business of the employer during bankruptcy or insolvency.

The court in this instance held that the surrender under our compensation statutes of the right to prosecute an action at Com-

mon Law for damages arising from the actionable negligence of another applied solely to the contractor and its injured employee, and that Harrington, in this instance, was a third person and thus liable at Common Law.

The owner of a building who has contracted for repairs of such and who fails to require insurance on the part of the contractor covering the risk of the contractor's employees under the Compensation Act may be held to be an employer in a compensation action, but will be not held to be liable as a third party. In *Sherlock v. Sherlock* (1924), 112 Nebr. 797, 201 N.W. 645, the court construing Section 48-116 together with other sections, found that the owner of a building, a drug company, was an employer within the meaning of 48-116. In this instance, an employee of a painting contractor was injured while painting the exterior of the building. This finding was on the ground that the employer, the drug company, would have been liable had the employee of the subcontractor been hired directly by the drug company. It was held that the upkeep, maintenance, and repair of the outer building was a portion of the regular trade, business, and profession of the drug company, and therefore the drug company would have been liable had they hired the subcontractor's employee directly. Under Section 48-116, in order that an owner, contractor, or subcontractor may be held to be an employer, the facts must be examined, and it must be shown that had the contractor or owner hired the employee directly himself, such employee would have been an employee of the owner; then liability will follow under the Compensation Act as a statutory employer. *McConnell v. Johnson*, 139 Nebr. 619, 298 N.W. 346 (1941).

In a suit at Common Law by an injured employee as against the owner of a building, it is necessary to allege and prove that the Compensation Law does not apply. In *Jones v. Rossbach Co., et al.*, 264 N.W. 877, 130 Nebr. 302 (1936), a petition was dismissed for failure to show by the petition that the Compensation Law did not apply. In this instance, the injured employee of a contractor sued the coal company, alleging negligence on its part for failing to comply with a City Ordinance. The court stated that where the owner of a building used in conducting the owner's business engages a contractor to make repairs and one of the contractor's employees is injured, it must be shown that the Compensation Law does not apply, and in the absence of such an allegation or proof, it will be presumed that the owner was an employer, as provided by Section 48-116.

By the same token, an owner who lets a contract to a contractor or a contractor who lets to a subcontractor a portion of a contract but does not require the contractor or subcontractor respectively to procure policies of insurance to guarantee payment of compensation according to the Act, is not liable to the employees of such contractor or subcontractor as third parties but may be held respon-

sible only for the amount that such employee would be entitled to under the Compensation Act.

In line with the above cases, it would appear that where insurance is carried, owners, lessees, contractors, and subcontractors may be third parties with respect to negligently caused injuries of employees or any of the others. Where insurance is not carried and liability for compensation would attach if the employee were hired directly, then such owners, lessees, contractors, and subcontractors may be held liable for compensation but not as third parties.

*Co-Employees—
Fellow Employees*

The court, in *Boyd B. Humphreys, supra*, answered the contention that all parties engaged in a common enterprise should be grouped together and stated:

Hence we conclude that under the facts in this case there is only one employer, and that is Cone (the subcontractor) and the only ones grouped are Cone and his employees engaged in the enterprise. The defendants and all others are third parties.

The above-quoted section would seem to indicate that co-employees or fellow workmen could not be considered third persons under the act. The question was again mentioned in *Sloan v. Harrington*, (1929), 117 Nebr. 809, 223 N.W. 663, wherein the court indicated that the question of whether or not the term "third person" could be applied to employees of an immediate employer was left undetermined in the decision. The question was directly before the court in *Rehn v. Bingaman, et al.*, 151 Nebr. 196, 36 N.W. 2d, 856 (1949), wherein the court, in discussing the relationship of the deceased defendant, who had been operating a boom which struck a power line causing injury to the plaintiff, stated that the question of whether the deceased was an independent contractor or a fellow employee need not be decided and that

In any event, whether he was one or the other is of no importance because he would be such a third person in any event. Conceivably, an independent contractor would be such a third person, and it is generally the rule that a fellow employee would also be such person regardless of the capacity of his employment so long as he did not occupy the relationship of employer-employee. 57 C.J.S. *Master and Servant* § 578, page 348; 35 Am. Jr. *Master and Servant*, Sec. 525, page 954, Sec. 526, Page 955; Notation 99 ALR., Page 442; *Hudson B. Moonier*, 8 Cir. 94 Fed. 2d 142, ID, 8 Cir., 102 F 2d 96.

The court went on to state further that

When the term "third party" is mentioned in the Workmen's Compensation Act, it means any person other than the master, or those whom the Act makes master, and the employee who is seeking compensation under their agreement. The act is careful to preserve the status of a third person by not defining the term; so the presumption must be that the law as to third persons in every respect stands as it was before the act. Citing *Allan v. Trester*, 112 Nebr. 515, 199 N.W. 841 and *Fonda v. Northwestern Public Service Co.*, 134 Neb. 430, 278 N.W. 836, indicating the same conclusion.

The court felt that to hold otherwise would unjustly confer upon every employee freedom to neglect his duty toward a fellow employee and thus escape all liability for damages proximately caused by his negligence.

A further discussion as to the liability of a co-employee or the responsibility as a third party to the employees of a subcontractor or contractor are set forth in *re Estate of Bingaman*, 155 Nebr. 24, 50 N.W. 2d 523 (1951), wherein the court stated that a person in the relationship of a fellow employee to another is not liable for negligent acts committed under the direction and control of the employer except for misfeasance or positive wrong. See also *Pester v. Holmes*, 109 Neb. 605.

One other question that should be explored and kept in mind is that of the loaned employee and the ascertaining whether a loaned employee has become the employee of another or is still considered to be the employee of the general employer. In this connection see *In re Estate of Bingaman, supra*; *Koestler v. Rogers Construction Co.*, 155 Nebr. 40 and 50 N.W. 2d, 553 (1931); *Shamberg v. Shamberg* 153 Nebr. 495, 45 N.W. 2d 446 (1950).

Effect of Release to Third Party

In *Hugh Murphy Construction Co. v. Serck*, 104 Nebr. 398, 177 N.W. 747 (1920), Serck, the injured employee who was employed by the Hugh Murphy Construction Co., was injured while driving a truck which was struck by a negligent third party. A release was taken from Serck for \$75 by the third party. Serck in turn then filed suit against the construction company for compensation and recovered for a period of twenty weeks at the rate of \$12 per week. The construction company interposed the release of the negligent third party as a bar to compensation action by Serck. The lower court said with reference to the release that Serck did not in any manner give up, release, or relinquish his rights to compensation. They felt that he had only given up, released, or relinquished such right as he or his employer for him might have had to recover something by way of damages from the negligent third party over and above any amount for which the employer should be liable for or paid to its employee, the defendant Serck, for compensation for his injuries in accordance with the terms of the Compensation Law. The court said that the amount which the employee was entitled to receive from the employer was in a large degree fixed by statute, that the amount which the employer might in turn recover from the wrongdoer is in turn determined either by settlement satisfactory to the three parties concerned or by the ordinary processes of litigation in an action for damages. The wrongdoers must take notice of the rights of all and cannot by a settlement with the injured party increase the burden of the innocent employer. The parties concerned are equal in the eyes of the law, and the court will not suffer one to profit at the expense of either of the others. To allow the work-

man to settle with the negligent third party for an unfair or inadequate sum would compel the employer to be mulcted to an additional extent; therefore, when the third party settled with the injured workman, it took the risk of having to pay additional damages to the employer if the settlement was not fair, adequate, and satisfactory. If such a settlement was satisfactory to it, the employer is entitled to deduct from the amount of compensation money which the injured workman has already received by way of settlement. If, however, the settlement was inadequate or obtained by fraud or mistake, then the employer is compelled to pay a greater sum by way of compensation. The employer still has his remedy by proceeding against the third party for any damages suffered by the workman in excess of the amount paid by way of settlement. In this instance, they allowed the \$75 to be applied as first payments on compensation. This case seems to indicate that if the amount of settlement is fair and not obtained by fraud or mistake, the amount of the settlement may be applied as against compensation payments due by the employer, but in the event the amount of the settlement is less than the amount of compensation, the employer may still have an action against the third party, but the employee is deprived of recovering any amount in excess of the amount to which he would be entitled under compensation. The language in this case seems to indicate that the court will not allow the compensation carrier or the employee to settle a subrogation claim or personal injury claim which would be unfair or inadequate as far as the other interested party is concerned.

A rather novel instance in which the question of the effect of release on one hand and a lump-sum settlement on the other hand was presented to the court in *Burks v. Packer*, 9 N.W. 2d 471, 143 Nebr. 373 (143). In this instance, plaintiff was the administratrix of the estate of her son who died as a result of an operation which was alleged to have been negligently performed by defendant doctor. The insurance company was made a party defendant in that a lump-sum settlement had been entered into between the insurance company and the administratrix after an award had been issued following the original hearing. The insurance carrier for answer admitted the allegation in the plaintiff's petition and by cross-petition alleged that the employee had sustained an accident and came into the hands of the defendant doctor for treatment which was negligently rendered, resulting in his death. The separate answer of the doctor denied the allegation in plaintiff's petition, and on oral motion plaintiff's action was dismissed as to the defendant doctor without prejudice to the rights of the insurance carrier under its cross-petition. Defendant doctor's amended answer to the cross-petition of the insurance carrier admitted the insurance company to be the carrier and that the deceased had come into his charge as a result of being referred by the employer's foreman and for further answer alleged payment to the plaintiff in the sum of \$2,500, in consideration of which the administratrix dismissed her

cause of action as against the defendant doctor, with prejudice. The insurance company filed a motion to require the action to proceed upon the original petition of the plaintiff and adjust the interests of the parties after verdict, which motion was overruled. It then filed a motion to enter judgment in favor of the defendant for \$2,000. This was overruled and the case proceeded to trial, resulting in a dismissal because of insufficient evidence to sustain a verdict. The doctor asserted that the statute contemplates a determination of liability either by admission or judgment, that the answer of the defendant doctor denied the liability, and that the settlement and release indicated that such were no admission of liability by the defendant doctor or any prejudice to his rights. The doctor further contended that the lump sum settlement approved by the district court, in effect, stated the claim did not arise out of and in the course of the deceased's employment, and therefore, when the court entered such order, the insurance company was deprived of its rights to be subrogated to the amounts therein paid.

The settlement entered into by the administratrix reserved all the rights of the insurance company and agreed to pay the insurance company the first \$2,000 out of the gross proceeds of any such claim or action which was then contemplated to be brought against the defendant for negligent diagnosis and treatment.

The second syllabus by the court is as follows:

Where an insurance carrier settles a compensation action, conditioned that it be paid first out of the proceeds of an action, brought by the personal representative of the deceased employee against another person, the amount of compensation paid by it, and the latter action is settled, such insurance carrier is entitled to equitable subrogation in the amount of compensation paid.

The court in its decision stated

Without regard to whether the evidence was sufficient to warrant submission of the case to the jury, the circumstances of this case warrant the application of equitable subrogation. While the characteristics of statutory subrogation and equitable subrogation are the same, we do not determine the case under statutory subrogation. See Comp. St. 1929, Sec. 48-118.

In this instance the district court directed that they enter a judgment for the insurance carrier in the amount of \$2,000 and costs against the defendant doctor.

In view of the holding of *Burks v. Packer, supra*, it would appear that in any settlement entered into with an administratrix or other person wherein there is a contemplated third-party action in the offing, it is suggested that there be included in the lump-sum settlement a reservation of all of the rights of the insurance company and an agreement on behalf of the party with whom the settlement is made that such insurance company be reimbursed the amount expended for compensation out of the gross proceeds of any such claim or contemplated action to be brought against a negligent third party.

Right to Participate in Trial and Liability for Costs

Generally speaking, it is the usual procedure for counsel representing an insurance company or employer who has been made a party defendant for the sole purpose of protecting a statutory right of subrogation not to participate in the trial of the matter, although such defendant does have a right to call witnesses and participate in the trial in an effort to increase the amount of the recovery of the plaintiff.

In the event counsel does not take part and participate in the hearing or the calling of witnesses, cross-examining witnesses, or arguing, there is no liability for costs, but in the event of participation in the hearing such that the defendant employer or insurer is practically a co-plaintiff so that the defendant is required to defend against both it and the plaintiff in order to escape liability to either, there is joint liability for costs. *Rehn v. Bingham*, 152 Nebr. 170, 40 N.W. 2d 673 (1950).

Attorneys' Fees

In the event the suit is brought by the employer and recovery is had, costs of such action are deducted from the amount recovered, and the employer is entitled to full reimbursement. *Bronder v. Otis Elevator Co., et al.*, 12 Nebr. 581, 237 N.W. 671 (1931). In the event the suit is brought by the employee, it is generally held that where the amount recovered is in excess of that which the employer is entitled to under the subrogation, the employer has a prior lien for the entire amount to which he is subrogated without the necessity of having to participate or contribute to plaintiff's attorneys' fees. In the 1955 session of the Nebraska Legislature a bill was introduced, the purpose of which was to have the insurance companies or the employer share the burden of attorneys' fees in cases where actions were brought by the employee and recovery had. The suggested amendment was not passed, however.

Parties

Section 118 provides that where the employee or dependents of a deceased employee bring an action against a third party, the employer, having paid or paying compensation, shall be made a party to the suit for purposes of reimbursement. You will note that the statute provides that only in the event compensation has been paid or is now being paid is it necessary that the employer be made a party defendant.

In *Denner v. Walters* 154 Nebr. 506 48 N.W. 2d 635 (1951), the question was raised whether or not a defendant who had received workmen's compensation benefits from his employer should be required to make his employer a party defendant after having counter-claimed for his injuries. Plaintiff claimed defendant counter-claimant was obliged to make his employer a party for the reason that the employer had paid compensation and for this reason moved to dismiss the first cause of action alleged in the counter-claim. The court, in discussing the problem, stated:

The employer of the defendant is not involved in this court action for damages, and the only right that could accrue, insofar as this case is concerned, to the benefit of the employer would be the right of subrogation for compensation paid by it to its employees as provided for in Section 48-118 RS 1943.

They went on to state that they were not required under the state of the record to pass upon the question of whether or not the defendant counter-claimant should have made his employer a party as required to do so under the Act. In this instance, verdict was in favor of the plaintiff and was affirmed. It was held that the admission of evidence with regard to the payment of compensation to the defendant by defendant's employer, who was not a party, was error; but the same as without prejudice, in view of the instructions by the court to the effect that in the event they should find for the defendant, no deduction for any amount of wages advanced to the defendant by his employer or any payments of medical should be made.

It is felt that the employer should be made a party in all instances where compensation is being paid or has been paid.

The proper party to bring an action in the event of death of the employee is the administrator, both under Section 25-305, Real Party in interest section, and under the wrongful death statute, Section 30-809 R.R.S. 1943 *et seq.* See also *Luckey v. Union Pacific R. Co.*, 117 Nebr. 85 219 N.W. 802 (1928). *Goeres v. Goeres*, 124 Neb. 720, 248 N.W. 75 (1933).

Concurrent or Joint Negligence of Employer as Affecting Right of Subrogation.

The question of whether a third party may plead the concurrent negligence of the employer to defeat the recovery under subrogation has been before the court on several occasions. As early as 1917 it was held that the fact that an employer's negligence concurred with the negligence of a third person to cause an injury which entitled the workman to compensation did not bar the employer's right to subrogation against a third person under the Nebraska Workmen's Compensation Act. *Otis Elevator Co. v. Miller and Paine* 240 Fed. 376 153 CCA 302. The court indicated that the liability of the company is positively fixed by law regardless of the question of negligence upon its part. The law also provides that company should be subrogated to the rights of the dependents or the deceased against the negligent third party, providing it was the negligence of the third party that caused the injury or death. They indicated that to construe this section as not permitting the employer to prosecute the action for the benefit of itself and the dependents of the deceased if the negligence of the employer concur with that of the joint tortfeasor in causing the death would be to in effect destroy this section. The feeling is that the action brought by the employer against the negligent third party must be treated, insofar as the right to recover is concerned, the same as if such action had been brought by the administrator of the estate of the

deceased or the injured workman himself, and to hold otherwise would defeat such an action and permit one wrongdoer to plead the fault of a joint wrongdoer in defense and would destroy the right of subrogation granted in the statute. The liability to compensate an employee imposed by law upon the employer regardless of negligence is in lieu of his liability for all other reasons. See also *Foster v. City of Lincoln* 107 Nebr. 404 186 NW 317 (1922). *Graham v. City of Lincoln*, 106 Nebr. 305, 183 NW 569 (1921).

Subrogation in the Event of Death

Section 30-809 Revised Statutes of Nebraska 1943 provides for an action for wrongful death. The following section, Section 810, provides that such action shall be brought by and in the name of the personal representative for the exclusive benefit of the widow or widower and next of kin and further provides that the avails thereof shall be paid to and distributed among the widow or widower and next of kin in the proportion that the pecuniary loss suffered by each bears to the total pecuniary loss suffered by all of such persons. Section 48-118 provides that the employer shall be subrogated to "all the right of the employee or to the dependents against such third person" and the employer shall be entitled to recover "any amount which such employee or his dependents should have been entitled to recover." This section has been construed to mean that the employer is subrogated to the dependents' share of the judgment accruing from the right of action given the personal representatives and not the right of action itself. In one instance the decedent, while working for his employer, was killed through the negligence of a third party. His employer paid compensation provided for under the Workmen's Compensation Act. The decedent's executrix brought suit, joining the employer as defendant, and recovered, the amount of the recovery being \$7,500, which was paid into court to await distribution. A son of the decedent by previous marriage, by his guardian, intervened and demanded distribution in the same proportions as the personal property of an intestate is distributed under the inheritance laws, or one-fourth to plaintiff, executrix, and three-fourths to intervenor. The district court directed distribution in accordance with such prayer after first deducting \$2,500 in fees for attorneys. This decision was appealed, and the supreme court found compensation benefits had been paid in an amount in excess of \$4,700 and that the employer had expended \$300 in expenses in making the recovery or a total in excess of \$5,000. Originally the action had been tried in compensation court, resulting in a finding that the executrix was also the widow and was the only dependent of the deceased employee. A lump sum settlement was consummated, and the payments made by the employer were adjudicated and authorized by the Compensation Law. The intervenor was not a dependent at the time of his father's death or dependent upon him in any way for support. The question before the court was whether the employer by statutory right of subrogation would be entitled to reimbursement for the payments and expenses in full

before any part of the money collected under Lord Campbell's Act can properly be distributed to the heirs of the deceased employee.

The court, in a discussion of Section 48-118, stated:

This section is part of an act imposing upon employers of labor a liability which did not previously exist. It was competent for the Legislature to prescribe the terms and conditions under which the new burdens were imposed. The right of subrogation to provide the means of reimbursement for compensation allowed and paid in consequence of a third person's negligence was an important creation of the Legislature. It was intended to benefit the public, the employer and employee, as well as the dependents of the latter. The right to which the employer is subrogated are the rights of "the employee" or of "the dependents," and these rights apply to "any compensation paid." The contract of employment was the employee's contract with his employer. The employee agreed to statutory reimbursement for the protection of the employer to the extent of the compensation paid in the event of a recovery from a third person—the wrongdoer whose negligence caused the loss. The statute is by construction a part of the contract of employment and that contract binds alike the employees and the latter's legal representative. *City of Grand Rapids v. Crocker*, 219 Mich. 178, 189 N.W. 221.

The court said that the measure of the employer's statutory right to subrogation under the Workmen's Compensation Law was reimbursement for the full amount of compensation properly paid by employer to employee's dependents, with the employer's expenses for making recovery to that extent from a third person whose negligence caused the death of the employee. The court said in connection with the view expressed as to the variance with the provisions of Lord Campbell's Act and that of the Compensation Act:

The Workmen's Compensation Law is the later enactment. It is an independent statute creating the remedies and liabilities and covering the entire subject of legislation to which it relates. It is well settled in the law that such a statute may modify inconsistent provisions of an earlier act without referring to him insofar as disbursements required by Lord Campbell's Act are inconsistent with disbursements required by the Workmen's Compensation Law, the provisions of the later Act control the specific instances to which it applies.

It was held that the employer was entitled to the entire fund remaining after payment of the attorneys' fees. *Bronder v. Otis Elevator Co., et al.*, 237 N.W. 671, 121 Nebr. 581 (1931).

The proper party to bring the action is the personal representative, and the Compensation Act merely relates to the distribution of the proceeds. In one instance where the administratrix, who was also the widow of the deceased, did not stand to gain by the action against the third party, she made a contract with the insurance company and with the employer that in the event there should be recovery, the entire amount, with the exception of ten per cent, would go to the employer and to the insurance company. The court held over objection that the administratrix in this instance was a proper party to bring the action, which was affirmed. *Goeres v. Goeres, supra*.

Just how the amount recovered in any action by the administratrix shall be divided as between the parties is of no concern of the defendant. See *Otis Elevator v. Miller and Paine*, 240 Fed. 376 153 CCH 302 (1917). Instructions to the jury that the amount of compensation received is immaterial and that the jury need not be concerned with the division of the fruits of the lawsuit, if any, are proper. *Graham v. City of Lincoln*, *supra*.

Third Party's Action Over Against Negligent Employer

The question of whether a third party, in action by an employee, can get contribution or indemnity from the employer when the employer's negligence caused or contributed to the injury has not been litigated in the State of Nebraska. The courts of the various states are more or less evenly divided on this question. It is indeed one of the most interesting angles of the compensation subrogation problem. In states where compensation subrogation is allowed, recovery over by way of indemnity has been allowed in certain instances. Such a right may be based on an express contract of indemnity where the employer has given a covenant to the landlord to hold the landlord harmless in the event of claims (*Kaylor v. Magill* [C.C.A. 6th] 181 Fed. 2d 179 [1950]), or it may result from a separate duty based on the relationship, such as a bailor-bailee situation (*Baugh v. Rogers* 24 Cal. 2d 200, 148 Pac. 2d 633; 152 A.L.R. 1043 [1944]) or a separate implied obligation to use care (See *Westchester Light Company v. Westchester Small Estates Corporation* 278 N.Y. 175; 15 NE 2d 567 [1938]) or duty of primary to secondary wrongdoer. An example of the later is *American District Telegraph Co. v. Kittleson et al.*, decided by the Eighth Circuit Court of Appeals in 1950, 179 Fed. 2d, 946. This was an instance where the defendant, Kittleson, an employee of Armour and Co., was injured when an employee of the American District Telegraph Co. fell through a skylight at the Armour Building, landing on Kittleson. Kittleson received compensation from Armour's and brought an action against the American District Telegraph Co. for damage. The American District Telegraph Co. filed a third-party complaint against Armour and Co., contending that the fall of their workman through the skylight was due to the negligence of Armour and Co. The District Court of the Northern District of Iowa gave judgment to Kittleson and to Armour's and entered an order for dismissal of the third-party complaint. The American District Telegraph Co. appealed. The Circuit Court of Appeal affirmed the judgment in the amount of \$60,000 in favor of Armour's and Kittleson as against the American District Telegraph Co. In this case \$6,800 had been paid in compensation benefits. The court further held that Armour and Co. could be held liable to American for the damages that American had to pay Armour's employee. Such a finding was based on the idea that the employee had a right of action as against his employer, Armour and Co., for compensation, that Armour and Co. being subrogated could, along with the employee, sue the third party whose negligence brought about the injuries, Armour's being

entitled to recover the \$6,800 paid out in compensation, and the employee entitled to receive damages in excess of that to which he had received in compensation. American, in turn, it was held, could recover on the ground that the employer's negligence was primary, since it created a dangerous condition; that is, allowing the skylight to become encrusted with dust, such that the employee of American could not distinguish it from the roof around it, while the negligence of American, the third party, was secondary in that its employee failed to discover the danger. The court indicated there was an implied promise of indemnity by the primary wrongdoer to the secondary wrongdoer. The court, in discussing it, indicated that "indemnity" implies a primary or basic liability in one person, though a second is also liable with the first to a third, and discharge of the obligation by a second person leaves him with a right to secure compensation from one who, as between themselves, is primarily liable. Court said that the difference between "indemnity" and "contribution," in cases between persons liable for a wrong, is that in the former the law implies an agreement or obligation and enforces a duty on the primary or principal wrongdoer to respond for all the damages, whereas in the latter there is no agreement, expressed or implied, but a common burden which the parties stand in equali juri and which in equity and good conscience should be equally borne. See also *Chicago and NW Railroad Co. v. Booten* 57 Fed. 2d 786 CCA Nebr. 1932, *Union Stockyards Co. of Omaha v. Chicago B&Q R. Co.*, 196 U.S. 217, 222, 25 S. Ct. 226, 49 L. Ed. 453 and 2 Ann. Cas. 525. In the latter case, it was said that indemnity is given to those whose only negligence is failure to discover a condition created by the negligence of another where both are liable to a third party.

As a result of the above, the attorney representing the employer under subrogation, when made a party defendant, is faced with a dilemma. Instinctively he is desirous of securing the maximum recovery on behalf of the plaintiff in order that he may be reimbursed in the amount for compensation, and at the same time knows that in the event of a large recovery by the plaintiff, he will be obliged to defend on the third-party complaint of the third party as against the employer for indemnity. The writer knows of two actions presently pending where the attorney is faced with such a situation. It is felt that in the future more third-party complaint actions will be filed.

LEGAL PROBLEMS IN DISABILITY INSURANCE

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In 1932 Amelia Chard was an instructor in French at the high school at Beatrice, Nebraska. Eighteen months previously she had purchased a life insurance policy which provided for monthly total

disability benefits if "the insured has become totally disabled by bodily injury or disease so that he is and will be thereby wholly prevented from performing any work, following any occupation or engaging in any business for remuneration or profit." The policy further provided that "if at any time the insured shall become able to perform any work, follow any occupation, or engage in any business for remuneration or profit, no further income payments shall be made." In 1932 Miss Chard became seriously ill, had a major surgical operation, and suffered a nervous and mental breakdown which resulted in private hospitalization and treatment by physicians and psychiatrists. For a period of ten years the insurance company paid the monthly total disability benefits.

By 1943 Miss Chard had become a night clerk in the Blackstone apartment hotel in Omaha working from 11:00 P.M. to 7:00 A.M. six days a week.

The insurance company discontinued the disability payments, and litigation followed. The trial court refused to direct a verdict for the defendant, and the jury awarded a verdict to the plaintiff. On appeal, the Supreme Court of Nebraska in 1944 held that the trial court was correct in refusing to direct a verdict for the defendant. (*Chard v. New York Life Insurance Co.*, 16 N.W. 2d 858 [1944])

The total disability clause in this case referred to inability to perform "any work," yet the court gave considerable attention to whether the insured was capable of resuming teaching. The court considered the nature and demands of the night clerk duties being performed by the insured and gave attention to such factors as the following:

1. There were few registrations during the insured's hours of duty.
2. Her work was done in comparative quiet, with lack of confusion.
3. The job did not require exceptional skill, tact, or great mental concentration.
4. "She does the work fairly well, but makes many mistakes ordinarily not made by others."

I have summarized this case in order to use it as a text that I can refer to in discussing legal problems in disability insurance for the case highlights a number of those problems.

Disability insurance achieved its original prominence as an adjunct of life insurance, and a considerable amount is still written in that way. It is that field to which all of us who write disability insurance in any form today look to for guidance and precedents.

Perhaps I should explain right here at the outset that there are two fundamental kinds of disability insurance. One is what might be called the long-term type, providing benefits for total

and permanent disability. Such benefits may continue to be paid up to age 60, 65, or, in some cases, even for life. This is the kind of coverage customarily provided by the disability provisions of life insurance policies.

The second type or short-term disability coverage is written by the health and accident or, as some prefer to call it, the sickness and accident insurers. These contracts have nothing to do with life insurance but provide, usually, weekly or monthly indemnities during periods when the insured is unable to work. In recent years many of the large life insurance companies have begun to write the separate contract type of sickness and accident insurance so that, as far as the source of the coverage is concerned, the situation is a little mixed. However, there is a real difference between the two kinds of coverage, about which more later.

My company, the Prudential, has been in the individual sickness and accident field only since 1952. By that I mean that only during the past four years have we written so-called income protection policies—not involving life insurance—to pay monthly benefits in event of inability to work because of sickness or injury.

We in the Prudential have had a great deal of experience with disability clauses in life policies—as a matter of fact, probably the first instance of the use of such clauses in the United States was in the weekly premium policies issued by Prudential eighty years ago providing for sickness benefits ranging from \$3 to \$25 a week. Our experience with that coverage was not good—the English Prudential had previously found it “disastrous”—and it was abandoned in 1877.¹ We did not get seriously into it again until about forty years ago and there were times in the thirties when we wished we hadn't. For many reasons it is not an easy form of insurance to write. While in some respects its legal aspects fall within a rather specialized area of the law, it is related, in many ways, to fields such as workmen's compensation with which most lawyers come in contact at frequent intervals.

The insurance industry, and particularly the life insurance industry, has had a large part in the emphasis placed on economic security today. We have taught the family head to believe that the protection of his brood against the hazards of life is among his highest duties, that he must provide, through insurance, against the day when he is no longer available to bring home the bacon.

But death is not the only hazard he faces; he may be incapacitated by sickness, injury, or even by advancing years. In many cases the need in disability is even greater because the one-time breadwinner, instead of being taken out of the picture, remains as a nonproductive consumer—and because of his condition a heavy consumer—of his family's reduced means.

According to Dr. Solomon Huebner, the leading writer-philos-

¹ The Prudential, May and Oursler, pp. 70-71, 74.

opher on life insurance, a condition of total and permanent disability—which he calls “living death”—is the worst of the three forms of death to the self-supporting individual, the other two being “actual death” and “retirement death.”² To provide protection against “living death,” however, presents problems that are unique and without counterpart in the life insurance field. They spring from the difficulty of defining the contingency insured against and the extremely subjective nature of the factors controlling the presentation of claims. In life insurance, for example, there is no problem of interpretation in judging the quick from the dead; nor can death be imagined or feigned (except for the rare case where there is a mysterious disappearance for seven years, and that sort of thing is normally motivated not by desire to cheat an insurance company but by desire for a new girl friend).

But total disability depends on what a man can do, and what he can do is invariably conditioned by what he is willing to do, and what he is willing to do depends all too frequently on the very practical consideration: “What’s in it for me?” A man who has a backache usually will not give up a \$150 a week job to collect a \$25 weekly indemnity. But if he is out of work anyway, that backache may suddenly become much more painful and debilitating.

It is extremely difficult to take proper account of such factors in actuarial planning. Disability insurance makes a valiant, and, on the whole, a remarkably successful attempt to apply the sharp, sure mathematics of actuarial science to an equation of imprecise terms, the solution of which depends upon the infinite variety of human nature.

If I were to ask you to tell me on what conditions disability benefits should be payable, that is, to state the risk that should be insured against in disability policies, no doubt you would say that benefits should be provided when a man is sick or hurt and unable to work. I would agree with you—that is our objective. And we would like to define it just that simply, only the facts of life will not let us—the facts of life being, in part at least, the ingenuity of lawyers.

A man who’s down on his luck and unable to find a job stubs his toe. Now he is hurt and unable to work. He could collect under the above definition, and you would help him. But it is not a claim an insurance company would feel it should pay, because by “sick or hurt and unable to work” its policy contract really meant to provide benefits only when the sickness or injury was severe enough to, and did, necessitate cessation of work. Well, then, we have to say so, and “there’s the rub.”

You are all familiar with the rule of law that the terms of a written instrument are construed against the drafter. This is particularly true of insurance policies which are contracts of adhesion,

² Life Insurance, S. S. Huebner, 4th Ed. pp. 362-3.

contracts which are offered to the insured on a "take it or leave it" basis without his having an opportunity to negotiate about any of the terms or conditions. And when, as in a disability case, the contest presents a picture of appealing human needs, clamoring in vain against an impersonal financial edifice of untold (but well known) resources, the application of this rule can become a little exaggerated.

The companies that first wrote disability insurance sought to secure their position by using an ironclad definition of disability, which, literally construed, would have provided for the payment of benefits only to insureds who were flat on their backs and mentally incompetent. These companies intended and followed a more liberal practice in the payment of claims, but they wanted the discretion in their hands to protect themselves against malingerers.

The contingency insured against was described as Total and Permanent Disability. "Total" was further defined as "the incapacity, resulting from bodily injury or sickness, to perform any work or engage in any occupation for compensation or profit."³ "Permanent" was intended to mean that the disability must be of such a nature and severity as to continue indefinitely; some companies specifically stated that the disability must be "for life." Let's see what the courts did with these concepts.

In *Federal Life Insurance Co. v. Lewis*,⁴ the Supreme Court of Oklahoma took the word "permanent" out of its dictionary meanings and re-defined it for insurance purposes. The policy promised benefits upon receipt of proof that the insured would be "continuously and wholly prevented for life, from pursuing any and all gainful occupations." The medical evidence showed that the insured was suffering from a disease known as ataxia tabes dorsalis, that as a result he had to some extent lost control of the muscles of the lower body and walked with great difficulty. However, he was apparently improving. The company had allowed benefits for a time but discontinued them when it appeared that the insured had sufficiently recovered. In the court action, the insured's doctor testified that the prognosis was not good but that he could not state definitely the insured would never be able to work again. The company sought to uphold its position on the ground that there was no proof of permanence.

It was recognized, of course, that the permanence of a condition of health is a matter of dispute even in medical circles, and the company expected to resolve doubtful cases in favor of the insured. In fact, it had done so in this instance. And there was a provision in the policy for periodic review of claims and cessation of benefits in the event of recovery. The court seized upon that as an implied acknowledgment by the company that "permanent" did not mean

³ Total Disability Provisions in Life Insurance Contracts, Herrick, p. 38.

⁴ 76 Okla. 142, 183 Pac. 975 (1919).

what it said. The opinion stated that, in the light of recovery clause, to give "permanent" a literal meaning would make the policy ambiguous and contradictory and meaningless in part. It was concluded that if the policy was to be read as a whole, "permanent" could mean no more than "probably permanent."

Decisions like this made the evaluation of the probability a question of fact. Questions of fact are for the jury, and there were the usual astounding results. Cases are on record in which benefits for permanent disability have been ordered paid to claimants who admitted in court that they had fully recovered—on the ground that, despite the facts, the disability should reasonably have been looked upon as "probably permanent" at the time of claim.⁵ The companies had not charged for benefits for "probably permanent" disability and never meant to promise them but found that they had done so in spite of their precautions.

Some of the later cases went even further. In *Bahneman v. Prudential*,⁶ the Supreme Court of Minnesota classified as permanent any disability "which might reasonably be expected to continue for an indefinite time." A Mississippi court defined "permanent" by antithesis saying, "We construe the word *permanent* when used in a policy provision such as this as one used for the proper purpose, and for the purpose only, of excluding disabilities which are merely *temporary*. Although the disability be one which may or will pass away in a fair period of time, yet if the required period is longer than that which, reasonably considered, is only temporary, then it must of necessity fall within the opposite general term 'permanent' because it is not temporary."⁷ Dr. Arthur Hunter, who developed the first generally accepted tables for disability rates and reserves, once commented: "*Permanent* in connection with disability under life contracts has come to have about the same degree of literalness as it has in connection with waves in women's hair."⁸

This trend in court decisions created a serious problem. Temporary disability could not be written at rates appropriate for a real permanent-disability risk. The companies resorted to compromise and adopted a presumptive clause which provided that disability would be considered permanent when it had lasted for a stated period, usually three months or six months. That, frankly, placed the companies in the temporary-disability business which they had sought to avoid. The health and accident insurers who wrote disability income coverage under separate contracts were always in that field and fixed their premium rates accordingly. Permanence was never a factor nor a problem for them.

⁵ *New England Mutual v. Durre* (Ind. Appl. 1936) 199 N.E. 868.

⁶ 193 Minn. 26, 257 N.W. 514 (1934).

⁷ 155 Miss. 515, 124 So. 485 (Supreme Ct. Miss. 1929).

⁸ *The Life Insurance Contract*, First Ed., Horne and Mansfield, p. 212.

As a result of this modification of the concept of permanence, my company on one occasion found itself under the necessity of paying so-called total and permanent disability benefits for pregnancy. The lady in question wrote us that, although under the best medical care, she had had four miscarriages and had been told by her physicians that the only way she could have a child was by being completely inactive during the entire period. We furnished claim forms and, because of the unusual nature of the case, assigned one of our representatives to investigate it. The representative reported that while it was a planned period of disability there was no question of its reality. He added, "I was impressed by the sincerity with which this woman is working at this job of having a baby. . . . She has lost other babies by not being inactive. She craves a child and is bound to have one if possible." The claim was approved. Shortly after the birth, we received a letter from the lady very courteously informing us that she was no longer disabled and expressing her appreciation to all the fine gentlemen of the Prudential who had helped her "the only way they could to have a baby the only way she could."

The other part of this "permanent and total" concept is defining what is meant by "total." The definition of the word "total" in this connection has been the subject of countless judicial pronouncements. In the first place, there is an important difference between occupational coverage and general or non-occupational coverage, i.e., the difference between inability to perform "the insured's occupation" and inability to perform "any occupation." Accident and health insurers wrote occupational coverage because they were in the temporary-disability business with benefits of limited duration, and they expected liability to attach whenever the insured was incapacitated to do his job. The insurers writing disability coverage in life insurance policies were concerned, on the other hand, with the long term only. They did not undertake to pay lifelong benefits, for example, to a street-car motorman who had hurt his foot and had been moved inside to an office job. So the life insurers wrote general rather than occupational coverage, promising to pay only when the insured could not work at all. Or at least they thought that is what they had done.

The courts took a different view. Practically speaking, none construed the clause as written; each case rewrote it to some extent, and some courts refused to recognize any distinction whatsoever between "his occupation" and "any occupation." In *Fogelson v. Modern Brotherhood*,⁹ a Missouri court said that a clause which included the usual language "inability to carry on any vocation or calling" "should be construed as meaning, if anything, the vocation or calling in which he might be following at the time he became disabled and not any vocation whatsoever he might be able to follow after he became disabled."

⁹ 121 Mo. App. 548, 97 S.W. 240 (Kans. City Ct. of Appeals 1906).

The Nebraska Supreme Court has followed this approach whereby no distinction is recognized between clauses referring to inability to perform the insured's occupation and clauses referring to inability to perform any occupation.¹⁰ The *Chard* case which I discussed at the outset is a recent example of this line of cases in Nebraska. The disability clause there involved referred not just to inability to perform the insured's occupation but to inability to perform "any occupation." The insured's occupation had been that of serving as a teacher of French. The opinion doesn't state what she was receiving in this employment in 1932, but we can assume, I am sure, that it was not more than \$2,500 a year, and probably less. Later she was serving in a job as an apartment hotel night clerk at \$1,200 a year, which certainly, using the plain language of the disability provision, involved "performing any work, following any occupation or engaging in any business for remuneration or profit." Yet the court considered whether the insured might have been able to resume teaching and held that the night clerk job did not prevent her from being entitled to total disability benefits.

In the *Chard* case, the court quoted with approval from other leading Nebraska cases to the same effect. One of these was the case of *Miceli v. Equitable Life Assurance Soc.*, 293 N.W. 112, rehearing denied 294 N.W. 659 (Nebraska 1940). In that case a laborer was covered by a permanent disability provision in a group life insurance policy which stated that payments would be made only if the insured was disabled from performing "any and all gainful occupation." In the original opinion the court stated:

If an insured's inability to do substantially and practically any of the material acts necessary for the transaction of his usual business or vocation is affected . . . he will be held to be totally disabled.

On request for rehearing, company objected to language "any of the material acts." Court denied rehearing, saying:

It is not important how many individual acts—whether one or several—the insured is prevented from performing. . . .

This approach of the Nebraska decisions is sometimes referred to as the "liberal" rule, sometimes as the "minority" rule, and sometimes as the "majority" rule. The line-up of state supreme courts on this issue, *i.e.*, whether the words "any occupation" are to be "construed" as meaning the insured's occupation, has shifted over the years. For example, in 1943 the Court of Appeals of Kentucky overruled a line of cases extending over a period of thirty years in that state which had held that a non-occupational disability clause was to be construed as though it were an occupational clause referring to the insured's occupation. (*Mutual Life Insurance Company of New York v. Bryant*, 177 S.W. 2d 588 [1943]) The court referred to its previous rule which it was overruling as the "minority" rule and characterized it as follows:

¹⁰ *Reinsch v. Travellers*, 133 Neb. 249, 274 N.W. 572 (1937).

The minority rule is generally referred to as the "liberal" rule of construction, but we think it is so ultra liberal as to surpass all rules of construction since it changes the meaning of the plain and unambiguous language. . . . After due and careful consideration we have concluded that the "minority" rule . . . is unsound and a misapplication of the law. . . .

An interesting sidelight of this Kentucky decision is that the court decided that its action in overruling the previous line of cases was not to be given retroactive effect, so that policies issued in Kentucky during the long period that the court was adhering to the "liberal" rule were to be construed as occupational clauses, even though they related to inability to perform "any occupation." Other states have likewise changed their minds on this question.

The application of the "liberal" rule has created some situations which were never anticipated and has resulted in the payment of claims which seem to many of us quite inequitable because of the drain they place on the disability reserves that have been set up for all of our policyholders. Back in 1919 we insured a man down in one of the southern states under a contract that provided for waiver of premium and monthly income benefits for total and permanent disability to carry on any occupation. The insured was an auditor for the Tax Commission, earning \$2,040 a year. He suffered from osteomyelitis, as a result of which his right leg became stiff. He was forced to leave his job for the better part of a year but later went back to work in the same department at the same salary. Prior to his disability, he had done a considerable amount of travelling, but afterwards he did not. After he returned to work, we discontinued benefits and were promptly sued. By the time the case came to trial, the insured had received a promotion and was making over \$3,000 a year. The insured's attorney argued that his client was no longer able to do his former work, and that if he did not have the osteomyelitis condition, he would be able to earn much more than his present salary. There was a judgment for the insured.

The insured has continued to work at his job and has continued to advance both in position and in salary. We have twice more attempted to recover the case and have twice been defeated in court. The last time we were threatened with a countersuit for \$2,500 for harassing the insured by requesting proof of continued disability. On a check-up in 1951, we found that this insured was then earning \$6,000 a year, but we have had no choice but to continue benefits and are still paying them.

Some strange situations arise from the application of the rule followed in certain states, including Nebraska, to the effect that inability to do any work is to be construed as meaning inability to do substantially and practically *any* of the material acts necessary for the transaction of the insured's usual business or vocation. See *Miceli v. Equitable Life Assurance Society, supra*. In the Missouri case of *Heald v. Aetna Life Insurance Company*, 104 S.W. 2d 379 (1937), the insured was a left-handed meat market employee who

suffered the loss of the thumb on his right hand. He was thereafter able to wait on customers, could buy meat for the market and sell it, and could supervise the work of other employees, but was unable to cut meat, a principal phase of his duties, because of his inability to hold or clamp tightly the pieces of meat in cutting or sawing operations due to the loss of the thumb. A judgment for the insured was affirmed. The unpredictability of decisions in this area is rather dramatically illustrated by the case of *Hood v. Texas Indemnity Insurance Co.*, 209 S.W. 2d 345, decided in Texas in 1948. A psychiatrist, a witness for the plaintiff, stated that the plaintiff's neurosis allegedly caused by injuries to his foot and elbow was, and I quote:

in part caused by an unconscious desire for compensation and after termination of this litigation he will begin to improve.

The Supreme Court of Texas affirmed the trial court's judgment for the plaintiff.

The majority view today is that the "any occupation" clause protects against inability to carry on the insured's own occupation or such other occupation as he is reasonably fitted for by training and experience. In other words, it is not to be contended that a paralyzed ditch-digger should learn to write short stories for a living, or that a surgeon who loses his eyesight should sell pencils on a street corner. But a man who suffers an ailment which makes a certain type of work difficult and who then turns to another in which he is able to make a living should not be considered totally and permanently disabled. Again, that is the rule which the companies themselves try to have their claim departments follow, but, like "probable permanence," it gives rise to fact questions which the industry, knowing the caprice of juries, never intended to get involved in.

Quite frequently courts have ridiculed arguments in favor of more literal construction of total disability clauses by saying that ability to perform a trivial operation, such as selling peanuts or shoestrings, should not be considered sufficient to bar a claimant from benefits. See *Mutual Life Insurance Company of New York v. Bryant, supra*. Again it is not the contention of the companies that such an unrealistic view should be followed, and this type of argument really amounts to erecting a straw man so that it can be knocked down. As we saw from the *Chard* case here in Nebraska, however, there are many instances where the work which the insured is doing and the money he is earning are far from "trivial." Insurance companies are usually willing to continue payments for a rehabilitation period until they can be sure that the insured is actually able to continue the new work, but they don't think they should be required to continue payments under total and permanent disability clauses where the insured has settled down to earning substantial income from work in which he is engaged.

However, the facts of life under the court decisions are often to the contrary. For example, herein Nebraska a salaried political

job has been held not to be a gainful occupation within the purview of the disability provisions of a life insurance policy. In *Woods v. Central States Life Insurance Co.*,¹¹ the insured had a policy of the type we have been discussing, providing for benefits for total and permanent disability from carrying on any occupation for profit. Insured was a registered pharmacist who suffered partial paralysis from the waist down. He gave up his trade and later was elected county treasurer. The company sought to terminate benefits on the ground that the insured was obviously not disabled from carrying on any occupation as specified, but it was held that this was not such an occupation. The court said his job was a sinecure "bestowed upon him perhaps because of his infirmities by an indulgent people," and cited with approval a South Carolina decision which held that a sheriff's job isn't really work.¹²

The question of whether a person is totally and permanently disabled is complicated by the fact that that often involves subjective considerations. In your Omaha newspaper of October 18th there was a news story with the heading "Total Disability' Result of Attitude." It tells about a worker who received minor injuries, but because of the fact that he interpreted the accident as "a warning of the displeasure of the Lord" and "a form of supernatural warning or punishment," his claim of total disability was upheld by the Supreme Court of Florida.

As has been stated, it was never intended to adhere to an unrealistic construction of "total disability" and to require a state of absolute helplessness as a condition of recovery. The courts early said it was sufficient if the insured's condition precluded him from performing the essential parts of his own occupation or such other occupation as he might be capable of fitting himself for within a reasonable time. When a salaried employee is laid off from work indefinitely on a doctor's order, the problem is fairly simple. It is the professional man and the independent and self-employed business man who worry our claim departments to death. In such cases you not only have trouble finding out what the man is able to do; you also can't find out what he is doing. That opens the door to a lot of questionable claims.

We had an insured whose business was the operation of apartment houses. He had poliomyelitis in his youth and claimed to have a weakened left leg, although at the time the insurance was issued he stated that he was in no way handicapped by the residual polio condition. His policies provided for the payment of \$500 a month for total disability comencing prior to age 60. The provision for after age 60 benefits was much more limited.

Several years before he reached age 60, he submitted a disability claim, along with a documented list of some 21 falls occurring from 1942 to 1945. He also claimed that he had to give up his business.

¹¹ 132 Neb. 261, 271 N.W. 850 (1937).

¹² *Dukes v. Jefferson Standard*, 172 S.C. 502, 174 S.E. 463 (1934).

His attending physician would go no further than to say that the disability was partial and that he might experience more difficulty with the leg as he grew older.

Our investigation revealed that instead of giving up his business he had merely entered into a partnership arrangement to let someone else appear to run it while retaining a substantial interest himself and continuing to direct most of the operations. It became increasingly evident that the insured was making a determined effort to establish a set of circumstances that would support his retirement on \$500 a month. We denied liability, and suit was instituted in the circuit court. The insured handled his own case, but he was so vigorous in the prosecution of it, jumping from his chair and running to the jury rail to make a point, parading around with his exhibits, etc., that the jury, for once, found in favor of the company.

There have also been theories developed to allow recovery in cases where the insured persists in working despite his disability handicap. A Minnesota court said it was enough if his condition was such that common care and prudence dictated that he should desist from the transaction of business.¹³ A Nebraska court said that a man whose disability incapacitated him should not be penalized because he continued to carry on "if he ought not soundly to be making the attempt."¹⁴

All of this, as you can see, is a pretty far cry from the original idea behind the disability clause. It simply reflects the maze you run into in trying to develop rules which depend, in so large a part, on predicting and classifying the behavior of the human animal. One authority has stated that "disability is total if the part of the duties of his occupation, which the insured is prevented by such disability from performing, is a substantial part, although he may still be able to perform some considerable part."¹⁵ I defy anybody to apply that one consistently!

Those are some of the problems that beset Home Office counsel in trying to define the contingency insured against in disability insurance. They are formidable but not, we believe, insoluble. Their solution has been delayed because the experience of the companies writing disability insurance was so disastrous during the depression years that most of them stopped writing it entirely. The problems of definition played some part in that debacle, but they were by no means the major cause. When disability insurance first began to be written on a commercial basis, the only statistics from which rates could be computed were those based on the experience of the fraternal orders. Those were closely knit organizations in which the members had a personal sense of responsibility for the

¹³ *Lobdill v. Laboring Men's Mutual Aid Assn.*, 69 Minn. 14, 71 N.W. 696 (1897).

¹⁴ *Miceli v. Equitable*, 138 Neb. 367, 293 N.W. 112 (1940).

¹⁵ T.A.S.A. Vol. XXVI Part 2, No. 74.

welfare of each other, and their experience was relatively favorable.

Disability coverage associated with life insurance—which originally was limited largely to waiver of premium—by the 1920's had become an important sales factor. Competition forced its expansion, first to payment of the face amount of insurance in instalments and then to disability income. In the latter '20's, some companies promised disability benefits as high as \$15 and \$20 per month per thousand of face amount—and most of it based on the inadequate fraternal rates.

When the depression came, disability claims mounted at a rate which suggested that nothing short of a major epidemic was sweeping the country. As one authority has put it: "Indispositions that were a mere annoyance in times of full employment and high earnings had a tendency to be completely prostrating when the dinner pail was empty."¹⁶ Underwriting had been far too liberal, and many people found themselves in the '30's with disability protection that exceeded their earning capacity. Human nature reacted as human nature does under such spurs. There are those in my company who can remember when the disability claims were stacked so high you couldn't see out the Claim Department windows, and across the street you couldn't see in because of the pile of policy loan applications. The insurance industry showed a heavy net loss on disability business during all the years from 1930 through 1941.¹⁷

It is not intended to suggest by any means that all of these claims were fraudulent. Many of those whose businesses crumbled were actually prostrated by the magnitude of their losses and suffered recognizable mental and physical impairments. But the borderline cases all fell on one side and some that were not even close were propped up and pushed over. One of our insureds was a real entrepreneur with the cleverness that is characteristic of the breed. During the entire '30's he was jumping in and out of business with the agility of a jack-rabbit. His fortunes were equally kaleidoscopic; one year he was a millionaire and the next he was broke. He took the precaution in 1931 to have himself declared incompetent and his wife appointed his guardian. Although he was the brains behind many enterprises he went to great lengths to keep his activities secret. We paid disability benefits from 1931 to 1937 before we discovered the facts. By means of a surveillance we obtained documentary and photographic proof of his multifarious activities. However, the insured carried out his faked insanity to the bitter end—at one time coming into the home office and threatening our people with a loaded pistol. Our negotiations for settlement of the case were finally completed in 1941, at which time the guardianship was discharged. By that time the insured was considerably less con-

¹⁶ The Disability Clause—Its Development and Present Status, S. C. Smith, Jr., *Journal of the American Society of C.L.U.*, Vol. V, p. 129.

¹⁷ Total Disability Provisions in Life Insurance Contracts, Herrick, pp. 33-35.

cerned about his disability benefits, as he had a new factory with 300 employees and Government contracts for a million uniforms.

Since 1932 practically all of the life insurers have reverted to waiver of premium as the sole long-term disability benefit. Having been burned once, the industry wants to be pretty sure of its ground before venturing into disability benefits of indefinite duration again. With waiver of premium, the problems of definition still remain, but the temptations are much less. People are not going to give up a job for an imaginary or trifling ailment just to have their life insurance paid for. They like to eat, too.

A few life insurance companies are going further and offering disability income under the traditional clauses, although the premium rates are increased and benefits cut down to \$5, or, at a maximum, \$10 per month per thousand. Insurance actuaries now have sufficient experience to be able to establish rates for commercial disability insurance that should meet the cost of the coverage. Underwriting has become much more conservative, and the dangers inherent in disability over insurance substantially reduced. But, by and large, the industry continues to be faced with a subjective approach to the concept of disability as the contingency insured against.

The Federal Social Security Law, in providing, in effect, a waiver of premium element, describes disability pretty much in the traditional way. To qualify for the so-called "freeze"—the elimination of disability periods from your earnings base—you must have a disability that (1) has lasted more than six months, (2) is expected to be of a long-continuing, indefinite duration, or to result in death, and (3) keeps you from any substantially gainful work.¹⁸ You will note that all of the old problems of permanence, probable and presumptive permanence, general or occupational coverage, and inability to work, are present here. The Government will no doubt become involved in the same claim difficulties that the insurance industry has had. Under the 1956 amendment to the Social Security Law, you may, if disabled as defined above, start collecting monthly cash disability benefits after age 50, subject to a waiting period of six months which cannot begin before January 1, 1957, nor more than six months before you reach age 50.¹⁹

Some in the insurance industry who believe that realistic disability income protection should be provided by the private companies have suggested that the way to do it is through the adoption of a new approach to the definition of the contingency insured against, one that will make its existence or non-existence easily ascertainable, like the fact of death. One suggestion along this line is to define disability in terms of reduction in earning capacity. This approach is in use by at least one company.²⁰ This company offers

¹⁸ Social Security Act (1954) Sec. 216.

¹⁹ Social Security Act (1956) Sec. 223.

²⁰ Mutual Benefit Life of Newark, N. J.

waiver of premium and disability income at \$10 per month per thousand up to age 55. Total disability is considered to exist when, due to sickness or injury, the insured's income drops below one-quarter of his former earned income and stays there for a period of four months.²¹ Earned income is defined so as to exclude amounts received by way of pension, retirement allowance, or partial salary continuance during disability.²² There is also pro-rate clause which provides in effect that disability benefits, together with all other disability benefits to which the insured may be entitled, shall not exceed 75% of pre-disability earned income.²³ There *are* problems in the administration of a pro-rate clause, but apparently they are not insuperable. Several other American and Canadian companies have a pro-rate clause in contracts that have the traditional definition of disability.

The sickness and accident branch of the industry has also come up with some interesting innovations. That line of insurance was not so badly hit by the depression because the benefits provided by those contracts were relatively short-term. In addition, the bulk of the business was either cancellable or renewable at the option of the company so that dangerous exposures could be readily eliminated. However, in the last ten years, perhaps partly because of the abandonment of cash disability coverage in most life insurance policies, there has been a tendency toward benefits of greater duration.

Income protection contracts are on the market today which provide for accident benefits for life and sickness benefits for as long as ten years. The trend may be back to even longer benefit periods for sickness, subject to various protective limitations to avoid the abuses which plagued the companies in the past. Accident benefits for life may be the source of litigation over whether disability was caused by sickness or by an accident. As you know, there have been many cases on this general issue arising out of double indemnity clauses. The typical case in this category is the insured who, because of illness or disease, is in a weakened condition, faints, and hurts himself in a fall. Accident or disease?

A company here in Nebraska offers sickness benefits for life, although they are reduced 50% after the first benefit year.²⁴ An increasing amount of income protection coverage is being written on a non-cancellable basis and guaranteed renewable at the option of the insured to a stated age, usually 65. In consequence, the sickness and accident industry, too, has had to face up to the vagueness of the concepts in disability insurance and try to do something about it.

²¹ Total Disability Provisions in Life Insurance Contracts, Herrick, p. 132.

²² The Disability Clause—Its Development and Present Status, S. C. Smith, Jr., Journal of the American Society of C.L.U., Vol. V, pp. 135-136.

²³ Total Disability Provisions in Life Insurance Contracts, Herrick, p. 132.

²⁴ World Insurance Co.—see Time Saver p. 936.

While still adhering to the traditional approach, they have sought to clarify, as well as can be, the distinction between general and occupational coverage. Disability in these contracts is defined as occupational for the first year (or two years) and thereafter as general. For example:

(a) "total disability" means the complete inability of the Insured due to sickness or injury to perform any and every duty pertaining to his occupation until Monthly Income Benefits have been payable under the Policy for 24 months during any period of disability; and

(b) after Monthly Income Benefits have been payable under the policy for 24 months during any period of disability, then for the remainder of such period, "total disability" means the complete inability of the Insured due to sickness or injury to engage in any and every gainful occupation for which he is reasonably fitted by education, training or experience. . . .²⁵

It will be noted that Part (b) adopts and seeks to codify the language which the courts included by construction in the old disability clauses. This has a tendency to discourage further judicial liberalization. This combined definition will also make it difficult for any court to say that occupational and general coverage are one and the same.

Another salutary provision added by the sickness and accident insurers is one which reads: "In no event shall 'total disability' exist for any purpose of this policy during any period in which the insured is engaged in his or any other gainful occupation."²⁵ It has always annoyed claim departments to have to pay disability benefits to a person who was working and earning a substantial living just because a doctor was willing to certify that he ought to take it easy. (Remember the tax auditor, the county treasurer, and the sheriff I told you about.) We know, of course, that there may be instances in which a courageous man will struggle beyond his capacities and to the detriment of his health to keep his business going for his family's sake. Such cases are deserving and, no doubt, will continue to be paid. But still, it is not safe to have available disability benefits which can be drawn upon without the insured's even having to give up other sources of income.

A rather analogous situation presents itself in connection with coverage on which my company did some pioneering—Income Protection for Women. Women's Income Protection was something the industry rather shied away from, not because there isn't a need, and not because the ladies are bad risks, but because the great majority of them shortly succumb to the blandishments of some eligible male and retire from the labor market to become housewives. Just about the only objective thing about disability is the job; it is usually a lot easier to tell whether a man is working than to tell how he feels. But when is a housewife disabled? Too frequently, and too long, I am afraid, if her disability coverage is sufficient to enable her to

²⁵ Prudential Policy Forms SA ORS 154.

hire someone else to do her chores.²⁶ If you have issued to her a non-cancellable and guaranteed renewable disability contract, this can become quite a nuisance. We have minimized the risk by providing for a 50% reduction in benefits if the insured, at the commencement of disability, is not gainfully employed on a full-time basis away from her residence. There is no reduction in premium, so the benefit is pretty expensive after retirement from the labor market. It is designed for, and serves a valid purpose with, career women only.

The Sickness and Accident insurers also use a pro-rate clause to guard against overinsurance. It is one of the optional provisions under the Uniform Individual Accident and Sickness Policy Provisions Law recommended by the National Association of Insurance Commissioners and provides that if total disability income benefits receivable exceed the insured's earnings at the time of claim or exceed his average earnings over the preceding two years, whichever is greater, total benefits shall be proportionately reduced to the amount of such earnings with a pro rata return of premiums. There is a further provision that this scaling down shall not go below \$200 per month, regardless of earnings. In application, this clause is similar to that used by some of the life insurers, although it is more liberal and permits benefits up to 100% of earnings rather than 75%. Among its difficulties is the necessity of investigating insurance in force at the time of claim, which will involve considerable expense and delay. During the time it has been in use, we have been in a period of generally increasing earnings, and to date no extensive experience has been had with it.

Insurance against loss of earning power fills an important need and is a coverage which should be provided by the insurance industry regardless of the problems involved. Over the years, legal questions involving disability coverages have given rise to frequent litigation and hundreds of reported decisions, many of them conflicting. Radically changed economic conditions could bring back some of the early volume of disability insurance legal problems and court cases. But much progress has been made in reducing the area of dispute. There is much yet to be done, but we will continue to study and to experiment—and to hope that in the years to come we will develop sounder approaches and more precise concepts, and, in consequence, a better product.

²⁶ Occupation of housewife is considered by courts a gainful occupation. *Frace v. Mutual Life Insurance Co.*, 151 Pa. Super 354, 30 A(2) 380 (1943).

**SECTION ON MUNICIPAL AND PUBLIC
CORPORATIONS**

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"Some Phases of Municipal Bond Law".....Winthrop B. Lane, Esq.
"Zoning"Raymond E. McGrath, Esq.

SOME PHASES OF MUNICIPAL BOND LAW

Winthrop B. Lane

When your chairman invited me to address this group, he advised me that the group would be largely composed of overworked and underpaid municipal attorneys who would like a paper on some phases of the mechanics of issuing municipal bonds rather than a so-called learned treatise on one of the many unanswered questions that arise to plague municipal attorneys. Hence this paper will be primarily a sketchy outline of how to prepare an acceptable bond history and will cover some of the essential steps in issuing municipal bonds. I will touch only incidentally on a few questions of substantive law.

Why a bond history? The answer is twofold. First, municipal bonds are required to be registered with the state auditor to be valid. As a condition precedent to such registration, you must file with the state auditor what is termed a bond history. In the second place, every careful bond buyer demands a legal opinion as to the validity of the bonds. These opinions are based upon the certified bond history, the same as a title opinion on real estate is based upon the abstract of title.

What is the nature of a bond history? A bond history differs from an abstract of title in that in the main it is a verbatim transcript of all proceedings leading up to the issuance of the bonds. A transcript is required instead of an abstract because there are no bonded abstracters of municipal proceedings. An examining attorney would not be justified in relying on a non-bonded abstract that would have no standing in court. Also, if an investment banker is buying the bonds for resale, he will demand and is entitled to have in his possession written evidence, in a form which would be admissible in court, of all matters necessary to establish the validity of the bonds. In some instances, municipal records have not been too well preserved. The investment banker should require possession of adequate proof of the essential facts for his own protection.

Thus, our first suggestion is when you are preparing the resolutions, ordinances, minutes, etc., you make at least three complete copies. This will save you a lot of work later on. The original should be kept as a part of the city records, and the other two copies can be used in making up the bond histories. Only the municipality's original copy need bear the original signatures, but it will do no harm to have all copies signed. Order at least three copies of each

proof of publication. Sometimes it is difficult to get extra copies at a later date. Most publishers make no charge for extra copies. Also, in the case of an election, be sure to save at least three copies of the official ballot, as you will need them for your bond histories.

Now, as to the contents of a history. I need not remind this group that there is no such thing as common law municipal bonds. A municipality has no implied authority to issue bonds. It must, in each instance, find an applicable statute and follow the requirements of that particular statute. The contents of each bond history will thus vary according to the statute involved. However, there are certain features which apply to all bond histories.

In the first place, the bond examiner wants to know that the municipality issuing the bonds is legally constituted. In the case of school districts, Section 79-426, Revised Statutes of Nebraska, 1943, provides that after the district has exercised its franchise for a period of one year, it is presumed to have been legally organized. Thus, a finding in the resolution calling the election, or in the bond resolution, setting out that the district is a Class I, II or III district and has been in existence for more than a year is sufficient proof of this fact. A certificate of the clerk to this effect is usually acceptable, although a direct finding in the proceedings is better. If the school district has been recently organized, particularly under the reorganization statutes, a complete history of all jurisdictional steps required for the organization must be shown.

Most cities and villages have been in existence for such a long period of time that their legal organization is presumed, and no further showing is required. However, it is helpful to the examiner if the transcript shows whether the issuing city is a city of the first class, second class, or a village. Some cities are right on the borderline, and the law requires the city to follow the law applicable to its classification based upon population. Thus, if the population changes so as to throw the city into a different class, the city has no choice but to follow the law prescribed for that class of municipality. If the city has adopted the city manager plan under Chapter 19, Article 6, a statement at the beginning of the bond history to that effect is desirable. Otherwise, the examiner may not be familiar with this fact and may make requirements which are unnecessary. Also, cities having home-rule charters may by their charter make certain requirements applicable only to that city. Hence, it would be very helpful to the examiner if the local attorney would show that the city is operating under a home-rule charter and furnish a copy of the charter, or at least the pertinent parts thereof.

The earlier in the bond history that the above matters are shown, the better, so as to avoid needless requirements by the bond examiner and additional work by the local attorney.

I should also state that there are certain sections of the statute which make specific requirements as to the contents of the bond

history. For example, see Chapter 10, Section 707, which prescribes seven different items to be included in a school bond history. It is well, of course, to comply with the statutory requirements, but in general if the jurisdictional steps referred to in this outline are included you will not have much trouble with your bond history.

Certain proceedings may be, or are required to be, initiated by petition signed by a given number of resident owners or electors. For example, in cities of the second class or in villages, under Section 17-510, a paving improvement may be initiated by a petition signed by sixty per cent of the resident owners directly abutting upon the street or streets to be improved. A word of caution in regard to such petitions is in order. Follow the exact statutory language as far as possible, and do not include more than is required.

For example, under Section 17-510, all that is required in the petition is a request that a paving or other improvement district be formed and the description of the street to be improved. If the petition goes on to recite that the pavement is to be of concrete and twenty feet wide, this is a limitation on the powers of the city, and frequently it is found that these limitations are embarrassing. Sometimes separate petitions are prepared for each block or part of a street instead of describing the entire street or streets to be included in the district. It has been our judgment that separate petitions cannot be added together to form a single district. The council must follow the description in the petition and not make a larger or smaller district. In other words, the ordinance creating the district must be responsive to the petition and not vary therefrom. Frequently we have found that these petitions have not been drawn with proper care and are an embarrassment to the city. For this reason, where a district can be formed by council action without a petition, we have favored such action and treat the petition as surplusage. Where the council bases its action on a petition, the council must find that the jurisdictional facts exist. For example, if a percentage of the resident owners is required, the council shall find the exact number of resident owners who own property on the street to be improved and the exact number of such owners who have signed the petition. A mere finding that the petition is in proper form and signed by the required number of people is a conclusion and not a finding of fact. The council probably sits as a quasi-judicial body in making these findings, and such findings would not be subject to collateral attack. Mere conclusions, as distinguished from findings of fact, would be subject to collateral attack and not binding upon the court.

Most statutes provide some criterion for determining the necessary signers, as for example, in 17-513, the ownership of the property is determined by the records in the office of the county clerk or register of deeds at the time of the adoption of the ordinance. In cases where a percentage of the electors is required, the statute frequently provides that the number voting at the last general election is to be taken as the number of electors at the time of the

filing of the petition. Each statute must be examined to determine the criterion imposed by law and then appropriate finding should be included in the ordinance or resolution to show compliance therewith.

In a number of cases, the statute requires that before issuing bonds, the proposition of the issuance of the bonds or the improvement of the property, or both, be submitted to the electors at a general or special election. Here again care should be used to follow the exact language and not enlarge or deviate therefrom more than necessary. Our courts have held that the provisions of the proposition submitted may be a limitation on the powers otherwise granted to the governing body. Thus, even though the statute would otherwise authorize the issuance of a six per cent twenty-year bond, if the proposition submitted at the election states that the bonds shall bear three per cent interest and run for ten years, the city would be limited to three per cent ten-year bonds. Under the present conditions, where the rate of interest on municipal bonds has fluctuated widely, it has been a source of embarrassment to have unnecessary limitations fixed in the proposition.

Some people think it is necessary to include these limitations to have the election carry. I seriously question if limitations on interest rates or length of time the bonds are to run have effect on the outcome of many elections. These matters can usually safely be left to the governing body. Including certain provisions may render the bonds unsalable after they have been voted, and you have thus defeated yourself.

Where a petition is required to initiate the submitting of a proposition to the electors, care should be used that the petition and the proposition submitted are identical. Sometimes the petitions have been drawn by laymen and cannot be followed in the proposition. This necessitates the circulation of a new petition with the corresponding embarrassment to the original promoter. The petition, the proposition stated in the ordinance or resolution calling the election, and the ballot must be consistent and should be identical.

Some statutes required that when bonds are to be issued, "the proposition of the question must be accompanied by a provision to levy an annual tax for the payment of interest, if any thereon, and no vote adopting the question proposed shall be valid unless it likewise adopts the amount of tax to be levied to meet the liability incurred." See Sections 23-127 and 10-402. In many cases I believe a vote in favor of issuance of bonds would carry the implied authority or instruction to levy a tax for the payment thereof. However, it is customary and we would recommend that the proposition in every instance include a provision for the levy of a tax. This is usually done in a separate paragraph which can be worded about as follows:

Shall the mayor and city council cause to be levied annually a tax on all the taxable property in the city, in addition to all other

taxes, sufficient in rate and amount to pay the interest and principal of said bonds as such interest and principal become due?

One other point should be noted. Section 10-104 requires the auditor to detach and cancel all coupons maturing before the first tax to meet the same has become due. Often the first levy would not become due until a year after the date of the bonds. Hence, when interest is payable semi-annually, we put in the proposition submitted and in the bond form the provision that interest is "payable one year after date and semi-annually thereafter." This provision is only necessary in bonds payable out of a tax levy.

Our courts have held that in most instances where notice is required to be published, the publication in the manner and for the length of time specified by the statute is jurisdictional and not a mere irregularity. I do not want to get too deeply into this question of what constitutes proper notice, as the wording of the several statutes varies considerably, and this would be a subject all to itself. However, I might mention one or two points.

Even though the statute does not expressly state that the last publication must be immediately before the election, our court seems to read into the statute the words "immediately preceding" the date of the election or meeting as the case may be. See, for example, *Levitt v. Bell*, 55 Neb. 57 at page 66; *Shannon v. City of Omaha*, 72 Neb. 281; *Bancroft Drainage District v. Chicago STPM & OR Co.*, 102 Neb. 455 at 459. There are decisions in other states to the contrary.

Where the statute requires a publication "once each week for three weeks," our court has held that the publication is complete on the third issue of the weekly publication. Thus, where this statute is involved, the election could be held or the council action could be taken on the sixteenth to the twenty-second day. See *Prucka v. Eastern Sarpy Co. Drainage Dist.*, 157 Neb. 248. On the other hand, if the statute provides for notice "for three weeks" or "during three weeks," the full twenty-one days after the first publication must elapse, and the action should not be taken before the twenty-second day and must be taken by the twenty-eighth day after the first publication. The safe rule to follow is that if three weeks' notice is required, you should publish the notice in four consecutive weekly publications. In computing time you exclude the day of the first publication and include the day of the last publication. It is much better to allow an extra day than to run any chance of an argument as to whether or not the full statutory time has elapsed. However, the action should be taken before the time of the next publication.

There seems to be some confusion as to the proper procedure for establishing sewers in cities of the second class and villages. Let us stop a moment to examine one or two points that seem to cause trouble. All sewers in cities of the second class and villages are constructed under the provisions of 17-913 and following. These proceedings are initiated by a resolution of necessity. Section 17-913

specifies about seven points that usually have to be included in such a resolution. One of these is a statement of the "outer boundaries of the district or districts." Some persons have interpreted this to mean that if you have several laterals, for example, you must set up a separate district for each lateral. I think this is erroneous and confusing. Under the case of *Hutton v. Village of Cairo*, 159 Neb. 342, the supreme court held in effect that it is not necessary to establish separate districts for each lateral or main, but you may establish one district including the entire project and merely describe the outer boundaries of the entire district. If you took any other view of this situation and formed separate districts for each lateral, to be consistent you would have to follow through and have a separate resolution of necessity for each district and let a separate contract for each district and levy special assessments separately in each district. Such would be very cumbersome and was not the intent of the law.

Section 17-916 provides that if petitions opposing the resolution signed by the property owners representing a majority of the front footage which may become subject to assessment for the cost of any proposed lateral sewer district are filed, "the resolution shall not be passed." This means, for example, that if the property owners on a lateral running from Eighth to Ninth Street do not want the lateral, this lateral should be eliminated from the project. On hearing, the resolution can be amended by eliminating this lateral and then passed without further notice. It should be noted that *only* property owners on the *laterals* have a right to file a petition objecting to the construction of that sewer. This is true even though the people along the main may be subject to special assessments. If the people along a main could object, it might mean that a small number of property owners could prevent the construction of the entire system, as the main is necessary for the balance of the system. The question is sometimes asked why notice is required to be given to everyone when only property owners along the laterals can file objections. Everyone in the city may have an interest in the sewer system and have a right to present their views to the council or village board. The decision, however, is up to the council or village board and not to the people at large. Only the property owners along laterals can control the construction of a particular lateral. For the purposes of such petitions, each lateral must be considered separately.

There is one other point I would like to call to your attention. Some people, in drafting the proposed resolution of necessity, include in this proposed resolution sections providing for the giving of notice, the form of notice, the time and place of hearing, etc. These provisions, in my opinion, should be in a separate resolution and not in the proposed resolution of necessity. In the first instance, the resolution of necessity is only "proposed" and not passed. Setting out the date of hearing, etc., has no place in the resolution as finally adopted. If included in the proposed resolution, the proposed

resolution should be amended by the elimination of these provisions before it is finally passed. I will say, however, that including these provisions in the final resolution does not invalidate the resolution or the proceedings but merely makes it cumbersome.

While we are on the question of the boundaries of a district, let me call your attention to the fact that special assessments can only be levied on property within the district, regardless of the fact that property outside the district may also be specially benefited. This is true not only with regard to sewers but also in road improvement districts and every other type of improvement where a district is required. Therefore, in setting up these districts, be sure that you include all property that you later want to subject to a special assessment.

The mere fact that property is included within a district does not mean that you ultimately have to levy a special assessment on all the property within the district. A special assessment can only be levied against the property within the district which is in fact specially benefited.

In street improvements we are constantly confronted with the question as to what streets may be included in a single street improvement district. The engineers like to include all the streets possible in one district rather than having a number of smaller districts. This is understandable from the engineer's viewpoint. However, the law is not geared to the convenience of the engineer. As regards cities of the second class and villages, Section 17-519 provides a single district "may include two or more connecting or intersecting streets." We construe this to mean that parallel streets, although connected by a cross street, cannot be included in a single district. The intent of the law was to permit the people on each street to determine whether that particular street should be improved. Thus, the people on Ninth Street should not be able to force pavement on Tenth Street, even though the two streets may be connected by a cross street, unless it constituted a continuous highway. The law must mean that the streets must be a continuous highway or a logical unit for improvement to be included in a single district. The next question is, what is the penalty for including two parallel streets in a single district. It may mean that the city cannot validly levy special assessments on any of the property in the district. After the pavement is completed and accepted by the city, the city is probably liable for at least the fair and reasonable value thereof, even though there are irregularities in setting up the district.

A word should be said as to the showing required in the bond history in regard to elections. In the main, the following instruments should be included: first, the resolution calling the election and the proof of publication of the notice calling the election; second, a copy of the oath signed by each of the election officials as required by Section 11-101; third, the return of each board. Attached to this return should be one of the ballots used at the

election. Fourth, a canvass of the returns. Section 32-902, as amended in 1953, and Section 17-603 are now consistent in that both require the canvass to be made on the first Monday after the election. Section 32-902 specifies the hour of 11:00 A.M., and Section 17-603 says nothing about the hour of the meeting. Canvass in county elections is governed by Section 32-496. This statute fixes Friday following the election as the time for making the canvass. Regardless of the statute applicable, the transcript should show that the canvass was made by the proper canvassing board and at the time specified by law.

In school districts, the length of time that the polls must be kept open is not specified. We have always held that the polls should be kept open for a reasonable length of time, and what constitutes a reasonable length of time may vary with the size of the district. In large districts, including cities, the regular hours of 8:00 A.M. to 8:00 P.M. are desirable. In small country districts, we have held that from 1:00 P.M. to 8:00 P.M. would be a reasonable length of time. A school meeting and an election are two different things. We would not approve merely passing out ballots at a school meeting in Class One and Two school districts. The action taken at a school meeting does not, in our opinion, meet the requirements of a vote at an election.

We have now reached the point where the initial proceedings, either the election or the establishment of the districts, have been accomplished. In cases where the electors have voted a specific amount of bonds, as, for example, in school bonds, swimming pool bonds, auditorium bonds, etc., the next step should be to issue the bonds by resolution or ordinance. The money in these instances usually has to be in the hands of a school district or city before the work is undertaken, because there is no provision for the payment of work, unless there is a fund on which the warrants may be drawn. Likewise the bond-holder has no legal concern with how the money is spent after the bonds are sold. On the other hand, in street improvements, sewers, etc., the bonds are not issued until the work has been completed and accepted. In most of these instances, the governing body has the right to issue progress warrants as the work progresses to be paid out of the special assessments or bonds subsequently issued. Also, in most of the cases, the amount of bonds is limited to the actual cost of the project or unpaid balance. Hence the bonds are not issued until the project is completed and accepted, and in some cases cannot be issued until after the time for payment of special assessments without interest has expired. In these cases the bond history must, therefore, include all subsequent proceedings. Generally speaking, these subsequent proceedings would include the letting of the contract, the engineer's report of progress, issuance of the progress warrants, the final acceptance of the work and determination of the cost thereof, and the levy of the special assessments, if special assessments are levied. I will not go into the details of these various steps, as in most instances

the validity of the bond is not dependent upon the regularity of these interim proceedings. These interim proceedings, however, are of vital importance to the contractor, in that most contractors have to sell their progress warrants in order to raise funds to continue the work. Progress warrants are not negotiable instruments in that the transferee takes free and clear of equity and defenses of the issuing city or village. If all these interim steps are not legally and regularly taken, we will not approve the progress warrants. Being non-negotiable and subject to all defenses, we are more critical of warrants than we are of the ultimate bonds which are negotiable and which presumably the holder thereof takes free of all irregularities, and only jurisdictional matters can be raised as a defense.

Again, let me digress a moment to say that the validity of the bonds is not dependent upon the validity of the special assessments. In approving a bond issue, we do not certify that the special assessments are valid or collectible. Special assessments are only pledged as collateral security for the payment of the bonds. The bonds still remain the general obligation of the city or village, even though the special assessments are not collectible. I will make the further observation that since the statutes in many instances provide for the relevy of any special assessment not regularly levied, and since the supreme court has not permitted collateral attack for mere irregularities, there have been fewer cases of contests on special assessments. From the standpoint of the city, as distinguished from the bond purchaser, it is important, however, that the interim matters be carefully handled, as otherwise the city may find itself burdened with a general obligation without any recourse against its properties specially benefited by the improvement.

We now come to the issuance of the bonds. This is usually accomplished through the bond resolution or bond ordinance, depending upon the particular circumstances. Although it may involve a certain amount of repetition, we like to have the bond ordinance or resolution make specific findings of the jurisdictional facts and that all the preliminary steps have been duly and regularly taken. Likewise, in the bond itself, we always include a paragraph to the effect that all matters required by law for the valid issuance of said bonds do exist or have been done. The reason for this finding is that municipal bonds are negotiable instruments, and it has been held that the recitals in the bonds will estop the issuing municipality to raise these questions if the bond is in the hands of a bona fide purchaser. We cannot depend entirely upon estoppel by these recitals. If we could, there would be no real reason for an examination of the prior proceedings. Recitals, however, are generally held to be important and should be included in every bond.

In connection with the sale of bonds, we are frequently asked as to the necessity or desirability of appointing a so-called fiscal agent. This is rather a delicate subject for me to speak on for the

reason that we represent or do a considerable amount of work for several of the investment bankers who provide fiscal agency services. Therefore nothing which I may say here should be taken as a recommendation either for or against such agency contracts, but only as an explanation of possible procedures.

If a fiscal agent is appointed early in the proceedings, they can be particularly helpful to the city attorney and save him a considerable amount of work. In most instances they will cause to be prepared and furnish to the city the necessary resolution, ordinances, etc., and usually check each step as the same is taken. They will help guard against pitfalls, such as limitations in the proposition submitted to the electors, and can offer helpful advice in arranging finances, particularly if the city or village has a considerable amount of financing that has to be dovetailed together. They will advise as to whether certain bonds will be salable and do the legwork in assisting the city in obtaining proper bids for the bonds and having them printed, registered, and delivered. Thus they save the local attorney a lot of work that otherwise falls on him. The services of a fiscal agent or an experienced bond attorney are of particular value in revenue bonds, as there is a wide area for negotiation as to the terms and condition in this class of bonds.

The other method is for each local attorney to assume the full responsibility of drafting and handling all the steps in the proceedings. In some instances, the local attorneys employ other attorneys to assist in the drafting of the various instruments and advise as to procedure. If you have your work checked as each step is taken, it may save some subsequent embarrassment. When the time has arrived to sell the bonds and before the bond resolution or ordinance is passed, you can send out to the various investment bankers and local banks a request for bids on the proposed bonds. Such a request for bids should be specific as to the terms of the sale but need not contain all the information found in a bond prospectus. If the information is inadequate, you may find that you are bothered by a lot of phone calls and requests for additional information. The following are some of the things that a prospective bond buyer would want to know:

- (1) The type of bonds, to wit, district paving or intersection paving, swimming pool bonds, etc.
- (2) The amount of the proposed issue.
- (3) Any limitation on interest rates.
- (4) The schedule of maturities.
- (5) The assessed value of the property within the municipality.
- (6) A statement as to any other bonds which the municipality has outstanding, and the amount accumulated in the sinking fund, if any, to pay the same.

- (7) Statement of overlapping debt of the political subdivisions.
- (8) If the bonds are revenue bonds, the amount of income that has been received over the past several years and the engineer's estimate of projected income.
- (9) Whether all maturities must bear the same coupon rate, or whether different coupon rates may be fixed for different maturities, and also whether split coupons are permissible.
- (10) Whether the bond purchaser is to bear the expense of printing and registering the bonds, or whether the municipality will furnish the bonds together with an attorney's approving opinion without cost to the purchaser.
- (11) The date the bond will bear and the probable date and place of delivery. These two dates should be as close together as possible, making due allowance for time to pass the bond ordinance and print and register the bonds, say, approximately thirty days.

You can add to this as much so-called sales talk as your desire.

I might state that the cost of printing the bonds and the cost of the attorney's approving opinion are pretty well established, so from the standpoint of the city it doesn't make too much difference whether these items are to be borne by the city or by the purchaser. If borne by the purchaser, the bid price will be higher to include those items of expense. It is also customary to require a certified check with every sealed bid. The check of the successful bidder will be held and applied upon the ultimate purchase price, and the other checks are returned when their bids are rejected. There is no fixed rule as to the amount of the bid check, but in my opinion it should not be so large as to discourage bidders or work an undue hardship on them.

I should also state that the law does not require a public auction of municipal bonds. A negotiated sale is permissible in most instances. Sometimes a negotiated sale is the only practical way of handling the financing. However, I believe in most instances the public feels better satisfied with a public auction, whether this is conducted by a fiscal agent or by the municipality direct.

In conclusion, municipal financing is a highly technical field. This sketchy paper does not begin to cover the many requirements of the law for a legal municipal financing or the many questions involved in the practical handling of the same. I trust that no one will treat this paper as a legal treatise or a bible of procedure, but only as a collection of scattered suggestions that may or may not be helpful, depending upon the experience and the immediate problems facing the individual members of this group.

THE LAWYER AND THE ZONING PROBLEM

Raymond E. McGrath

When a lawyer examines a title to city real estate or is consulted with reference to the construction of a building, one of the very important things to be determined is whether or not the purpose for which the client is to use the building is in compliance with the zoning regulations of that particular area of the city.

However, frequently the lawyer has a zoning problem presented to him *after* it has become a problem; *after* the title to real estate has been acquired; *after* the building plans have been made; *after* the city building department has determined that the proposed use is not in conformity; and sometimes even *after* the client has already started to use the property and the legality of its use has been questioned.

The lawyer always has the problem presented to him from the standpoint of his client's best interest, which may or may not be consistent with the public good.

The planner, on the other hand, works out an over-all plan for a large area, or even for the entire city, which plan the planner feels is consistent with the public good and sound progressive over-all planning.

In carrying out the provisions of an over-all plan, many unlooked-for situations occur, and sometimes injustices develop.

With the growth of any city, the problems of proper zoning multiply and at times present situations that are extremely difficult to resolve equitably. As these problems develop, you as practicing lawyers may expect to see an increasing number of cases of this kind.

New concepts in zoning are constantly arising as conditions change, with the concomitant need of additional or different regulations. For example, expressways with their non-access and minimum speed features affect materially the zoning of the abutting properties. The idea of the highway builder is to prevent a clustering of businesses along the way. The property owner may see in his site an ideal location for a hamburger stand, pointing out that its desirability as a residence is lessened by the increase of traffic on the superhighway. The conflict of his private interest with the public good demands the best judgment of the city council and the court.

The increasing height of structures, particularly television antennae, which stretch their needlepoints higher than most skyscrapers, makes problems affecting not alone nearby properties and traffic on their streets but also the flight patterns of aircraft.

The wide distribution of automobiles and the simple physical fact that their bulk is disproportionate to the number of their

passengers must be taken into account in zoning any area in which large numbers of people congregate habitually. Many have given up in despair trying to solve this question. Automobiles are a factor, too, in zoning areas where the concentration of population is more sparse, although there the problem may be easily solved by prescribing minimum space requirements.

Having started with existing cities which required accommodation of ordinances to antecedent conditions, legislatures and city councils have been almost always in the position of trying to catch up. This, of course, results in something less than the ideal in zoning, which could be accomplished only in a city built completely according to plan. It is not always the fault of the lawmakers. They have no way of telling in time for desirable planning that a cow pasture in their environs may be selected by faraway Washington for a military installation, or by Western Electric for a \$45,000,000 factory.

As cities spill over their limits, even if they have extra-territorial zoning jurisdiction, they find need of cooperative effort. The growth may exceed the speed of their annexation process, and totally unplanned and unregulated communities grow up in the county. It is the rare real estate developer who makes any provision for any more in the way of improvements than that required to make his lots marketable. In fact, competition probably prohibits reservation of any substantial area for parks or even a modest playground. The answer lies in raising zoning from the merely municipal level. Growth stems from the central city, so there is a community of interest in the metropolitan area which is the proper basis for city zoning extending by legislative act over as wide an area as necessary to accomplish uniform results. The alternative is joint city-county zoning or cooperative effort between two or more counties where an urban area extends over the line into another county, as is the case in Douglas County, where Harrison Street, the Omaha city limit, is on the Sarpy County line, and an immense development has taken place between the city expanding from the north and the Strategic Air Command, the Allied Chemical and Dye Corporation, and other plants providing the stimulus from the south.

Any lawyer who has worked with these problems will tell you that zoning is one field of the law where the blood pressures of opposing litigants are usually extremely high and the boiling points are frequently very low. If a lawyer called into this type of litigation—particularly if it is aggressively contested—has a firm grasp of a few basic legal principles involved in the matter of zoning it will help a great deal in working out the problems of his client, and possibly in pouring oil on what are often very troubled waters.

The term "zoning" in its broadest, and original and primary, sense is simply a division of a municipality into districts and the designation by a board or proper authority of different regulations

with reference to the use of the real property in those districts, and with reference to the type, size, and other qualifications as to structures therein.

It has been said that "zoning regulations" are confined to the structural and use restrictions upon real estate within prescribed districts or zones.

The power exercised by governmental authority in connection with zoning laws is generally recognized as the exercise of a police power, and this power differs considerably from the right of governmental authority to restrict the use of real estate by condemnation under any power of eminent domain. While it is true that zoning and eminent domain have a great deal in common, one very important difference is that if property is taken from an individual in the exercise of the powers of eminent domain, a fair and reasonable compensation is paid to the individual. In the exercise of the zoning authority, whether the value of the property is reduced or destroyed or increased, no compensation is paid to the owner of the property.

The courts are uniform in holding that the restricted or prohibited use need not constitute a nuisance in order to authorize enactment of zoning regulations. The zoning ordinances are far broader and have a much wider scope than the mere suppression of a nuisance in connection with the use of property.

Modern zoning laws, as we think of them today, are of fairly recent origin in the law, but with the development of our metropolitan areas, cities, and villages throughout the country, and with the terrific increase in our population and in the complication of problems developing in connection with the use of real estate, there has developed a tremendous number of decisions in both state and federal courts dealing with such zoning ordinances; and, as might be expected, there has been conflict and some confusion as a result.

The power exercised by the municipal authorities in connection with zoning goes to the very limit of social authority and control of property. If this nation is to be regarded as a country of liberty and freedom of action, there is probably no field where this liberty and freedom of action with reference to individual rights over property is more sharply curtailed. It is the exercise of a social restraint that was not known to the common law. Under the old common law, a person could use property for any legal purpose as long as that use was not a nuisance. The zoning regulations, which are a fairly recent development in our legal system, go away beyond the controls and powers that were recognized under the common law.

The power to zone is the exercise of a police power and, there-

*City of Scottsbluff v. Winters Creek Canal Co., 155 N. 723, 58 NW2, 543. 37 Am. Jur. Muni. Corps, § 289, P. 930.

Standard Oil Co. v. City of Kearney 106 N. 558, 18 N.W. 109 18 ALR 95.

**OK as to Nebraska, but see Berman v. Parker, S.C. of U.S. (Em. dom.)

fore, the aesthetic* cannot be taken into consideration. **How far does this police power go? We all agree that this police power permits restraints in matters of health, morals, and safety, but does it also permit restraint in matters of welfare? This gives rise to the question as to whose welfare is to be protected—the welfare of the community, the welfare of the immediate neighbors, or the welfare of the property owner.

So great are the zoning powers that a corrupt government, in their exercise, could permit one man to enhance the value of property that he owns and take away from the value of surrounding property.

Our courts should not hesitate to upset a zoning plan where it clearly works an injustice on one individual or group to the benefit of another group or individual.

The Nebraska Supreme Court has established, in a long line of decisions, that what is the public good as it relates to zoning ordinances affecting the use of property is primarily a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and unless an abuse of this discretion has been clearly shown, our court has taken the position that it is not the province of the courts to interfere. This was the court's decision as recently as April 7, 1954, in the case of *Graham v. Graybar Electric*, 158 Neb. 527, 63 NW2d 774.

In this case, the plaintiff contended that the zoning ordinance was illegal because it was "spot zoning." The particular area involved had been zoned first industrial under the ordinance, and the evidence disclosed that much of the land around the property was residential in character. Introduced into evidence in this case was a map of the city of Omaha showing, among other things, that the property involved was adjacent to the Omaha Beltline Railroad, and also that throughout a large part of the course of this railroad through the city, property adjacent to the Omaha Beltline Railroad was zoned first industrial. I call this case to your attention because it states so clearly the rule of law above referred to and limits the area in which the court will inquire, and states that unless an abuse of discretion has been clearly shown, the courts will not interfere. In this case the court sustained the action of the Planning Commission and the City Council.

In another case, however, *Davis v. the City of Omaha*, 153 Nebr. 460, 45 NW2d 172, decided December 20, 1950, the court held that the zoning ordinance involved was invalid and that from the record the ordinance appeared to be unreasonable and arbitrary and overruled the action of the City Council and the Planning Board.

In the syllabus by the court in this same case, most of the basic principles with reference to zoning are simply and clearly stated:

1. Cities of the metropolitan class are, for the purpose of promoting the health, safety, morals, or the general welfare of

the community, empowered to regulate and restrict the height, number of stories, and size of buildings and other structures; the percentage of lot that may be occupied; the size of yards, courts, and other open spaces; the density of population; and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

2. Pursuant to this power for any or all of said purposes the city council may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of regulation. Within such districts it may regulate, restrict, or prohibit the erection, construction, reconstruction, alteration, or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.

3. Restrictions upon the power are that such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements; and to promote convenience of access. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality.

4. The zoning of property is permissible under the police power and its exercise may not be denied on the ground that individual property rights may be adversely affected.

5. The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary.

6. In zoning what relates to the public good is a question primarily for determination by the zoning authority and in the absence of violation of law or unreasonable or arbitrary action its determination will be allowed to control.

7. The courts will in an appropriate action instituted for that purpose declare invalid a zoning ordinance where it is made to appear that such ordinance is unreasonable and arbitrary.

Nearly every city adopts a general or "comprehensive" zoning ordinance, and frequently the zoning problems that confront the lawyer involve local departure from these comprehensive zoning ordinances. One of the terms most frequently used in connection with any proposed or suggested change in the general zoning plan is "spot" zoning. This term is generally used when an attempt is made by the governmental authorities to create a small area within the limits of a zone in which uses are permitted that are inconsistent with those permitted in the rest of the area. The city planner of the city of Omaha, Mr. Alden Aust, has recently defined a zone to be a "spot zone if it is just a lot or two surrounded by a different zone; if a business tries to invade a nice residential area so as to enjoy the amenities created by the residential property owners; if it is not in keeping with the existing neighborhood land-use

pattern; if it damages all the adjacent property owners while conspicuously benefiting the applicant; or if it does not really promote the general welfare.”

Where there is an existing non-conforming use of real estate at the time of the passage of the zoning ordinance or regulation, it is well settled that this use may be continued. These are called “grandfather uses.” Usually such existing non-conforming structures and uses are specially sanctioned in the ordinance, but these non-conforming uses usually cannot be expanded in any way and must be continued pretty much in the same pattern as that established prior to the enactment of the zoning ordinances.

In 1941 the Legislature passed a group of laws, 23-161 through 23-174 of the Nebraska Revised Statutes of 1943, which were designed to promote the health, safety, morals, and general welfare of the community, giving to county boards in counties where there is located a federal fort, airport, manufacturing plant, or similar military establishment the right to set up zoning districts, to establish a zoning board, and to regulate and restrict the erection, construction, reconstruction, alteration, repair, sanitation, and use of buildings, structures, or land. These statutes specifically provide “that such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such district or zoned territory.”

Your attention is especially called to Section 23-168, because it would appear that the statute gives to the court a far broader right on review of decisions coming under this particular statute than has previously been the case under the decisions in the State of Nebraska. After providing for the mechanics of appeal from the order of the County Board in connection with these zoning matters, the statute states:

. . . At the expiration of the time for filing answer, the court shall proceed to hear and determine the cause without delay and shall render judgment thereon according to law. If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. **THE COURT MAY REVERSE OR AFFIRM, WHOLLY OR PARTLY, OR MAY MODIFY THE DECISION BROUGHT UP FOR REVIEW.** Appeal to the district court shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order. . . .

While I do not think the Nebraska Supreme Court has yet ruled on this particular phase of this statute, in view of the fact that the power exercised by municipal authorities goes to the very limit of social authority and control of property, we think the

courts should examine very carefully the acts of the local authorities in these zoning matters, and if there has been an abuse of discretion, the decision of the local board should not be upheld.

We have recently had a case in which there is a complete reversal of a long-held concept, which shows that the law of zoning, as might be expected in any relatively new field of jurisprudence, is in a state of flux. It might be more proper to say that the philosophy of the planners has changed, and the case shows that the court found it possible to accommodate the age-old constitutional principles to their ideas. The opinion is from the District Court of Appeal, First District, Division 2, California, in *Roney v. Board of Supervisors of Contra Costa Co.*, 292 P2, 529. The court found valid as having proper relation to public health and safety an ordinance which prohibited the construction of residences in an industrial zone without a special land-use permit. The ordinance upset the commonplace theory of zoning which assumes a hierarchy of uses, in which the residential has long enjoyed the primacy, along with which has gone the prerogative of being admitted into any zone.

A contrary result was reached by a court divided four to three, Justice Harry Heher writing the majority opinion, and Justice William J. Brennan, Jr., the dissenting opinion in *Katobimar Realty Company v. Webster*, 20 N.J. 114, 118 A2, 824.

It is true that for some purposes in the techniques of zoning it may be useful to have a certain order of activities, but when we drop our preconceived notions, back away, and take a good look at the situation, can we logically conclude that a beautiful home ought to be permitted alongside a properly zoned but unlovely packing house? In our scheme of urban living, does not each have its place, and why should one have "rights" superior to the other? We have no difficulty in keeping packing houses out of residential neighborhoods. It may not be as readily seen why packing houses should have reciprocal rights, but there are reasons why they should have them. There are reasons, too, why for the good of their owners and tenants, residences should be barred from industrial zones.

A comment by a group of long-time students of the subject will serve as a conclusion on this point. By their chairman, Fred G. Stickel III, Counsel for Roseland, New Jersey, in a report to the National Institute of Municipal Law Officers, the Committee on Zoning and Planning said:

We predict that the philosophy expressed in the California case as well as that in the dissenting opinion in the New Jersey case will be commonly accepted throughout the country before many more years have passed.

We, as lawyers, must realize that the specific problems of our clients with reference to zoning matters should be resolved to the benefit of our clients only if this benefit is consistent with the common good.

I wish to thank my good friend and former teacher, Mr. Louis TePoel, who has served since 1937 as a member of the Omaha Planning Board, and Mr. Ed Fogarty, the City Attorney of Omaha, and the chairman of this Municipal Affairs Committee, for their ideas, suggestions, and very gracious assistance in connection with the preparation of this paper.

SECTION PROCEEDINGS
FRIDAY, OCTOBER 19, 1956

SECTION ON TAXATION

Barton H. Kuhns, Esq.
 Chairman

- “Procedure in Tax Fraud Cases”
 Hon. Joseph T. Votava, Esq.
 Former United States Attorney for the
 District of Nebraska
- “Your Future Income Taxes”
 Hon. Laurens Williams, Esq.
 Assistant to the Secretary of the Treasury

PROCEDURE IN TAX FRAUD CASES

Joseph T. Votava

Tax cases involving fraud are becoming more numerous and more serious. They are likely to increase in number and in seriousness. It cannot be otherwise. For 1953, the year last reported, there were over 53,000,000 income tax returns filed, and of these over 46,000,000 reported some taxes. About the same number of returns, and likely more, will be filed every year into the indefinite future. Tax rates run from approximately 20 percent to 90 percent; we can only expect that under our system of self-assessment, some of the taxpayers will get into difficulties and that they will need the services of a lawyer. (In truth, many need a lawyer before they file their returns.)

Fraudulent tax returns carry with them two severe penalties, both of which may be imposed, the criminal penalty and the civil penalty. The criminal penalty law provides that a person who wilfully attempts in any manner to evade or defeat any tax or the payment thereof is subject to a penalty not to exceed five years in the penitentiary or up to a \$10,000 fine or both. A false return for any individual year is a separate offense. The civil penalty law provides that if underpayment is due to fraud, a penalty of 50 percent is added to the deficiency; this means the entire deficiency, although only a part of it may be due to the fraud. The Statute of Limitations on the criminal penalty is six years. The civil penalty is made more stringent, because there is no Statute of Limitations as to it, and both taxes and penalties may be assessed for any year if there is fraud in that year's return, no matter how far back that year may be.

Just now I am concerned with a case where the Revenue Service is attempting to assess taxes and penalties for all of the years beginning with 1932; and, if fraud is proved, the assessment can be made, and the 50 percent penalty added.

So the question of fraud in tax returns, both criminally and civilly, is a very serious matter. If the Government is successful

in establishing fraud, in addition to the 50 percent penalty, the Tax Service is likely to impose certain smaller penalties, and then charge interest at the rate of six percent per annum from the date when the tax should have been paid. You can appreciate that such a client may be in danger of losing all of his property and of spending some time in the penitentiary besides. No wonder that the taxpayer faced with this problem, if he appreciates the situation, sweats blood, and he has reason to sweat blood.

One of the dangerous circumstances connected with these cases is that the taxpayer does not realize what he is up against until it is too late. Generally he goes to a lawyer asking for a key to the barn after the horse is stolen. If the taxpayer would only realize his danger the instant that the Revenue Agent, smiling and courteous (as they always are), comes in with the intention of a "routine audit," and seek the help of a lawyer then and there, the attorney could do considerable for him.

Too often the taxpayer does not go to a lawyer until the audit Revenue Agent, with the assistance of a special intelligence agent, has all the necessary evidence to send the client to Leavenworth. The Government has all the taxpayer's records, a sworn statement from the taxpayer, given "voluntarily," of course, and often corroborated by the taxpayer's own accountant showing a large deficiency.

Not all tax cases are that gloomy. They run the gamut. Some taxpayers come in at the beginning of the investigation, the so-called routine audit, and others come in when the Internal Revenue Service is ready to inflict the coup de grace. What is a lawyer to do with such cases in such various stages and what can he do?

Naturally you do not expect me, in the limited time allotted, to give you a treatise on tax fraud law practice. That would take a book of several hundred pages. Citation and analysis of cases likewise seems impractical, because every tax case, as Judge Medina recently said, stands on its own bottom. Every case has different facets and different issues, and every lawyer, when involved in one of these cases, necessarily will have to look up the law on the particular questions in his case. If a tax fraud case runs its full course clear to the final affirmance by the Supreme Court of a verdict of guilty, not only tax law but criminal law in all its phases, trial law, procedural law, and law of evidence are involved.

In addition to knowledge of the law, the lawyer representing a taxpayer must have a knowledge of the business of his client. He must be able to check the computations of an accountant intelligently, and personally be able to determine what the tax should be. He must have trial technique and knowledge of human nature, and, finally, he will need a good deal of common ordinary sense and judgment.

My remarks, therefore, will only hit some of the high spots

that might be of interest and possibly of some value to you. What then should a lawyer do when a client comes in with a case of claimed or possible tax fraud? The same as with any other case; he must first learn what it is "all about." However, it is even more important in a tax case than in any other, because all of his subsequent strategy will begin there.

Broadly speaking, clients in tax fraud cases fall into two classes, those who are guilty of tax fraud, and those, strange as it may seem to the Internal Revenue Agents, who are not guilty. I might add a third class: those who are guilty but who cannot be proved guilty because, after all, the Government in a criminal case must prove beyond a reasonable doubt, a willful attempt to evade a substantial part of the tax and prove that the attempt was intentionally made with purposes of tax evasion. To take advantage of a fraud civilly, it is incumbent on the Government, not the taxpayer, to prove the fraud by clear and convincing evidence.

In these remarks, I shall treat this third class and those whose guilt is doubtful as falling in the guilty class, because it is always safe to prepare for the worst and hope for the best.

I shall mention civil fraud only incidentally, because, in substance, civil fraud differs from criminal fraud only in degree. Furthermore, if criminal tax-evasion prosecution is successful, for all practical purposes you have lost the civil fraud case for that particular year.

On the other hand, preparation of defense to criminal prosecution which does not materialize prepares a defense to civil fraud.

The case of a guilty or possibly guilty client must necessarily be handled differently than that of an innocent taxpayer. The approach and the entire strategy must be different. Therefore, the first thing above all others, it is necessary to get all the possible facts both from the client and from any and all other sources. You should know your case, both on facts and law, as well as and better than the Government.

Clients in these cases will generally prove uncooperative. At least at first they are reluctant to open their breasts to the lawyer. Most of these clients, outside of their tax difficulties, are respectable citizens. If they have done anything improper, they are loath and ashamed to admit these things even to their lawyer, and yet the lawyer must know what the facts are if he is properly to represent the client.

It may take some diplomacy to get full cooperation, and "drag out" all of the facts from the client.

It will help if the client and, naturally, the lawyer know how the Revenue Agents operate and their means of information. When this is made clear to the client, he is more likely to "open up" and assist you to get all the facts. The client and the lawyer must know

that the Revenue Agents are highly qualified for their jobs. Some are lawyers, some are accountants, and all of them are experienced in their work. Revenue Agents know what it takes to make a case of fraud. They know what elements must be proved. In addition to that, every year they receive several days' training on how to ascertain the facts as to a taxpayer's income. The client must understand that although the Revenue Agent is fair and courteous, he is an employee of the Government, and that it is his sworn duty to ascertain the true income of the taxpayer so that all taxes legally due are paid. The client must know that although there may be various means of concealing income, the Revenue Agent knows all these various schemes.

The client should know at the very beginning that although the Revenue Agent, when he comes in with the avowed purpose of a routine audit, probably already has information that the tax return is not what it should be. There are various sources where he may get such information, and there are various reasons why the Revenue Agent may become suspicious. A short time ago a case came to my attention where the investigation started because, although the taxpayer up to now had been living in modest circumstances, recently he purchased a very expensive home, put in a complete air conditioner, and bought several thousand dollars worth of furniture. Immediately the Revenue Agent wanted to know "how come."

It may be that the Revenue Agent received a tip-off from an enemy of the taxpayer or a former employee. I recall a recent case of a taxpayer who was engaged in the sale of novelties and who kept very accurate books of purchases, of sales, and of expenses. He did a good deal of traveling, but of course the higher the expenses, the lower was the net income, so he "imagined" many trips and many hotel expenditures and made his bookkeeper enter itemized details of the amounts and the hotels where the employer presumably stayed on particular dates. These expenditures, however, still did not reduce the taxes low enough, so he decided to give bonuses at Christmas time, \$500 to \$1,000 to each employee. So far, so good! However, one of these employees was subsequently fired and came in with the story that, although the employees received checks for bonuses, immediately after cashing the checks they had to return the money in currency to the employer. She further furnished the information that the various hotel and traveling expenses were fictitious, and the Revenue Agent, inquiring at the hotels, found that the employer had never stayed at these hotels. The other employees who received the alleged bonuses confirmed the story of the discharged employee.

The taxpayer should remember that, although many people will lie for their own benefit, when it comes to a showdown, they are not likely to perjure themselves for the benefit of someone else.

Revenue Agents may come across a suspicious tip in the routine

audits. They may become suspicious because of the taxpayer's expensive mode of life, or because the taxpayer is engaged in activities that undoubtedly produce large incomes but the tax return is modest; divorce and other court proceedings, public records, former employees, enemies, ex-wives, former returns, and the like furnish leads. Besides, the client should know that there are people who get paid as tax informers. The last report of the Internal Revenue Bureau shows that something over \$600,000 in rewards was paid during the year to tax informers.

The client should know that his tax returns for several years back are available to the Agent; and even if the tax returns because of age had been destroyed, the records show the amount of taxes paid by the taxpayer for many years back. From these payments, he can substantially reconstruct the amount of income which the taxpayer reported. From these records, he can tell about what the present worth of the taxpayer should be.

The returns and audits of other taxpayers are available, and they are likely to disclose large payments to the client.

This reminds me of the case of a former colleague, a United States Attorney in Illinois, apparently an able lawyer. He was doing a little law practice on the side, and it happened that one year he received a fee of upwards of \$5,000 from a distillery client. The United States Attorney "forgot" in his return to include this particular fee. The client's return was audited, and, to justify its legal expense, the distillery told all about this fee. Of course the U.S. Attorney found himself in rather unpleasant difficulties.

Payments of interest and of dividends made by corporations are available to the Agent. The records in the banks, the ledger sheets, the deposit slips, and microfilms of checks in many banks, and the records of insurance companies showing the policies owned by the taxpayer can be searched by the Agent; records of stock-brokers showing purchases and sales of stocks and of bonds are also available.

Only recently a client was greatly surprised that the Revenue Agent knew exactly how many Government and postal bonds the taxpayer owned and when he purchased them. He forgot that the Treasury has a record of these. The Revenue Agent carefully investigates the taxpayer's bank borrowings and particularly the financial statements which the client gave to the bank. Reports to Dun & Bradstreet are available to the Tax Service. There are the various public records showing property bought and property sold. The records of suppliers of raw materials and of wholesalers of merchandise are also available, and if retailer buys largely from one company, such as implements, autos, lumber, by adding the average profit, you and the agent can get a line on a retailer's income.

I recall the case of a retail liquor dealer in Omaha who, be-

sides supplying the wants of local customers, also supplied the demands of the thirsty citizens of Kansas and Oklahoma. That taxpayer forgot that there are records, both here in Omaha and in Lincoln, showing the quantity of liquors purchased at wholesale. By simply adding up the "markup," it wasn't at all difficult to determine substantially the net income of the taxpayer. In the various hospitals are records of the patients of any particular physician. By getting a list of taxpayer's patients and contacting them, returns have been proved false.

These outside individuals and institutions do not have to furnish this evidence except upon a summons or subpoena. As a matter of actual practice, it is hardly ever necessary for the Agents to have recourse to a subpoena. These institutions and individuals know that the evidence is procurable, and rather than be summoned, they voluntarily furnish the information; and if the taxpayer inquires about it, nine times out of ten they will claim total ignorance about the matter. These institutions know that it is sometimes very irksome to remain loyal to their customers and refuse to furnish the information, except upon a summons or subpoena.

Some years ago a bank about one hundred miles west of here refused to furnish information to Revenue Agents and even refused to comply with a summons. We thereupon brought proceedings in the District Court and obtained an order requiring this bank to bring its books and records pertaining to this taxpayer to Omaha. As it turned out, it took a large truck to bring all these records, and there they were, all spread out on the tables in the south courtroom. In the meantime, the bank's business was at a standstill. It was not long before the banker begged the court to permit him to take his books and records back, promising hereafter to furnish any and all information that the Revenue Agent asks for, and he did.

All of these sources of information are well known to the Revenue Agents, and the clients should know that it is next to impossible to cover up, and that he might as well immediately disclose everything about his business to the lawyer so that the lawyer can properly protect him. With the client's assistance, the attorney should be able to verify the client's story. But the lawyer should verify it if possible, with or without the client's cooperation.

I recall the case of a very successful farmer who conceived the "novel idea," as he thought, that it was unnecessary to deposit his checks from livestock commission companies and from grain elevators, but that he could use them by a simple endorsement in the payment of some of his large obligations. He reported only the income that went through his bank. Of course he was surprised when the Revenue Agent produced the figures from the commission companies and the grain dealers, and not only that, but, by examining the checks, the Revenue Agent could tell the taxpayer exactly what he did with those checks.

The giving of an untrue statement when you promised the Revenue Agent that you are going to give him the facts not only is highly unethical and dangerous to the success of your particular case, but the client ought to know that even though he might not be prosecuted under the taxing statutes, there is another statute which the Government has available. Section 1001, Title 18 of the Criminal Code makes punishable by imprisonment up to five years and a fine of up to \$10,000 the giving of any false statements within the jurisdiction of any Governmental agency.

I have dwelt on the subject of the means as to how the Revenue Department gets its information and how it can ascertain what the actual income of the taxpayer is so that these things could be forcibly called to the client's attention in order that the attorney representing him can obtain the necessary evidence, and thus be governed in his representation of the client. Furthermore, as to any suspicious information given him by the client, because the client sometimes feels that what the lawyer doesn't know won't hurt him, the attorney himself should verify the information received from the client and be fortified for all contingencies. Besides, following the same methods as the Revenue Agent uses, you may develop a defense which will prove the innocence of your client, and either prevent prosecution or otherwise win the case.

In recent months we read a good deal about proof of tax fraud cases by the "net worth" method. Speaking of proof of tax fraud by any particular method is rather inaccurate and confusing. As I have already stated, each case must rest on its own bottom.

Under the Criminal Statute, the Government must prove that there was a deficiency, which, of course, depends on proof that the taxpayer's income was larger than that reported and that the understatement was wilfully done with the intent to evade the payment of the required tax. Those are the issues to be proved, and they are provable by any evidence direct and circumstantial that is admissible, evidence which will convince a jury beyond a reasonable doubt that the particular issues have been so proved. Those issues may be proved by the so-called "net worth" method, or they may be proved by the omission of particular items of income that are not included in the reported income, or those issues may be proved by the deposits in the bank and the checks drawn against it. They may be proved by the large expenditures made by the taxpayer, or those issues may be proved by the statements and the admissions and the records of the taxpayer, or they may be proved by a combination of any or all of them. The ultimate question is—has there been evidence introduced to convince the jury beyond a reasonable doubt that the taxpayer understated his income wilfully and with the intention of evading the legal tax?

Probably one reason we hear so much nowadays about the net worth method is because it is a convenient way of proving a tax-

payer's income. If in 1940 the taxpayer starts with no assets and in 1950 winds up with a large estate, and if during the intervening period his tax returns show only a small net income, it is rather difficult for the taxpayer to show that he was truthful in his returns, unless he can show sources of non-taxable income during those intervening years. The taxpayer, because nothing happened during the intervening years, becomes lulled to the belief that all of his tax returns had "passed the muster." Under these circumstances, the taxpayer is likely to make his case difficult both for himself and for his attorney.

In all audits, and certainly in all audits where there is the least suspicious circumstance, at the earliest opportune time, the Revenue Agent is likely to ask what is probably the most dangerous question which the Agent can ask of the taxpayer. This question will come up after the Revenue Agent becomes acquainted with the taxpayer and after both had been working hard all day and, lighting their cigarettes, they start to visit. The Revenue Agent compliments the taxpayer on his business and wants to know about when he started in the business, and soon come the questions, "What did you start with?" and "What were your assets at such and such a date?" The uninformed taxpayer, either because he wants to show how successful a businessman he is or because he wants to be modest or is generally secretive, nine times out of ten will minimize the assets and the monies that he had at any particular past time. If the taxpayer had \$50,000 in the bank at that time, he is more likely to say that he had about \$10,000. At the close of the day, the Revenue Agent writes up a report on his daily activities, and he puts down the exact words, the exact time, and the exact amount which the taxpayer said that he had as assets on a certain date. From then on, the Revenue Service has a starting point on which to build up their net worth increase proof. When the Revenue Agent gets that statement from the taxpayer, all he needs to do is to take the returns for the succeeding years, subtract the amount of taxes that had to be deducted from the net income, subtract the estimated living and other non-deductible expenses, and he has a fairly close figure as to what that taxpayer should be worth at the present time. Then he ascertains from other sources which I have already mentioned what the present assets of the taxpayer are, when he acquired them, and what was the cost of those assets. If there is a substantial discrepancy, the taxpayer is in hot water. Therefore, if a taxpayer calls in an attorney at the very beginning of an investigation, the lawyer should by all means caution the taxpayer about this, in my opinion, the most dangerous question that is likely to be asked him. It might still be better to caution the taxpayer that if he does not talk at all, he is not likely to say the wrong thing.

In this connection it may well be remembered that the Fifth Amendment to the Constitution still obtains, and that the taxpayer (and of course his attorney, also) has the complete right to refuse

to give any evidence, oral or documentary, including his accountant's work papers and reports if taxpayer retains possession or ownership, that might tend to incriminate him. This privilege does not extend to outsiders or to corporations, but it is in full force and effect as to individual taxpayers, and there is no reason why a lawyer should permit his client to be sold down the river on the assumption that he has to furnish an explanation as to his taxes. Naturally it is better for the client to be able to say, "I am sorry I can't give you this explanation or these records, but my lawyer positively prohibited me so doing. He says for you to call him."

This brings me to the controversial subject. Should or should not the taxpayer and his attorney cooperate with the Internal Revenue Service? As I have already indicated, it all depends on the facts and circumstances of the case, and that is why a full and complete investigation of the facts and the law should be made at the earliest possible time; otherwise, the attorney does not know which approach to take. In his relations with the Internal Revenue Agents the word "cooperation" is really a misnomer. From the standpoint of the Revenue Agents, cooperation is largely a one-way street. They want the taxpayer and you to lay your cards on the table face up, but as a rule they never disclose any of the facts which they have.

I do not mean this by way of criticism. I sat on their side of the table for too many years. The Revenue Agents have a duty to perform; they have their instructions and directives. They can only go so far. If the attorney will clearly indicate to the Revenue Agent why, at least at the inception of the investigation, he cannot furnish requested information, he will appreciate the attorney's position. It is the lawyer's duty to protect the interests of his clients, guilty or not guilty, and they understand it. After the attorney has satisfied himself whether the case falls into the guilty or not guilty class, he can then chart his course in his dealings with the Revenue Agent. If it appears clear or substantially clear that there is no deficiency in fact, or that if there is a deficiency and it can be established that the error was not due to wilfulness and with the intent of evading taxes, of course it is to the interest of the client to produce these facts for the Agent's consideration. Revenue Agents, either Audit or Intelligence, are disinterested persons, and they do not want to recommend prosecutive action if the evidence is not there. On the other hand, if an Intelligence Agent is investigating the case, it is with the objective of prosecution, and the Agent is seeking to obtain evidence to convict the client, and certainly no lawyer is justified in furnishing such evidence.

Even though taxpayer's counsel cannot cooperate by furnishing damaging evidence, it does not mean that his relations with the Revenue Service should not remain friendly or that he should abstain from conferences with Revenue Agents. Even though neither

party will furnish evidence to the other, the conferences will tend to clarify the issues, the lawyer will learn what are the contentions of the Service, and on the other hand, it may eliminate a lot of unnecessary investigation on the part of the Revenue Agent as to issues that will not be disputed.

The main problem, of course, is the doubtful cases, and where prosecutive action may or may not be recommended. That is where the knowledge and judgment of the attorney, based on full information, come into play.

Up to now I have emphasized the importance of determining just what the facts of the case are; by that I do not mean that during all this period the attorney should not concern himself with the law. Of course he should. In any event, he should study the appropriate statutory provisions and also, if nothing else, go through the annotations as found in the U.S. Code Annotated. He should read the cases that appear appropriate to the issues involved and even such as are not actually in point. All of these are likely to suggest leads for investigation and also suggest possible defenses. When the attorney has the facts and is prepared on the law, he must then determine whether he should go all out and stop prosecutive action before it reaches the indictment.

Let me briefly outline the general course of a tax fraud case before indictment. Investigation usually starts with the Audit Revenue Agent. It may be a routine audit. It may be an audit with ulterior motives based upon tips, suspicious circumstances, or other information that has reached the Internal Revenue Service. When the Audit Agent makes a preliminary investigation and finds suspicious circumstances that might justify prosecutive action, the matter is reported to his superiors; the Intelligence Division is then notified, and a special agent of the Intelligence Division is assigned to the case. From that time on, the investigation is largely under the control of the Special Agent, who may continue the work independently or in cooperation with the Audit Agent. When the Special Agent completes his investigation, he submits his report and recommendation to the Chief of the Intelligence Division of the District. He may recommend prosecution. The Chief of the Intelligence Division, if he disagrees with the Special Agent, disapproves the recommendation, and prosecutive action terminates. If the Chief of the District Intelligence Division concurs in the Special Agent's recommendation, the matter is forwarded to the Intelligence Chief of the region. He again may disapprove, but he generally concurs with the District Chief. Up to now the case has been handled by investigators who are primarily interested in determining whether or not the taxpayer is guilty of the violation. If and when the Chief of the Regional Office of the Intelligence Division concurs, the case is referred to the Enforcement Attorney in the Office of Regional Counsel.

Here it is considered from a somewhat different standpoint. The attorney has to determine not only whether or not the taxpayer is guilty but also whether he can be proved guilty—whether there is such evidence as will sustain a prosecution. For that reason he carefully considers the evidence, the law, and the recommendations, and he may disagree with the recommendation of the Intelligence Division in toto, or he may point out the necessity of further investigation, before he reaches a final conclusion. If he agrees with the recommendation of prosecution, the same goes to the Department of Justice. If he disapproves the recommendation for prosecution, he has to give in writing his reasons for such disapproval. If the Intelligence Chief concurs in the conclusions of the Enforcement Attorney, naturally the prosecutive action stops. If the Intelligence Chief does not agree with the conclusions of the Enforcement Attorney, he may require additional investigation, or he may set down his reasons for differing with the Enforcement Attorney, and the case goes back to the Enforcement Attorney. If the Enforcement Attorney stands by his conclusions and disapproves prosecution and the Regional Chief of Intelligence likewise stands by his conclusions that prosecutive action should be instituted, the case is then forwarded to Washington to be resolved by the two respective branches at the national level; but the general counsel has the final word. He may stop or recommend prosecutive action. If he recommends prosecution, the case then goes to the Department of Justice.

Until recent years, the Department of Justice carefully considered each case before sending it back to the United States District Attorney, recommending submission of the case to the Grand Jury. In the last few years, I believe the action of the Department of Justice is more or less routine and perfunctory, and the case almost automatically goes back to the U.S. Attorney with recommendations for prosecution. The taxpayer and his attorney, if they know that the case is in the hands of the District Attorney, have a right to appear before him and present their side in order to persuade the U.S. Attorney to drop the action. In ninety-nine times out of one hundred the effort will prove futile, because when all of the other officials who handled the case before it reached the U.S. Attorney recommend prosecution, it is very difficult for the U.S. Attorney to refuse to submit the case. In due course the case is submitted to the Grand Jury.

The question often arises whether or not the taxpayer should or should not appear before the Grand Jury to present his side of the controversy. I think we should understand somewhat the workings of the Grand Jury. The Grand Jury is a body of not more than twenty-three nor less than sixteen qualified citizens. Before an indictment is returned, twelve or more must vote for such an indictment. They are an independent body, entirely independent both from the U.S. Attorney and from the Court, and almost a law

unto themselves. It is sometimes thought that you must have the permission of the Court or of the U.S. Attorney before a person whose case is being considered is permitted to appear before the Grand Jury. This is an erroneous assumption. It is the Grand Jury itself that has the right and the power to decide that question, and the request should be made to the foreman of the Grand Jury.

I am now speaking of the theoretical concept of the Grand Jury. The practical workings in a Grand Jury room are somewhat different. The fact of the matter is that whenever a U.S. Attorney presents a case to the Grand Jury and he has substantial evidence of probable cause (and he would be foolish to submit a case if he did not) and definitely wants an indictment returned, an indictment will be returned. The Grand Jury serves generally for the full eighteen months allowed. After the U.S. Attorney works with the Grand Jury for a week or so, they necessarily become friendly. The Grand Jury is likely to go along with the U.S. Attorney.

I appreciate that almost in every Grand Jury session, the Grand Jury returns one or two "No Bills," meaning that on one or two cases so presented by the U.S. Attorney, they refuse to return an indictment. My experience with Grand Juries for some eighteen years taught me, however, that these cases where a "No Bill" is returned are usually, if not always, such as the U.S. Attorney feels that he must present, either because of pressure from the investigating agency or for other reasons, but believes that the evidence or the law is such that he cannot obtain a conviction. In such cases he so indicates to the Grand Jury, and thereupon the Grand Jury "No Bills" the case, the case is terminated, and everybody is happy.

In a tax case where the Special Agent who investigated the case recommends prosecution and all those other officials that I have mentioned recommend prosecution, it is too much to be hoped for that an appearance by the taxpayer himself will sway enough votes so that at least twelve of the Grand Jury will not vote for an indictment. For that reason, I emphatically do not recommend that a taxpayer appear before a Grand Jury.

When a taxpayer comes before a Grand Jury, he must waive immunity. He must appear without counsel. His testimony is taken down in shorthand. It is almost certain that an indictment will be returned, and then the attorney for the defense is in the dark as to what the client actually did say in the jury room, and this certainly handicaps the defense. The taxpayer cannot escape from his testimony before the Grand Jury, and his testimony may be used to impeach him at the trial.

While United States Attorney, I never objected to a prospective defendant coming before a Grand Jury. I felt that if we really had a case, the prospective defendant's appearance will not prevent an indictment. On the other hand, the prosecution would then have the defendant's complete statement upon cross-examina-

tion by the U. S. Attorney and by the jurors. Furthermore, if the case will not stand up before a Grand Jury, it is too weak to go to a Trial Jury.

Attorneys for involved taxpayer want to prevent prosecutive action, if possible. From what I have already said, you will note that there are two practical times and places when this should be seriously attempted. If you have a good case, or one sufficiently doubtful, the taxpayer's side should be given to the Special Agent, and before he makes his first recommendation to his Chief. On such a case, the Special Agent is likely to recommend that no prosecution be instituted, and that the case be referred merely for civil disposition.

The second practical place and time is when the case reaches the Enforcement Attorney in the Regional Counsel's office. There the case is considered independently from the investigating officers. It is considered from all angles, but primarily "would a prosecution be successful." This attorney does not want to clutter up the Service and the courts with protracted litigation which eventually will not be successful. Furthermore, under the policy of the Internal Revenue Bureau, all civil action on the case is stopped until criminal prosecutive action is terminated. That may delay the assessments of deficiencies and probable penalties. The Internal Revenue Service wants to avoid this if there is no likelihood of successful prosecution. If you fail at either one of those two places, the chances are about nine out of ten that eventually an indictment will be returned.

I do not mean to say that there is no possibility of stopping a prosecution at any of the intervening points or with any of the intervening officials. You can even present your contentions in the Department of Justice or to the U. S. Attorney, but the likelihood of success is very slim.

If new facts develop at any time, of course, these should be brought to the attention of the proper officials.

Voluntary disclosures or the fact that prosecutive action may affect the health of the taxpayer are no longer given any consideration in the question of prosecution, and properly so. But if, after the case is in the hands of the U. S. Attorney, it should happen that the defendant, either before or after indictment, is in such physical or mental health that he cannot properly conduct his defense, there is a provision for calling the matter to the Court's attention, and the Court will properly refuse to go on with the trial. If the defendant's condition is such that it is not likely to improve, it may even terminate the prosecutive action. Ordinarily, however, if an indictment is returned, the case goes to trial as any other criminal case and has to be handled as such.

After an indictment, the defendant is arraigned and asked to plead guilty or not guilty or nolo contendere. Nolo contendere

is merely a face-saving plea of guilty and has the same consequences as a plea of guilty.

The question then arises whether the defendant should stand trial. The attorney must determine from the facts and the law what is the proper thing to do and the proper thing to recommend to his client. If there is a possible defense, the defendant should plead not guilty and stand trial. By pleading *nolo contendere* or guilty, you lose all your rights of appeal, you lose all possible errors in the trial of the case, and you lose your possible chance of having one man out of the twelve on the jury refuse to convict. To be safe, the defendant should stand trial. Likewise he should not waive a jury. It is done in some jurisdictions, but I do not recommend it. After all, it is for the Government to prove every material issue beyond a reasonable doubt, and certainly it should be harder to convince twelve jurors than to convince one judge of the guilt of the defendant.

Furthermore, it is possible that some errors in the trial in the admission of evidence or in the instructions may creep in if you try the case to a jury.

On the other hand, I do not mean to say that a defendant should never plead *nolo contendere* or guilty. After all, it depends on the facts, the law, and the circumstances of the case.

This reminds me of a prominent and highly successful and able attorney in the southern part of the state, now dead. On more than one occasion I heard him say that he would *never, never* plead a defendant guilty.

During the '20's we had, probably not in force, but at least on the Statute Books, the liquor prohibition law. This attorney was not in sympathy with that law; so, during the years of prohibition, he stocked his basement with a large variety and quantity of liquors, and it was well known that his friends and acquaintances and clients were always welcome to sample his stock. He never sold any.

One time he was defending a liquor law violator, and in his argument to the jury he made the statement that the liquor agents "had it in" for his client and were not treating everyone alike. Pointing across the street to his residence he said "they don't dare to search my basement or to arrest me." This put the liquor agents in an embarrassing position, and they had no alternative but to go across the street, raid his basement, and place him under arrest. The attorney was indicted. He promptly appeared before the judge and pleaded guilty and received a sentence of ten days imprisonment. So one should hardly ever speak in absolutes. Each case must be determined on its own facts and merits.

I do not think that a defendant needs to fear that he will lose any rights by standing trial. In some jurisdictions it is quite customary to be more lenient in the sentence if the defendant does

not put the Government to the expense of a trial. Some judges grant some leniency partly to avoid a long trial. We need have no fear on that score in this jurisdiction. Knowing the attitude of our judges, I am satisfied that they feel that a man is entitled to his day in court, and the fact that he stood trial should not justify a higher penalty than if he pleaded guilty or *nolo contendere*. But there may be circumstances where a plea of *nolo contendere* is proper. There may be no possible defense. The client wants to have it "over with," or he may want his civil liabilities determined as soon as possible, and there may be other valid reasons.

On this occasion, a discussion of a criminal trial is out of question. That involves the law of evidence, technique of trial, and all of the other elements that go into the trial of a case. I do want to emphasize, however, that no matter how many tax or other criminal cases you may defend, never forget to read all the rules of criminal procedure. They are short, they are simple, and they will alert you to many things that might escape your attention otherwise. Also let me point out that the defense attorney should be prepared to know exactly what the Government must prove in order to sustain its case, and that the attorney should furnish the court with proposed instructions to the jury. The court may not adopt them, but it will inform him as to what should be the charge. You will find that in the "Current Decisions of the District Courts," in either Prentice-Hall or Commerce Clearing House Service, many of the cases reported contain the charges to the jury in full. They will prove very helpful.

Even though your case may seem very promising during the trial, carefully read again the last rules of the Federal Rules of Criminal Procedure on what to do if and when the verdict goes against you. You should be prepared for any eventuality. However, let us hope, after you have exhausted all your efforts to forestall prosecution and still the case is submitted to a jury, that when the jury marches in and lines up and the court asks for the verdict, the clerk will read "Not guilty."

By way of epilogue: I probably should not thus mar these "erudite" remarks, but I feel that I ought to make one more practical suggestion. You may know, and if you don't, you will soon learn, that clients involved in tax matters are money-conscious. It is important to bear this fact in mind.

A wise lawyer will require a substantial retainer and a definite arrangement for fees. If you do not do this, you may retain a jaundiced memory of your case. If you pull your client through unscathed, he will feel that after all he was not guilty of anything, that he could have had the same results without an attorney, and, therefore, why should he pay? If you are unlucky and the facts and the law are against you and the client is "stuck," naturally the client will feel that he does not owe you anything, because you have not produced any favorable results. The final outcome will

be that you wind up with very little money but a lot of very useful experience. However, useful experience does not pay office rent, and you cannot buy groceries with it.

BARTON H. KUHNS: At the Dallas meeting of the American Bar Association, I was visiting with Laury about matters pertaining to the Tax Section of this Association and the Tax Institute which will be held in December as usual, and invited Laury to appear on this program this afternoon, and he very graciously consented to do so.

As you all know, Laury's title is that of the Assistant to the Secretary of the Treasury. If any of you take the *Federal Register*, you read several times a week that the proposed regulations are still coming out but rapidly drawing to a conclusion. Laury's title as he told me in Dallas was "Your Future Income Taxes." I take it he is going to tell us what our future income is and thereby compute our taxes for us.

YOUR FUTURE INCOME TAXES

Laurens Williams

LAURENS WILLIAMS: Mr. Chairman, ladies and gentlemen. I hope you will permit me in a word to say how wonderful it is to be back home. I have not felt so good for a long time as I have the last day or two here in Nebraska, and I would like to take some of this weather back with me.

It is an honor to be asked to speak to you today. I am, as the title implies, sort of going to take off into the wild blue yonder this afternoon instead of talking with you on technical subjects, because it seemed to me that what I am going to say is a bit long-winded, but in order to cover in detail what is in effect the thesis of this paper, it is necessary to give you the sort of general information that lawyers generally in America ought to have. So I want to visit with you this afternoon about the amount of taxes and the kind of taxes which we Americans currently are paying to our federal government.

I am going to say also that at least currently the Treasury Department is fully aware of the important part which the lawyers of America play in the collection of the revenue of our federal government. After all, our system of taxation is almost entirely one of voluntary self-assessment.

Our laws today are complicated. People must turn to professional people for help, and they do turn increasingly to lawyers. And the Treasury Department is fully aware, therefore, of the importance of lawyers in the administration and collection of our revenue and is always glad to participate in any popular institute for the continuing education, so to speak, of the professional people of America.

However, what I am going to say this afternoon is not, and

this is not said because I have to say it, because I do not have to say it, but it just happens that what I am going to say this afternoon represents my own personal views, collected out of a little over twenty-three years in the practice of law here and now a little over twenty-three months in the Treasury Department. And what I am going to say is nonpartisan; it is not political. I want to speak to you only as an ordinary American lawyer who happens to have had an opportunity to observe a little bit about our taxing system.

As a preface and with proper modesty, I want to say that I think I am as keenly aware as at least are most Americans of the imperfections in our taxing system. However, I have been quite deeply disturbed by the potential implications of some of the comments and some of the statements which have been appearing in the press about our American revenue system. And what I want to say will relate directly, it will be responsive to these comments that you are reading currently in some of the national magazines and some of the press.

You see, recently voices have been raised in America saying that our present taxing system should be abolished or at least parts of it should be abolished, that our taxing system is too complicated, that it is discriminatory, and that it is confiscatory.

Now that kind of statement sounds good; it has a natural appeal. That is the sort of thing that is attractive to all of us. It is the sort of thing that we all thoughtlessly like to hear and to say, particularly when we know how high and how heavy taxes are, and when we know there are complications, and we know that there are instances of some discrimination in our tax laws. Nobody likes taxes; after all, it is sort of an American right, American privilege, something like Monday morning quarterbacking, to gripe about taxes.

Now, however, this is going farther than merely griping about taxes. And so, frankly, I have decided to raise my own small voice to suggest that before we conclude that this present taxing system of ours should be scrapped, that we ought to take a look at the other side of the coin, take a careful look at this taxing system of ours, and see how it is working, see what the causes are, what the things about it are that we do not like, and consider what the alternatives are.

Now I profess no special competence to foresee the future, but I do want to talk with you this afternoon about two basic subjects and look into the future in respect to each.

First, I want to talk to you about the amount of taxes which Americans will be required to pay to the federal government in the foreseeable future, and, secondly, I want to talk about the kind of taxes which I believe will be levied to raise the huge sums which I think our federal government is going to require.

I would like, of course, to foretell large reductions in the amount of taxes we are going to pay; and I would like very much to foretell vast simplification of the systems of taxation under which we are going to pay those taxes. But realism and candor forbid both such predictions.

The 1957 federal budget, that is, the budget for the current fiscal year which commenced July 1, 1956 and runs through next June 30th, calls for expenditures by the federal government of 69.1 billion dollars. That is a sum so vast, so huge, so great that, frankly, I do not think there is a man in this room, including myself, that actually can grasp the enormity of that amount of money, and contemporaneously during that same twelve-month period the federal government will be collecting from the American people largely from taxes slightly more than 69.1 billion dollars.

Now what are these manner of expenditures, and when, realistically can we expect the federal government under any administration to materially reduce the amount of its expenditures? Well, personally, I have reached the conclusion that the present state of the world has produced an international situation in which there is no hope for large tax reductions in the foreseeable future.

In fiscal '57, the federal budget allots \$42,968,000,000 or 62 percent of the total federal budget, to the Department of Defense and to other major national security programs, 62 percent of the total expenditures, 43 billion dollars, rounding it out.

And yet, as huge as that sum is, it already represents a reduction of 14 billion dollars from the estimates submitted in January of 1953 for the fiscal year of 1954. I think that until our impelling need to be militarily strong is past, no one wisely can predict proportionately large decreases in our expenditures for national security. If you keep in mind the terrific cost today of these jet planes you see making vapor trails over Omaha and Lincoln daily, the cost of nuclear submarines, the cost of guided missiles, the cost of all these modern electronic, atomic instruments of warfare, how much do you expect Congress will reduce the 36 billion dollars which currently is budgeted directly to the Department of Defense?

Let us be realistic about this thing. Just a few months ago the Congress voted 500 million dollars more to the Department of Defense than the Department itself and the military itself asked for. How much do you think Congress is going to reduce the two and a half billion dollars which currently is budgeted for the military phase of our mutual security program, which, incidentally, is already reduced three billion dollars from the January, 1953 budget estimate?

Can anyone realistically expect that there will be a material reduction in the little less than two billion dollars which currently is budgeted to the Atomic Energy Commission? Or will Congress eliminate or materially reduce the four tenths of one billion dol-

lars which currently is budgeted for stockpiling and increasing our national defense production capacity? And yet these items that I have mentioned amount in the aggregate to 43 billion dollars, 63 percent of the total federal budget.

I am not condemning and I am not supporting any of those expenditures; I am simply trying to speak to you as a realist, trying to face the facts of life in America today and in this world today. And I submit that no one can expect substantially large reductions in our defense expenditures until the day comes, as it must some day come, when the international situation has changed enormously.

Now, if we cannot expect a big cut in military expenditures, how about the other 38 percent of the federal budget, that which calls for civilian and non-military purposes? Can we expect a reduction in taxes or a reduction in expenditures there? Well, over ten percent of that remaining 38 percent, a little more than ten percent of the total federal expenditures, will go simply to pay interest on the national debt. And I assume that we would all agree that there will not be any substantial reduction in that expenditure until the time comes, if it ever does, when we substantially cut our national debts off.

Well, that leaves us 28 percent of the total federal budget at which to look on the expenditure side to see if we can realistically expect the federal government to cut down expenditures. That is about 19 billion dollars, again so much money that I do not have any idea how much it really is, and I doubt if you do. What about it?

Well, 11 or 12 billion of that 19 billion dollars, over 17 percent of the total federal budget, consists of such things as grants and aids to states, the veterans' expenses, the cost of the agricultural program, unemployment compensation, federal employees retirement pay, the cost of running the Congress and the Courts, and other things of that nature; either well entrenched, well established, now almost traditional type of federal functions, or else essential federal government functions.

Now who is going to expect veterans' benefits to be cut off if you are realistic, or expect the farm program to be terminated overnight, or expect unemployment compensation to terminate, or do you think that we are going to close Congress and the Courts? And yet those are the things which currently costs about 11 to 12 of the remaining 19 billion that we have not previously looked at.

Well, that leaves seven or eight billion dollars of federal expenditures, about 11 percent of the total, to which you can look to see if you are realistically going to get any reduction in your taxes through reduction in expenditures.

I suggest that that remaining 11 percent is not controllable, that is, readily controllable, at least, as a practical matter, because

that happens to be the costs largely of operating all the various departments and agencies of the government.

And, moreover, if you are thinking about this federal government of ours materially reducing its expenditures, I suggest that you have got to take into consideration the question of how much money the federal government will spend in the future on new and additional things resulting from new and additional demands and needs, for new and additional services, from the government of a civilian nature, civil benefits for the nation as a whole.

How about highways, schools, housing, and all of these other things in respect to which terrific demands are constantly appearing before the Congress with concomitant demands for huge additional new appropriations of money?

Well, in the belief that I do this realistically, I am simply facing the facts of life. I suggest to you that the only hope for a ten to twenty billion dollar reduction in federal expenditures, and that is the only thing that can possibly cause a substantial reduction in taxes, by a reduction of expenditures, lies in the hope for substantial change in this international situation and resulting in substantial reduction of the costs of our mutual and national security programs.

Well now, if that analysis of the expenditure side of the budget is correct, then there may not be much hope for reduction in taxes or reduction of federal expenditures for some time to come. Actual expenditures of the federal government only three years ago, in 1953, fiscal '53, were 74.3 billion dollars. For fiscal '56 they were 66.3 billion dollars, a reduction of eight billion dollars.

However, in 1954, we had a tax cut of 7.4 billion dollars, which at current income levels would amount to over eight billion dollars. Thus, the eight billion dollar reduction in these expenditures that has been effected in the last three years has already been matched by an offset in tax cut.

Now we have a balanced budget; that is due to the increased production of wealth and the increased level of income, and certainly as far as I am concerned any hope for reduction of the magnitude of the reduction that we got in '54 seems to turn wholly on this world situation.

In other words, I think that the federal government is destined to spend around 70 billion dollars in the immediate foreseeable future. You see, simultaneously then, we are going to do one of two things. We are either going to tax ourselves enough to raise the money we are spending and pay as we go, or else we are going to tax ourselves only part of that money, and we are going to borrow the balance, which, of course, ultimately means increasing the national debt, which means abandoning the balanced budget, current fiscal policy. It means inflation, which of course is the cruelest type of an indirect tax.

There, I think, the choice is clear, and personally I think we are going to have to find a predictable fiscal and monetary climate where business can continue to increase as it has been, to expand, to increase our production of wealth, and so forth, that we have got to have a sound reliable predictable policy, which means a balanced budget, which means taxing ourselves enough to pay for these large expenditures, which, in turn, I think, means that for the immediate future any tax reductions of any kind will have to come from one of two sources, neither of which is large.

First, such increased revenue to the government as comes through the projected annual constant yearly growth in our population and the increase in our production of wealth, which, stated simply, means more people making more money with which to pay taxes. And then, secondly, such additional economies in government itself as continued vigilance on the part of all may make it possible. Again being realistic, I say that the amount of such reduction and expenditures through further economies in government, I suspect, are very, very small.

In other words, I think we face a very heavy burden of taxation ahead. It is a burden that I expect sometimes is too heavy to be borne permanently without affecting the well-being of America. Certainly, taxes are too high. Certainly, we must somehow get to the day when they can be reduced.

But until that day comes, with this heavy burden of taxation on us, we have got to raise this money somehow. So let us take a look and see what are the taxes that currently are raising this money that the federal government takes in annually. What is this federal taxing system?

Well, in the current fiscal year, the budget calls for collection of revenues of 69.8 billion dollars. That is 700 million dollars more than the budget expenditures, and it is only 200 million dollars less than 70 billion dollars.

Now where will that money come from? Well, it comes from seven sources, broadly speaking. One of these is a nontax source. Nontax sources will produce approximately 3.2 billion of the 69.8 billion.

Now what are these nontax sources? Briefly, they include sale of surplus government property, rents, fines, recoveries, penalties, gifts to the government, and that type of receipt by the government. But the rest of this 69.8 billion, or 66.6 billion, will come from six kinds of taxes.

Now three of these tax sources are so minor that they are relatively insignificant; net employment taxes produced about 300 million dollars a year for the general budget. It is a lot of money, but when you are talking about 69.8 billion dollars, then 300 million dollars is not a very big bite in it.

Now can we look to employment taxes to replace some other kind of tax which currently is under attack? Well, I think that most Americans would agree that we do not want employment taxes increased, at least, not substantially. The present law already schedules a rise in employment taxes from 2.25 percent to 3.75 percent on every employer, and also on every employee in 1960. That means a total tax on gross payroll of 5.5 percent.

The federal government currently collects 7.5 billion dollars in payroll taxes; but 7.2 billion of that is transferred into the social security, and so forth, trust fund for the purpose of paying the social security benefits, and the excess of the 300 million stays in the general budget.

I think it is perfectly silly to expect employment taxes to be a replacement for any other current tax.

The next minor tax source is customs and tariffs. They produce about seven-tenths of a billion a year. I do not suppose the majority of Americans would want to increase tariffs, customs duties, very materially, and, as a matter of fact, I do not think any increases of substantial amount in our tariffs would produce substantial additional revenue to the government in any event. At the present time they only produce seven-tenths of one billion dollars. So, there again, without going into detail there is not a likely source for large additional revenues to replace any other taxes.

Now the third source, estate and gift taxes. In combination, they only produce 1.2 billion dollars a year for the federal government, that is all. Now is there a chance of the federal government to get large additional revenues from that source? I think it quite obvious that there is no way of increasing rates so substantially that the federal government would get substantially more money.

At the present time as you know you reach the 30 percent bracket in a taxable estate of a hundred thousand dollars; at a million dollars you are at 39 percent; at three million dollars you are at 56 percent; at six million dollars you are at 70 percent; and everything over ten million dollars is taxed at 77 percent now.

But then, we look at these things and see if the federal government could get some more money by increasing these rates. If, instead of these already confiscatory rates, the government said, "We are going to take 100 percent of everything over half a million dollars of everything that every American leaves behind when he dies, and, in addition, we are going to collect out of that first half-million dollars what we currently collect," the government would only raise about an additional one billion dollars a year, that is all. And if you are going to be realistic, obviously government would not raise that, because rather than leave their money to the government would not most wealthy Americans do what they are already doing—put their estates in accepted foundations of their own charity? Or are we going to say that we are going to tax all

charitable gifts and bequests in America at 100 per cent? I suggest that Americans, at least, yet, would not stand for that kind of a tax, and even if it did, nobody realistically believes that state and gift taxes would raise enough money if we confiscated everything over some reasonable figure instead of taxing as we now did, enough money to substantially supplant any other taxes.

Well now, to summarize for a moment, to see the three minor tax sources, customs, unemployment taxes and estate and gift taxes produce only 2.2 billion dollars at the present time; but with no realistic prospect that they can or will be increased or changed in such way as to provide enough money to supplant or replace any other form of tax.

These three things in combination plus non-revenue sources, non-taxables, only produce 5.4 billion dollars, which is only eight percent of the total federal revenue, which leaves 92 percent, or 64.4 billion dollars, to be raised by other tax sources.

Those other tax sources are really only two in number, but I want to break them into three for discussion purposes. The three mainstays of the present taxing system are, first, excise taxes, which will provide about 9.2 billion dollars a year this year; corporate income taxes, which will produce net about 21.2 billion dollars a year, and individual income taxes, which under the August estimate will produce about 34.1 billion dollars this current year.

You see thus excise taxes produce about 13 percent of the total federal revenue; income taxes about 79 percent; and all of the others in combination only eight percent.

Now as realists, as people who want to be factual about this problem, I put to you the problem of where government would turn to produce the 55 billion dollars in revenue which now is being produced for the federal government by income taxes. Let us first take a little quick look at excise taxes. They are the most productive of all federal taxes except income taxes. However, it is a form of tax for which many Americans have little funds, because it is a tax on consumption, but it is a real revenue producer, over nine billion dollars a year. Now how much more realistically would rate increases in excise taxes add to federal revenue? Well, about 4.7 billion of this, a little over nine billion dollars, of excise tax revenue comes from alcohol and tobacco taxes. The current liquor tax is \$10.50 on a gallon on a product that costs the industry between one and two dollars a gallon to make, to put in bond, and in charred kegs; to keep in warehouse storage up to eight years, and then bottle ready to put on a distributor's shelves.

The current tobacco tax is eight cents on a package of twenty cigarettes, obviously exceeding the cost of production and manufacture. I suggest that there is very little room for large amounts of additional revenue for the government in these areas. Somewhere, you see, government would reach the break-through point,

the point of diminishing returns, where we are getting back to bootlegging again, and that kind of problem.

As a matter of fact, a great many honorable people in the alcohol industry today sincerely believe that we already have reached that point.

Well, without exploring it in detail, let us suppose that Congress did just double all excise taxes currently levied. Suppose they doubled the ten percent tax now imposed on automobiles, the tax on refrigerators, household appliances; doubled the tax on transportation, on communications, on admissions to movies; doubled all stamp taxes, the taxes on alcohol and tobacco, and everything else that is now subject to excise taxes.

And then make another assumption, which I am afraid will be a little foolish, but let us make it; that doubling excise taxes somehow or other did not reduce the volume of sales and of services now subject to excise tax, so that the government's revenue from these sources was doubled. Suppose in addition we changed our estate tax laws and confiscated 100 percent of all estates over half a million dollars, and took what we currently take from the first half-million dollars.

Well, we would still be 45 billion dollars short of replacing the revenue currently raised by the income tax. And, incidentally, the hue and cry for reduction of excise taxes, at least in Washington, is much more intense, gentlemen, than is the hue and cry for reduction of income taxes. Just sit there and take the pressure for a while and you will come to that conclusion, at least so far as the effective representation of industry in the halls of Congress is concerned.

Well, not only are income taxes currently our main source of revenue, but I think they are destined to be for some time to come. Viewed realistically, I think it has to be that way. Now it may be that government leans too heavily on income taxes. Seventy-nine percent of your revenue is an awful lot of money to get from that type of source, but that is a debatable problem, incidentally.

But certainly we ought to go a little slow in substituting a sales tax or anything the equivalent of a sales tax for an income tax. What would a sales tax that is large enough to replace the income tax do to this country? What would it do to business? What would it do to our economy? What would it do to our people? How many jobs would be destroyed, would be just wiped out overnight?

I am talking off the record. These are not published figures. It will be all right to publish them in January, but I do not want them out now, because I do not want any political or election implications in what I have to say, because it is not intended.

But, you know, it would take a retail sales tax of over 26 percent on every retail sale of everything in America except food and government purchases to raise the money now raised by the income tax. Remember that a lot of these things are already taxed at ten percent or more, and that the 26 percent figure I have given you contemplates continuous retention of all current excise taxes.

I suggest to you that with the exceptions that the Congress certainly would grant, it would take at least a 40 percent break to raise the money currently raised by the income tax.

Well now, if instead of replacing the income tax with a retail sales tax, suppose we used a manufacturer's and producer's tax, so you taxed the farmer on the sale of his product. It would take a rate of 36 percent on top of current excise taxes, even if nothing was exempt except food and government purchases.

Take another look at a different approach. If we taxed all retail sales except food and government purchases, and in addition we taxed every consumer expenditure for services, taxed lawyer services, doctor's services, every service rendered in America, and we kept our present excise taxes in effect, the rate would have to be 16 percent. That would mean a direct tax of 16 percent on every paycheck in America, from withholding. And how unrealistic! Can you imagine Congress taxing medicine, drugs, medical and hospital care, sale of homes, rents, all clothing, adding 16 percent to the current payroll tax? It gets down to how silly can you get?

Well, obviously current income taxes in the case of individuals are too high, extremely high, perhaps much too high. They are so high now that even after the '54 reduction, the government could not raise much more money by increasing current income tax rates. For example, if, instead of taxing at the present rates, the government confiscated 100 percent of all surtax of net incomes of individuals over \$40,000 per year on joint returns, or over \$20,000 a year on a single return, the total additional revenue that the government would get by taking 100 percent instead of what they currently take is only 1.9 billion dollars.

That is substantially less than the loss of revenue involved in a \$100 increase in a personal exemption; 1.9 billion dollars, that is all, that current rates leave large taxpayers in America under your current income tax practice in respect to their ordinary income. That is how close we already are to confiscation of large incomes under current rates.

Here is another interesting fact. Suppose we stopped the individual surtax, at the top tax bracket, at 50 percent instead of letting it climb up to 91 percent as it currently does. The government's revenue loss would only be about three-quarters of a billion dollars a year. In other words the surtax rates above 50 percent today only

produce about three-quarters of a billion dollars a year. And remember, you have reached the 50 percent bracket at \$16,000.

If the surtax brackets were stopped at 75 percent instead of going up to 91 percent, the revenue loss to government would be only about 80 million dollars a year. Now 80 million dollars is a lot of money, but when you are talking about \$69,800,000,000, then 80 million dollars is not so big.

If the top surtax bracket was stopped at 30 percent, the revenue loss would only be 2.9 billion dollars a year. In fact, the total surtax bracket system produces only a little over 5½ million dollars a year.

So put it the other way; the 20 percent bracket, the bottom bracket, produces all but 5½ billion dollars of the money raised by the individual income taxes. In other words, the 20 percent bracket produces 84 percent of the amount raised by the individual income taxes, and the surtax bracket structure only produces 16 percent.

Well now, so much for the surtax bracket and the problem of surtax rates. I want to take a look at another facet of this problem. Let us take a look at this income tax structure, the system itself, and ask ourselves whether it is wholly bad, whether the things that are said to be wrong with it have as their source some evil un-American thing. The charges are that the income tax law is terribly complicated, it is so complicated that only a professional can understand it; that it is discriminatory, that it is inequitable, and that it is confiscatory. And now what I have said about surtax rates and estate tax rates does relate to the charge that they are confiscatory, but that is a matter of opinion. Those rates, however, in combination with the special treatment that we give to capital gains are, in my judgment, the direct cause of the immense drive to convert ordinary income into capital gain, to defer realization of income, and to split income, so to speak, into different tax returns, and all of the other techniques for minimization or deferment of over-all income tax liability, which, in turn, I want to explain a little more in a moment, is one of the major causes of the law's complexity and of some of the alleged inequities.

But now, what about the charge that the tax law is so complicated that only the professional expert can understand it.

Well, obviously, there is a great deal of truth in that charge; it is complicated. However, there are many worthwhile things in America today that are complicated and which not everybody can understand. Frankly, I do not understand how a radio works, how television works, how an automobile works—most of the things which we Americans use in our daily living are complicated, and they require experts to maintain and repair them.

As a matter of fact, a vast number of the essential things in American life today can be operated only by experts. There are

a lot of things in life today that are too complicated for everybody to understand fully; so I suggest that it is clear, is it not, that the mere fact that something is complicated does not ipso facto, of itself, indict it. You see, business itself is pretty complicated; our whole life is pretty complicated; and there are good American reasons for these complications in American life today, and there are good American reasons for the complications in the income tax law.

Here we are, 169 million free Americans, free to live our own lives, free to do things the way we want to do them. We are free to travel, to live here, to move there; we are free to work, we are free to quit. We are free to select the times and the places, the terms and the conditions under which we are going to work. We are free to build, to renovate and change, and to tear down. We can organize businesses, we can reorganize them, and we can liquidate them; and we are free in America to select the ways of doing all these things. We can select an infinite variety of ways, means, terms, conditions, provisions, and the times and places when and where we are going to produce income.

We are pretty ingenious people in America, a very vigorous, dynamic people. We have a lot of ingenuity, and, by the way, we have a lot of motivation to make our personal affairs, our personal transactions, and to make our business transactions very complicated. You see, we have the right in America, and we zealously assert it. That is one of the things that we demand and never surrender.

We have the right as free men to determine the form and the substance and the timing of our personal and our business transactions.

Now, any income tax law, to be fair, has to reach everybody; any tax law, to be fair, to be equitable, to be as little discriminatory as possible, has to reach all incomes wherever and whenever realized and it has to tax it to the right person.

Now, there is this constant hue and cry for a simple income tax law. Well, we can have a simple income tax law any time we want it. It would not be difficult to draft. The three of us here on the rostrum have all the technical ability it would take to produce a simple income tax law in a two-day session at the maximum. The trouble is you would not stand for that law, you would not want it. Americans would not tolerate any simple income tax law. Why? Well, the reason is simple. Any simple income tax law has to take a meat-ax approach; it would be outrageously discriminatory; it would create intolerable competitive advantages and disadvantages.

In its application to some taxpayers, it would be extremely partial and unjust; it would discriminate in favor of some and against others. You see, simplicity and fairness simply do not

go together in a tax law. They are both desirable goals, but they will not fit; you can not have both in a free and complicated society, where you want your tax law to reach all income whenever and wherever realized and tax it to the right person.

Why is our law complicated? Is it because Congress is inept, or the Treasury, and Congressional staffs are deliberately trying to be complicated, just writing for the experts to understand, or maybe too naive to know the effect of what they are doing? Is it because Congress is weak and succumbs to lobbying pressure?

Well, I do not think so; I think the major causes of complications in our tax law today are two in number, and both of them arise out of the same essential basic American principle. These things are, first, the impelling need that all Americans naturally have in them for justice, for fairness; the impelling need to make our tax laws as little inequitable, as little discriminatory, and as neutral in their impact on our fellow Americans as we can.

And, secondly—and this is just as important, in fact, it is more important, from the standpoint of creating competition—there is this dominant overriding necessity of preventing avoidance of income tax by the sophisticated and erudite well advised taxpayer; of trying to make sure that every American bears his fair share of the total tax burden.

You see, one of our basic principles in America which has been something pretty sacred for most of us, is that ours is a government of law, not government by a man. We are pretty dedicated to that concept, and I think we have grown great in America partly because of that concept. We want no vesting of broad discretionary authorities in tax administrators to decide how much tax we individually are going to pay, or who is going to pay tax. We want our tax liabilities determined under laws applicable to all men. As free men living under law, we claim the right to shape our affairs the way we see fit, and when tax rates are as high as they are today, some of us are pretty ingenious in shaping our affairs, but that is our lawful right, and you will fight for that right too, will you not?

Well, what does that mean? That means that any law, to be as fair as we can make it to prevent avoidance, has to be complicated to prevent particular taxpayers from shaping their affairs in such fashion as to avoid what is really their fair share of the total national tax burden, and at the same time leave us free in America to shape our own affairs the way we want to shape them, and the way we are going to shape them.

No, a simple tax law will not work. It would do one of two things: it would either make it impossible for some Americans to do business the way they want to do business and conduct their affairs the way they want to conduct them, or it would enable others to avoid their fair share of the total burden. It is a beautiful

dream to have a simple tax law, but I am afraid that it is just a dream. I do not think life in America is like that.

You see, the price you would have to pay for a simple income tax law that would work and that would leave you free to shape your own affairs the way you are going to demand the right to shape them, well, the price would be to vest in the tax collector almost unlimited discretionary authority to determine the amount, the character, the ownership, and the time of taxability of income. And that means abandonment of our basic principle of freedom under law, of government by law, not government by man. That simply is not the American way.

Well, what then are the causes of these complications? I am not going to try to explore them all. I do not have the time; but I am going to assert that with a very few exceptions, the complications in the tax laws today have their origin in and owe their continuing existence to one or more of the following things, each of which I say to you is inherent in greater or lesser degree in any income tax system containing surtax brackets, dividing ordinary income and capital gain, and so forth, that it is going to operate in a free society such as ours, which itself is complex, and if you are going to have government by law, not government by man.

And I want to give you some illustrations to document briefly each of these points. First, as I mentioned, the necessity of preventing tax avoidance. Take a look at the throw-back rules and the taxation of an income of trusts and estates. There are few things in life more complicated than that. Look at the horrible problem in net operating loss, in carry-backs and carry-overs, in corporate reorganization, in collapsible corporations, in 306 stocks, in collapsible partnerships, personal holding companies, and I could go on listing that sort of thing almost endlessly. Every one of those complicated provisions is caused by the necessity of preventing tax avoidance, the conversion of ordinary income into capital gains, a big lot of income at capital gain rates, and that sort of thing.

Those complications represent the necessity of being fair, of preventing avoidance by erudite taxpayers through the use of clever form arrangements, and there are very few areas of the income tax law that are free from the potential of "gimmicking." We are pretty clever people. A lot of us lawyers can be pretty ingenious in finding new ways to avoid; so, to be fair, the tax law must try to prevent each of us from gaining an unfair advantage over our fellow Americans. Therefore, in any fair tax law, we have to have it complicated to prevent avoidance of the provisions if we are going to continue to have government by law and not government by man, and be left free to shape our own affairs, and at the same time prevent the erudite from escaping his share of the tax burden. It is that simple.

Now, second, the minimization of competitive advantage and disadvantage; that is a motive for complication. Take a look at the

complications and the rules relating to prohibited transactions of exempt organizations. What brought that into the law? Just one simple thing; they came into the law to prevent charities and other exempt organizations from engaging in unfair competition with private business, nothing else.

Third, the elimination of what otherwise would be a very unfair discrimination. Well, look at the new sick-pay provisions with all their horrible complications. These provisions were adopted solely to eliminate a discrimination. What was that discrimination? Well, under the old law if I were an employee, my employer bought an insurance policy which paid me benefits when I was sick. There was no tax on my benefits. They were tax-exempt. But if my employer put in his own sick pay plan and paid me sick benefits with his own money instead of providing like benefits through an insurance policy, then my benefits were fully taxed. Well that was deemed to be a pretty unfair discrimination; so into the law came these new sick-pay complications with all their god-awful complications.

Take a look at the new retirement income credit; it takes a half a page on Form 1040 to try to boil it down. It is so terribly complicated that one tax service recently said, quote: "One trouble is that it involves complications which might baffle the tax practitioner who can take a tax free reorganization in his stride."

Well, what brought that into the law? The elimination of unfair discrimination, nothing else. What was that discrimination? Well, if you have social security benefits, they weren't taxable, but if you saved your own money and built up your own retirement fund and received income from your own investments when you retired, that was taxable.

So, to stop this discrimination, to level it off between the non-taxable income of the social security fund and the self-employed fellow who built up his own little retirement fund, into the law came the retirement income trick, with all its complications.

Well, the fourth cause of complication, relief from inequitable or harsh result. Look at Section 303, which deals with the redemption of stock to pay death taxes. Take a look at this recent legislation of the last session of Congress dealing with the problem of distribution by corporation of property in kind with the stockholders, where the property exceeds in value the claims and profits of the corporation.

Take a look at our whole system of foreign tax credits which can get horribly complicated. All of those things, and I could go on again listing endlessly, all of those things came as relief from an inequitable and harsh result that would follow in the absence of such provision.

Well, there is a fifth general area of complication; there are a good many instances in which something has been done in the tax

laws to encourage a particular public purpose. Take a look at depletion and the intangible write-off. How are they justified? The answer is, in the main, done for a public purpose, to encourage the exploration and development for minerals in the country.

Take a look at the emergency amortization of defense facilities. Take a look at the emergency amortization of grain and storage facilities. Why did that come in? To encourage the construction of grain storage facilities by private capital, because if private capital did not do it, government was going to have to do it. Public purpose. Take a look at Section 175, on water conservation. What brought it into the line of a public purpose? To encourage soil and water conservation.

Take a look at the Western Hemisphere Trade Corporation situation. It is terribly complicated and contains all kinds of problems. They came in for the same reason. Again, I can give you a long list. A lot of things have come into our tax law because in the judgment of Congress it was wise to use the tax laws to encourage a particular public purpose.

I want to say that I personally do not like that doctrine; I disapprove of it. I think it is the wrong way to use the tax laws, but that has been a cause of the complications, and I suspect, whatever your politics, and almost under any administration you are going to have an occasional use of tax laws for a non-revenue purpose. And whatever kind of a tax you have, whether it is income tax or anything else, it is one of the facts of American life today.

Now the final point on this thing. I think it is obvious too that wiser administration at times in the past, sometimes perhaps a more far-seeing litigation policy on the part of the Treasury and Internal Revenue, more thoughtful consideration and better understanding of the long range of the thing by the courts, or a little wiser action by Congress in the first instance, could have spared us the need for some of the Congressional action which has added a lot of complications to our income tax laws.

Take a look at what has been done in the whole area of intangible write-off, and there is another instance of flipping and flopping back and forth, and every time they won, they found out that they won the battle and lost the war, so they had to take a new position, and that has been going on for fifteen years.

So that type of situation contributes to complications. But, after all, how critical should we be of the fact that sometimes the Administration has not been as wise as it should have been or sometimes revenue is litigated when it should not have been litigated as it now turns out. Or it turns out that Congress should have been a little smarter in the first place, or it turns out that the courts should have been more far-seeing and should have been wiser in their decisions.

What does that prove? We are not going to have too much

improvement, I suppose, in administration, handling of things in revenue, of handling things in our courts. Are we going to have much wiser judges? Is Congress going to be much wiser?

I suggest to you that that is one of the prices that we pay for our system of freedom under law. As a matter of fact, that is one of the reasons, is it not, for the principle of government by law, not government by man.

And if these things I have just mentioned have been a cause of complication, then what would be the effect of instituting a system in which you vest in men the authority to determine when and how much taxes you are going to pay, which is the alternative, in my judgment, to a somewhat complicated law?

Well, of course our tax laws are not perfect. They are far from perfect. Nobody knows it better than those who have had a little experience in the Treasury Department; on the contrary, I say to you with all earnestness that all of the people in government who have any official responsibility or connection with our income tax laws know that our tax laws are imperfect. We in the Treasury, the Committee on Ways and Means, the Committee on Finance in the Senate, and their professional staffs, a lot of great professional organizations like the American Bar Association, in its Section on Taxation, the American Law Institute, American Institute of Accountants, and a lot of other professional organizations are working constantly on improvement of our present tax laws.

Personally, I am glad that these voices have been raised, challenging the fairness and the propriety of our income tax laws, because I think it will help to stimulate more and, I hope, better thinking by all of us about our income tax laws, and that is all to the good.

Clearly there is a lot that can and should be done to improve, to clarify, and to simplify this total income tax structure, to make it less imperfect, to make it more fair and just. Certainly in many instances the complications are not worth it. Perhaps in a few instances, sometimes with Treasury urging, I hope not, it has not happened recently, Congress has introduced complications so extreme, that what they have really done is burned down the barn in order to kill one or two wrecks. But I hope that you will agree with me that there is another side to the story, and that blind repudiation of the income tax based on half learning, without looking to see how it is working and without looking to see what you could turn to to see what you could substitute for it, will not add much to the construction of American life. After all, the whole American scene is kaleidoscopic; change is the order of the day. Experience constantly brings to light the need of further change to meet the nation's changing needs.

I think that constant vigilance, earnest and sincere effort, and all the while adherence to fundamental American principle will

keep our income tax laws relatively fair, but they will not be fair and also truly simple, not unless and until the day comes when either our society and our economy are simple or, God forbid, some of our precious freedom is gone from our land.

As to these complications, I suggest that with the continuing education of the professional tax people of America and the people generally in America, and with the continued efforts that are now being made, they are in progress for simplification and improvement, particularly now that these voices have challenged people to redouble their effort to simplify and improve and clarify, I think we will continue to have a taxing system which is one that the people of this country ought to think about pretty long and soberly before they discard it.

I submit that the remedy is improvement, constantly working with it, simplifying and improving, and not to destroy it.

And one final thing, and I say this out of experience, and out of a fairly considerable experience. We now have in this country a taxing system which is so much fairer, it is so much more equitable, and it is so much more like America than the taxing system of any other nation on the face of this earth that any comparison of our taxing system with that of any other civilized nation on this earth will leave you with a very great and very deep appreciation of the over-all fairness and the over-all good of the system we do have in America.

Thanks very much for listening. I think it was too long, but you seemed to hang on, so I kept on. Thank you very much.

BARTON KUHNS: We have one other item of business, but, first, Laury, I want to thank you very much indeed for your very informative and very inspiring paper, and I really think that this section on taxation of this State Bar Association is very fortunate to have two such papers as we have heard this afternoon, and I think it will be a credit to any tax meeting anywhere in the country.

JUNIOR BAR SECTION

Ray C. Simmons, Esq.
Chairman

“Analysis of Tabulation of Economic Survey”

Panel Discussion

Panel Members

Ray C. Simmons, Esq.
Chairman of the Section

Donald Boyd, Esq.

Dewayne Wolf, Esq.

Edmund McEachen, Esq.

William Stewart, Jr., Esq.

Albert Schatz, Esq.

The Junior Bar Section received and discussed the analysis of the economic survey of the bar which follows and adopted a resolution which is made a part of the proceedings of the section.

FINANCIAL SURVEY OF NEBRASKA LAWYERS

The income of Nebraska lawyers is the fourth lowest in the United States outside the South, according to a 1950 U. S. Census report. And, between 1929 and 1949, total incomes in the United States increased 141 percent during rising costs of living, while those of non-salaried lawyers increased by only about 73 percent, according to a 1954 U. S. Department of Commerce survey.

Seeking to learn the financial facts of life of the Nebraska lawyer, the Nebraska Junior Bar, working with the Nebraska Bar Association, carried out a financial survey of Nebraska lawyers in April 1956. Confidential survey forms were sent to 2,200 Nebraska lawyers. Eight hundred and fifty-three of these forms were completed and returned by the lawyers. This was a 39 percent response, which compares favorably with surveys of other states, which report percentage returns as follows: Iowa 42 percent and Ohio 41 percent.

The 853 returns were tabulated by the University of Nebraska Department of Business Research, under the direction of Dr. Edgar Z. Palmer. The department found that 251 of the returns were checked by the lawyers as indicating they were not in private practice or were in part-time practice. There was insufficient number of the part-time-lawyer returns for it to be practicable to tabulate them. Accordingly, the 251 were set aside. Only the remaining 602 returns completed by lawyers who indicated they spent 80 percent or more of their time in law practice, were used in the tabulations.

Following are those tabulations which we believe will be of the most interest to Nebraska lawyers. Again, these tabulations involve only lawyers who indicated they spent 80 percent or more of their time in private law practice.

AGE, BY SIZE OF CITY

Age in Years	All Cities	Omaha	Lincoln	Size of City				
				10,000 to 50,000	5,000 to 10,000	2,000 to 5,000	1,000 to 2,000	Under 1,000
All ages (percent answering ¹)	602 29%	179 23%	71 19%	101 45%	61 50%	89 33%	73 36%	28 24%
Under 25	2	1	0	0	1	0	0	0
25 to 29	47	18	9	5	5	4	5	1
30 to 34	77	21	10	15	12	7	11	1
35 to 39	84	25	16	14	2	15	9	3
40 to 44	78	18	4	14	10	18	11	3
45 to 49	73	22	4	11	9	10	12	5
50 to 54	72	22	6	10	8	14	5	7
55 to 59	56	19	3	14	3	4	9	4
60 to 64	45	14	9	7	3	6	5	1
65 to 69	40	9	5	8	5	8	2	3
70 to 74	11	5	1	1	1	2	1	0
75 and over	9	4	0	2	1	1	1	0
Not given	8	1	4	0	1	0	2	0
Average age	46.8	46.9	44.7	47.6	45.8	47.7	45.7	50.0

¹This percentage is the number of full-time lawyers who answered the survey compared to the number of lawyers listed in Martindale-Hubbell. As noted earlier, survey returns from non-full-time lawyers were not tabulated.

Looking at the first horizontal figures and the percentage figures under them, we see that the survey returns are fairly well scattered through the various sizes of Nebraska cities. And the first vertical figures show the returns to be fairly well distributed age-wise. One limitation to the graphs is that the tabulator reports that the 28 returns for cities under 1,000 contain some with population unspecified. This limitation as to cities under 1,000 applies to all graphs in this survey.

The "average age" of lawyers is shown to be about the same for all sizes of Nebraska communities, which disproves the belief that younger lawyers gravitate to the larger cities. Although lawyers under 30 seem to be particularly heavy in Omaha and Lincoln, lawyers in the 30-to-45 bracket appear to be well distributed through all sizes of Nebraska cities.

**IMPORTANCE OF VARIOUS FIELDS OF LEGAL WORK,
BY SIZE OF CITY**

Size of City	Probate	Office Practice	Damage Actions	Income Tax	Title Examination	Corporate Work	Domestic Relations	Collections	Other Fields
Percentage importance									
ALL CITIES	25.0	20.8	14.0	9.5	8.7	8.1	5.8	4.6	3.5
Omaha	19.7	21.0	15.2	7.4	7.6	14.3	7.0	4.7	3.2
Lincoln	19.6	19.8	16.7	3.4	7.5	13.2	9.5	4.8	5.4
10000-50000	24.5	20.7	18.6	6.3	8.5	8.6	6.0	3.9	2.9
5000-10000	28.4	20.8	13.4	11.6	10.3	4.5	3.6	3.4	4.1
2000- 5000	28.5	21.1	12.3	11.3	8.5	2.7	5.9	5.9	3.8
1000- 2000	32.4	20.4	8.1	17.3	10.6	1.7	2.9	4.1	2.5
Less than 1000.	33.1	21.9	6.1	17.0	10.6	.6	2.3	4.2	4.2

Lawyers were asked to list in order of importance five fields from which their income came. Points were assigned these fields by the tabulator as follows: first mention, 5 points, second mention, 4 points, etc. The above figures show the relative importance of the fields, though they do not necessarily correspond to the percentage of income from that field.

The table shows probate work to be the most important income-wise, and, as expected, that this importance increases as the size of city decreases. In Omaha and Lincoln, office practice is slightly more important than probate. Office practice is about equally important for all sizes of Nebraska cities.

Iowa's 1955 survey showed probate by far the most important field, income-wise, half of Iowa's lawyers rating it such. Next in order came damage cases, office practice, income tax practice, corporations, title examination, auto claim investigation, collections, domestic relations, and criminal law. Iowa's tabulation showed probate work to be most important for 71 percent of the lawyers in cities under 5,000 population, and that this percentage steadily and sharply dropped as population increased, so that less than 26 percent rated it as most important in cities over 50,000 population.

An Ohio 1953 survey showed various fields to bring the following percentage of income:

Corporate practice	19%
Probate and Trust	15
Damage actions	15
Real estate	11
Office work	11
Domestic relations	9
Tax	6
Collections, insolv.	4
Others	10

SIZE OF CITY AS AFFECTING INCOME

Size of City	Av. Gross Receipts	Average Expenses	Expenses Percent of Gr. Receipts	Average Net Income ¹	Average Net Income ²
All Cities	\$13,464	\$4,355	32.4%	\$ 9,109	\$ 9,178
Omaha	15,082	4,735	31.4	10,347	10,680
Lincoln	16,714	6,282	37.6	10,432	9,641
10,000-50,000	14,905	4,077	27.4	10,828	10,796
5,000-10,000	11,905	3,860	32.4	8,047	7,812
2,000- 5,000	12,542	4,234	33.8	8,308	8,181
1,000- 2,000	9,840	3,531	35.9	6,309	6,263
Under 1,000	8,977	2,672	29.8	6,305	6,376

¹Includes returns giving gross receipts, expenses and net income, a total of 483 returns.

²Includes also returns giving net income only, a total of 592 returns.

In the upper right-hand corner is a figure in which Nebraska lawyers will be interested: The average net income of the full-time Nebraska lawyer is tabulated as \$9,178. This may raise a few lawyer eyebrows, particularly in view of a 1951 federal survey which showed the average net income of Nebraska lawyers to be \$6,333 and a 1949 U.S. Census Bureau report which showed it to be \$5,446.

One important limitation to the \$9,178 figure should be noted, however. This figure is the average income of lawyers spending 80 percent or more of their time in law practice—"full-time" lawyers. More accurately it is the income of the "successful" lawyer. The survival-of-the-fittest law has removed a sizable number of lawyers from the full-time category, leaving only the more successful lawyers to whom the \$9,178 figure applies.

Iowa's 1955 survey showed its lawyers' average income to be \$8,643. However, Iowa included in its figures the income of part-time lawyers, so it is difficult to compare the Nebraska and Iowa figures. Ohio's 1952 survey, covering only full-time lawyers and thus on the same basis as Nebraska's tabulation, showed an average income of \$11,700.

Nebraska's survey shows, as expected, that a lawyer's income is higher in the larger cities. However, the tally shows the lawyer in the 10,000 to 50,000 population city to have the highest average income of all.

A federal survey a few years ago showed lawyers in cities between 100,000 and 250,000 population to earn an average income twice that of lawyers in towns under 1,000 population. Ohio's 1952 survey indicated lawyers in cities of 200,000 to 500,000 population averaged \$11,000, and those in cities under 5,000, only \$7,100. Iowa's 1955 survey showed lawyers in cities over 50,000 earning about \$10,500, and those in towns under 1,000 about \$4,500.

As for office expenses, the above table shows Lincoln with by far the highest average expense. Otherwise expenses generally decrease as the size of city diminishes.

Iowa's 1955 survey results are similar, average expenses dropping rather steadily from about \$5,500 for cities over 50,000 to about \$2,500 for towns less than 1,000. Secretarial expense was by far the largest item in Iowa, averaging about 67 percent of total expense, and rent the second largest at about 18 percent. As city population increased, secretarial expense became a smaller proportion of total expense and rent became proportionately larger. However, for all sizes of city the cost of secretaries plus rent totaled about 85 percent of expenses. All other expenses combined thus totaled only 15 percent.

Minnesota's 1952 survey showed that the average salary paid secretaries was about \$205 in the three largest cities and about \$157 in cities under 10,000 population. Annual rent was \$887 and \$445, respectively, for the two categories. The Minnesota bar committee, however, concluded that the small-town lawyer's expenses for law library, insurance, supplies, etc., nearly offset his advantage as to secretary and rent expense. Minnesota apparently did not ask lawyers to list total expenses. The latter item was asked for in Nebraska's survey, and shows the small-town lawyer to have a decided advantage expense-wise, contrary to the Minnesota committee's conclusion.

AGE AS AFFECTING AVERAGE INCOME AND EXPENSES

Age in Years	Expenses, Percent of Gross Receipts	Average Net Income
All Ages	32.4%	\$ 9,178
Under 25	-----	1,887
25-29	32.2	4,686
30-34	33.1	6,473
35-39	33.1	8,764
40-44	33.2	9,182
45-49	30.3	9,094
50-54	33.7	11,797
55-59	31.2	12,145
60-64	29.5	10,952
65-69	29.7	9,481
70-74	27.0	10,103
75 and over	34.5	7,108

The right column shows the average net income of the Nebraska lawyer to reach its peak at age 55-59 and to be about two and one half times the income at age 25-29.

A U.S. 1951 survey gave 50-54 as the peak age for lawyers'

income for the country generally, and indicated lawyers at that age earned more than twice as much as lawyers in the 25-29 bracket. Iowa's 1955 survey showed the years 55-64 to be most lucrative, with a top income of \$10,981. The average income for lawyers under 34 was \$5,463. Ohio's 1952 survey showed lawyers to hit their maximum at age 55-65, when they averaged \$16,400, compared with \$4,200 at age 24-29.

NUMBER OF LAWYERS IN OFFICE AS AFFECTING
INCOME AND EXPENSES

Number in Office	Average Gross Receipts	Average Expenses	Expenses, Percent of Gr. Receipts	Average Net Income ¹
All returns	\$13,464	\$4,355	32.4%	\$ 9,109
1	11,105	4,128	37.2	6,977
2	12,380	3,784	30.6	8,596
3	14,159	4,225	29.9	9,934
4	18,328	5,461	29.8	12,867
More than 4	20,291	6,165	31.0	14,126

¹This is the average net income of the 483 returns in which gross receipts, expenses, and net income were all included and excluding returns listing only net income.

A 1951 survey for all the United States showed that the average lawyer practicing alone earned \$6,334; in a two-man firm, \$8,833; in a three-man firm, \$14,103; and in a four-man firm, \$18,275.

This survey is submitted to Nebraska lawyers without recommendations at this time, to be studied and discussed by them.

Junior Bar Section
Ray C. Simmons, Chairman

RESOLUTION

Be it resolved by the Junior Bar Section, Nebraska State Bar Association, that the result of the financial survey of the Nebraska lawyers be submitted to the Executive Committee of the Nebraska State Bar Association with a preface showing present-day economic conditions generally, and

1. Request that the survey results be published in the *State Bar Journal*, and

2. Request that a committee be appointed for preparation and promulgation of a minimum-fee schedule for the State of Nebraska, and

3. That the Executive Committee of the Nebraska State Bar Association take such other action to carry out the various suggestions obtained from lawyers throughout the state.

House of Delegates**Friday, October 19, 1956**

HALE McCOWN: The report of the Section on Real Estate, Probate, and Trust Law, Herman Ginsburg, Chairman.

HERMAN GINSBURG: Mr. Chairman and members of the House, the Real Estate, Probate, and Trust Law Section reports that we had our session yesterday at the time set in the program. We had a very large attendance. The new members elected to the Executive Committee of the section were Floyd E. Wright of Scottsbluff and Fred H. Richards of Fremont.

Now the next item that I have to report, and I am a little bit embarrassed thereby, is that our Executive Committee did not have too much to do, apparently, and they decided that they would re-elect the same officers that we had last year, so Herman Ginsburg is going to serve as the chairman and Lynn Heth as the secretary.

The main items of business of the section were a very interesting speech by Professor Basye on "Improvements in Conveyancing Procedure," and then we had the report of our Title Standardization Committee, which I want to briefly summarize.

The report of the committee was adopted unanimously with a few minor amendments. In a general way, the report of the committee calls for amendment to two of the presently existing standards, Standards 11 and 20, which will require acts of the Legislature, because they are standards which have already been enacted into legislation.

And then the report of the committee as adopted provides for eight new standards which have been accepted by our section.

Then there are some other matters in the committee's report which were adopted by the section which I feel I should specifically call to the attention of the House, as follows.

That upon the adoption by the section of the amendments to the existing statutory standards, necessary bills be presented to the Legislature for the purpose of enacting such amendments into law.

Next, that the standards and comments as approved by the section be printed in permanent form, bound in the form of a desk book for lawyers, preferably with a loose-leaf binding, and kept up to date as standards or comments may be amended or revised, or additional standards or comments adopted in current annotations.

Parenthetically, I might say that that, of course, will entail some expense.

That the Title Standardization Committee be continued to carry on the work of renewing, revising, and preparing the standards

and assisting in the interpretation of legal questions as the development of statutory or case law may from time to time require.

And, finally, that the Legislative Committee of this section be requested to prepare a bill for the presentation to the Legislature. I will not go into the whole thing, but it refers to the matter of vacated streets, alleys and highways and public ways, and so forth, which through inadvertence in previous years have not been formally conveyed, at least, by the description in the deed of conveyance.

As I previously mentioned, the report of the committee has been approved unanimously by the section, and at this time I move that this House approve the action of the section in that regard; That the amendments to existing standards be approved and the proposed new standards be adopted.

VOICE: Second.

HALE McCOWN: It has been moved and seconded.

May I suggest, Mr. Ginsburg, that it also carries as a part of the recommendation that this House recommends the Executive Council's expenditure of funds required for publication, as shown by the report.

If there is no objection, all those in favor of the motion will say aye.

Opposed, the same sign. The motion is carried.

The next item of business is the report of the Section on Insurance Law, James Ackerman.

JAMES N. ACKERMAN: Mr. Chairman, the Insurance Section met this morning and have had two excellent papers, one by Joseph P. Cashen on "Some Problems of Subrogation in Workmen's Compensation" and the second on "The Disability Clause" by J. Edward Day.

As items of business, the section elected Joseph C. Tye and Harold Kaufman as members of the Executive Committee, and the newly organized Executive Committee elected as its chairman for the coming year Floyd Wright, and as secretary Joseph Tye.

HALE McCOWN: Is there a motion that the report be approved, Jim?

JAMES N. ACKERMAN: I move that it be adopted.

VOICE: Second.

HALE McCOWN: Those of you in favor of the motion, say aye.

Opposed, the same sign. The motion is carried.

The next item of business is the report of the Section on Taxation, Barton Kuhns.

BARTON KUHN: Mr. Chairman, the Section on Taxation met this afternoon, and there were two excellent papers, one en-

titled "Procedure in Tax Fraud Cases" by Joseph T. Votava, and the other "Your Future Income Taxes" by Laurens Williams.

The members of the Executive Committee of the section met immediately following the adjournment and elected as their officers Tom Davies of Lincoln as chairman; Keith Miller of Omaha as vice-chairman, and John Mason of Lincoln as secretary. The only other announcement is that plans are under way for the usual December Tax Institute, of which notice will be sent to the members of the Association in due course and in ample time. Dan Stubbs and John Mason were elected to the Executive Committee.

I move the approval of the report.

HALE McCOWN: Is there a second?

VOICE: Second.

HALE McCOWN: Any discussion?

(There was no response.)

HALE McCOWN: All those in favor of the motion say aye. Opposed, the same. The motion is carried.

HALE McCOWN: The next report is the report of the Section on Practice and Procedure by Lowell Davis.

LOWELL C. DAVIS: The Executive Committee of the Section on Practice and Procedure held two meetings in Lincoln to formulate the program for the meeting which was held here yesterday.

The program consisted of an address by Charles C. Scott of Kansas City, Missouri, who talked on "The Preparation and Presentation of Photographic Evidence."

The second part of the program consisted of a panel discussion in connection with "Trial Procedure from Judicial Standpoint." Members of the panel were Judges Yeager, Spencer, Nuss, and Kuns.

The program was well attended and well received. Your Executive Committee of this section hopes the program has made practical and worth-while contribution to the Association's activities.

It is further the opinion of this committee that the scope of the section activities could profitably be extended to include a statewide institute sponsored by the Association, and to include practical discussion of the matters pertaining to the practice and procedure in the state of Nebraska.

A subcommittee of this section has met and had preliminary discussions with the Committee of the Nebraska Hospital Association to consider problems of mutual interest regarding the procurement and use of hospital records, patient interviews, and so forth.

It is recommended that this discussion be continued to explore the possibility of joint action and in resolving such mutual problems.

Following the section program on October 18, 1956, the following were elected to the section's Executive Committee for three-year terms: Jack Devoe and Lowell C. Davis.

The Executive Committee then elected the following officers for the ensuing year: George Healey, chairman; Raymond McGrath, vice-chairman; Jack Devoe, secretary.

I move that the report be adopted.

HALE McCOWN: Is there a second?

VOICE: Second.

HALE McCOWN: Any discussion?

(There was no response.)

HALE McCOWN: All those in favor of the motion say aye. Opposed, the same sign. The motion is carried.

The next item of business is the report of the Section on Municipal and Public Corporations by Edward Fogarty.

EDWARD FOGARTY: Mr. Chairman and ladies and gentlemen. We held our meeting this morning. We had a paper on "Zoning" by Raymond E. McGrath, who gave us a review of recent legislation and recent cases affecting both city and county zoning.

We had a paper read by Winthrop B. Lane on the subject of "Bond Histories," which I recommend to you. We disclaim any credit for it as being a bible for your use, but I think it could be dignified by being called a "Handbook," and when it is published I think you will want to use it occasionally.

The new members of the section's Executive Committee are Winthrop B. Lane and Barlow Nye.

The Executive Committee of the section elected as their officers for the ensuing year Jack Pace, chairman; Harold Rice, vice-chairman; and Albert Reddish, secretary.

I move the adoption of the report.

HALE McCOWN: Is there a second?

VOICE: Second.

HALE McCOWN: Any discussion?

(There was no response.)

HALE McCOWN: As many as favor the motion, say aye.

Opposed, the same. The motion is carried.

HALE McCOWN: Next will be the report of the Junior Bar Section by Ray Simmons.

RAY SIMMONS: The new members of the Junior Bar Executive Committee are Robert Berkshire of Lincoln and Edward A. Cook III of Lexington. The new officers of the Junior Bar are Edmund McEachen of Omaha, chairman; Dewayne Wolf of Kearney, vice-chairman; and Robert Berkshire of Lincoln, secretary.

We discussed at our meeting a financial survey which the

Junior Bar took this last year together with the Senior Bar, and we have mimeographed forms of that available to give out to any of you who are interested. We recommend a uniform minimum fee schedule.

HARRY SPENCER: I move the report be approved.

VOICE: Second.

HALE McCOWN: All in favor say aye.

Opposed, the same. The motion is carried.

We have one item of unfinished business which we were discussing, mainly, the responsibility of committees with respect to legislation in similar matters. I am going to ask Bob Downing if he has a report to make at this time.

ROBERT DOWNING: I do.

Mr. Chairman, on behalf of the Committee on Legislation, I present the following resolution.

Be it resolved, first, that the President, with the advice and consent of the Executive Council, determine the jurisdiction and prescribe the duties of the Committee on Legislation, and the jurisdiction and duties of all other committees and all other sections with regard to legislation be sponsored, supported, or opposed by the Association.

That all chairmen and members of committees be informed and instructed as to such jurisdiction and duties at the time that they are notified of their appointment, or as soon thereafter as possible, and from time to time thereafter as circumstances require.

And, second, that the chairman of the House of Delegates arrange for the submission to the House not later than the next annual meeting of one or more proposed amendments to the by-laws of the Association designed to conform to the by-laws to Article 6 of the rules controlling and regulating the Association.

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

HALE McCOWN: Mr. Downing, as I understand it, this is primarily with the idea that we should be somewhat slow about the actual amendment of our by-laws, but in order to permit an efficient functioning of this session of the Legislature, it was deemed advisable to present this resolution, giving the President the authority to do that coordinating for the present time, with the idea that the next meeting of the House will be, of course, next fall, and at that time we will have a definite presentation of of any concrete suggestions for by-law amendments. This, I believe, essentially is the proposal.

Is there a second to that motion?

VOICE: Second.

HALE McCOWN: Is there any discussion?

(There was no response.)

HALE McCOWN: As many as favor the motion will say aye. Opposed, the same. The resolution is adopted.

May I now suggest one of the appropriate items of business here, and you may either drop it or you may go ahead, as you see fit, as the final order of business; at the moment our by-laws, articles, and rules, of which we have none at the moment, do not provide anything for a quorum of this House. Consequently, rules of order govern, which means a majority. There is a possibility you may wish to provide that one-third of the members of this House shall constitute a quorum for transaction of business as a rule of this house, which under the by-laws we have the right to adopt the rules for our own governing.

The chair will entertain such a motion if anyone has such a desire.

HARRY SPENCER: Mr. Chairman, the suggestion was made that possibly the President may feel it desirable to call a meeting of the House of Delegates for some purpose. It seems to me that the majority might be too high a quorum in that situation, and I therefore move that one-third of the membership of the House of Delegates shall constitute a quorum.

HALE McCOWN: It has been moved; is there a second?

VOICE: Second.

HALE McCOWN: I might say, very frankly, that the object in mind was that in the event the President should determine it appropriate to have actual House action to back legislation, either presented or opposed by this Bar Association, it might be advisable to call a special meeting of this House, and in that event, in January, at the end of the twentieth legislative day, it might be difficult to get a majority, and in order to be able to speak for the Association, it was deemed certainly within the province of this House to adopt this rule to that effect.

Is there further discussion?

(There was no response.)

HALE McCOWN: Now as many as favor the motion will say aye.

Opposed, the same.

Rule One of this House of Delegates has been adopted and will be designated Rule No. 1.

So far as I know there is no other scheduled business on the agenda.

Is there any unfinished business to come before this House?

(There was no response.)

HALE McCOWN: If not, may I express to each of you my personal appreciation for your attendance, and particularly for

your attendance today. We definitely have a quorum, I might tell you, and when we counted, the quorum was here, and I appreciate it that you fellows did come back today.

If there is no further business to come before this House, the motion to adjourn is in order.

MR. CASSEM: Mr. Chairman, let's not depart without taking the occasion to express, as it should be annually expressed, I think, the appreciation of this legislative body for the quietly efficient way in which Brother Turner continually promotes the affairs of this Association.

I move that we express our gratitude to him.

GEORGE H. TURNER: It is contrary to the rules of this Association to express any commendation to any officer.

HALE McCOWN: The motion has been made and seconded, and, off the record, has been unanimously adopted.

A motion to adjourn is in order.

VOICE: I so move.

VOICE: Second.

MR. McCOWN: All in favor say aye, and, fortunately, it is not debatable; and, thank you very much.

(The House of Delegates adjourned.)

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PRESIDENT ATEN: Gentlemen, we will have a general session of the Association for about two minutes. If you will come to order, we will get it over with very shortly.

I think everyone will agree with me that that is a very efficient way of presiding.

I would rather believe that Roberts Rules of Order had probably been amended this afternoon. Anyway, I would like to offer my personal congratulations to Hale on a job very well and efficiently done, and to assure him that the Association as a whole appreciates his handling of the affairs of the House of Delegates.

Mr. Secretary, is there any unfinished business?

GEORGE H. TURNER: Not to my knowledge, Mr. President.

PRESIDENT ATEN: There being no unfinished business, I would like to now call to the chair Barton H. Kuhns, your President-elect.

I might say we did this last night and we are not going to repeat it, and all I am going to do is tell you that it is now a pleasure to turn over to my successor, Barton H. Kuhns, of Omaha, the administration of your affairs of your Association as President, and I understand he will speak for approximately an hour.

PRESIDENT-ELECT KUHNS: I thought it should be two hours. Thank you, Wilber.

I expressed last evening my sincere appreciation of the honor of being chosen as President of this Association; and all that I wish to say now is to repeat that same expression of appreciation, and I think, Wilber, that the record of this 57th Annual Meeting will be a permanent memorial and tribute to the fine work which you have done as President of the Association since the last annual meeting.

I do want to say that I would appreciate it very much, and I may be inviting trouble, but I do so knowingly, that if any of you have any suggestions, criticisms, or comments upon the activities of the Association, this meeting, ways in which we can improve the conduct of meetings in the future, anything that pertains to a proper function of this Association, I wish you would write me about it.

I assure you that it will receive very serious consideration and thought, and we will either adopt the suggestion or have some reasons for not doing so.

Just a minute Mr. Turner has handed me a note, I think—George tells me that there were 831 members of the Association registered at this annual meeting. I believe that is one of the largest, if not the largest—the largest meeting that the Nebraska State Bar Association has ever held.

I will make committee appointments promptly. I think the very first task is going to be the matter of delineating these legislative assignments and getting ready for the legislative program of the Association.

A good many of you will be hearing from me in that connection in the very near future.

Is there any unfinished business to come before the assembly?

(There was no response.)

PRESIDENT-ELECT KUHNS: If not, the chair will entertain a motion to adjourn.

HARRY SPENCER: I move we adjourn.

VOICE: Second.

PRESIDENT-ELECT KUHNS: It has been moved and seconded that we adjourn.

All those in favor signify by saying aye.

Those opposed—the meeting is adjourned.

(Thereupon, at 4:55 o'clock P.M., the 57th Annual Meeting of the Nebraska State Bar Association was concluded.)

NEBRASKA STATE BAR ASSOCIATION

STATEMENT OF CASH RECEIPTS AND DISBURSEMENTS

SEPTEMBER 25, 1955 TO SEPTEMBER 30, 1956

Receipts:

Active Members Dues		\$37,630.00	
Inactive Members Dues		4,960.00	
Dues Received in Advance—1957		5.00	
Reinstatements:			
1955	\$45.00		
1954	35.00		
1953	12.00		
1952	12.00		
1951	10.00		
1950	8.00		
1949	6.00		
1948	6.00		
1938-1947	1.00	135.00	
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Miscellaneous		6.00	
Statute Books, Etc. Sold.....	1.75		
Less: Remittance to State Library	1.75		
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Overpayments	52.50		
Refunds	52.50		
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Reimbursement—Rocky Mountain			
Mineral Law Institute	114.25		
Expenses to be Reimbursed	113.75	.50	
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Reimbursement of Prior Year's			
Football Tickets		105.00	
Reimbursements of Prior Year's ABA			
Regional Meeting Expenses	428.42	\$43,269.92	
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Expenses:

Salaries and Payroll Taxes	6,253.90
Executive Council Meetings	1,002.65
Miscellaneous	25.55
Audit	175.00
Officers' Expense	1,186.07
Aid to Local Bars	168.18
Office Supplies and Expense	1,316.10

Telephone and Telegraph	320.84	
Junior Bar Institute	267.28	
Institute on Fees and Office Management	59.25	
Contributions	50.00	
Insurance	87.02	
Family Law Institute	1,097.77	
Institute on Real Estate Titles	1,243.46	
Social Security Poll	84.35	
Nebraska Law Review	4,330.06	
Directory	934.65	
Committee Expenses:		
Advisory	260.20	
American Citizenship	9.05	
Inquiry	621.86	
Joint Conference Lawyers and Accountants	170.80	
Judiciary	12.54	
Co-operation with American Law Institute	272.84	1,347.29
Judicial Council	42.40	
Junior Bar—Economic Survey	177.46	
Section on Practice and Procedure	50.00	
Postage and Express	1,180.93	
American Bar and House of Delegates Meeting	1,936.82	
Nebraska State Bar Association v. Feehan	353.40	
Wilson v. Marsh	1,724.43	
Bates Case	435.40	
Nebraska State Bar Association v. Richards	218.08	
U. S. Government Bonds Purchased	2,000.00	
Equipment Purchased	638.20	
Trustee's Expense—Rocky Mountain Mineral Law Foundation	53.50	
Nebraska State Bar Association Journal	1,275.83	
Less: Advertising	930.50	345.33
Public Service	5,337.82	
Less: Reimbursements	338.10	4,999.72
Nebraska State Bar Association Annual Meeting	6,508.55	
Less: Food Cost Reimbursed and Display	2,198.50	4,310.05

NEBRASKA STATE BAR ASSOCIATION

Football Tickets	105.00		
Reimbursements	24.50	80.50	
	<hr/>		
Certificates	2.00		
Reimbursements	2.00		
	<hr/>		
Fee Schedules	15.00		
Reimbursements	10.00	5.00	
	<hr/>		
Tax Institute	2,478.11		
Reimbursements	16.58	2,461.53	
	<hr/>		
American Bar Association			
Regional Meeting	293.60		
Reimbursements	25.60	268.00	41,230.17
	<hr/>	<hr/>	<hr/>
Excess Receipts Over Disbursements			<u>2,039.75</u>
Cash Balance September 25,			
1955	3,307.77		
Excess of Receipts Over			
Disbursements	2,039.75		
	<hr/>		
Cash Balance September 30,			
1956	5,347.52		
	<hr/>		
Represented By:			
First National Bank	2,418.35		
Continental National Bank	2,929.17		
	<hr/>		
	5,347.52		
	<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 P. 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. 1908	*Francis A. Brogan.....	Omaha	39. 1938	Harvey M. Johnson.....	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			

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	35. 1923-26	E. E. Good.....	Wahoo
2. 1900-08	Andrew J. Sawyer.....	Lincoln	36. 1924-26	Robert W. Devoe.....	Lincoln
3. 1900-02	Edmund H. Hinshaw.....	Fairbury	37. 1924-24	Fred A. Wright.....	Omaha
4. 1903-06	W. H. Kelligar.....	Auburn	38. 1925-28	Paul Jessen.....	Nebraska City
5. 1904-07	John N. Dryden.....	Kearney	39. 1925-27	Clinton Brome.....	Omaha
6. 1905-08	F. A. Brogan.....	Omaha	40. 1927-29	Charles E. Matson.....	Lincoln
7. 1907-10	S. P. Davidson.....	Tecumseh	41. 1927-28	Fred S. Berry.....	Wayne
8. 1908-09	W. T. Wilcox.....	North Platte	42. 1928-29	Robert W. Devoe.....	Lincoln
9. 1909-11	R. W. Breckenridge.....	Omaha	43. 1928-30	T. J. McGuire.....	Omaha
10. 1910-12	Frank H. Woods.....	Lincoln	44. 1928-34	Harvey Johnsen.....	Omaha
11. 1910-10	Charles G. Ryan.....	Grand Island	45. 1929-31	E. A. Coufal.....	David City
12. 1910-19	Alfred G. Ellick.....	Omaha	46. 1929-29	Anan Raymond.....	Omaha
13. 1911-13	John A. Ehrhardt.....	Stanton	47. 1930-32	Paul E. Boslaugh.....	Hastings
14. 1911-11	Benjamin F. Good.....	Lincoln	48. 1930-30	J. L. Cleary.....	Grand Island
15. 1912-15	C. J. Smyth.....	Omaha	49. 1931-33	W. C. Dorsey.....	Omaha
16. 1912-12	William A. Redick.....	Omaha	50. 1931-31	Fred Shepherd.....	Lincoln
17. 1913-15	W. M. Morning.....	Lincoln	51. 1932-34	Richard Stout.....	Lincoln
18. 1913-16	J. J. Halligan.....	North Platte	52. 1931-32	Ben S. Baker.....	Omaha
19. 1914-14	H. H. Wilson.....	Lincoln	53. 1933-35	Barlow F. Nye.....	Kearney
20. 1915-17	Edwin E. Squires.....	Broken Bow	54. 1933-33	J. J. Thomas.....	Seward
21. 1916-16	John N. Dryden.....	Kearney	55. 1934-36	Chas. F. McLaughlin.....	Omaha
22. 1916-17	Frederick Shepherd.....	Lincoln	56. 1934-34	John J. Ledwith.....	Lincoln
23. 1917-17	Frank M. Hall.....	Lincoln	57. 1935-35	L. B. Day.....	Omaha
24. 1917-18	Anan Raymond.....	Omaha	58. 1935-37	James M. Lanigan.....	Greeley
25. 1918-18	A. C. Wakeley.....	Omaha	59. 1935-38	H. J. Requarte.....	Lincoln
26. 1918-22	Fred A. Wright.....	Omaha	60. 1935-38	Raymond M. Crossman.....	Omaha
27. 1919-19	R. E. Evans.....	Dakota City	61. 1935-40	F. H. Pollock.....	Stanton
28. 1919-22	Geo. F. Corcoran.....	York	62. 1935-41	T. J. Keenan.....	Geneva
29. 1919-20	L. A. Flansburg.....	Lincoln	63. 1935-39	Walter D. James.....	McCook
30. 1920-20	W. M. Morning.....	Lincoln	64. 1935-37	Roland V. Rodman.....	Kimball
31. 1920-27	Anan Raymond.....	Omaha	65. 1936-36	J. G. Mothersead.....	Scottsbluff
32. 1921-21	Alfred G. Ellick.....	Omaha	66. 1936-36	James L. Brown.....	Lincoln
33. 1921-23	Guy C. Chambers.....	Lincoln	67. 1937-39	David A. Fitch.....	Omaha
34. 1922-24	James R. Rodman.....	Kimball	68. 1937-39	Raymond G. Young.....	Omaha
			69. 1937-41	M. M. Maupin.....	North Platte

*Deceased.

70.	1937-41	Golden P. Kratz.....	Sidney	102.	1947-55	Lyle E. Jackson.....	Neligh
71.	1938-42	Sterling F. Mutz.....	Lincoln	103.	1948-49	Robert H. Beatty	
72.	1938-42	Don W. Stewart.....	Lincoln				North Platte
73.	1940-46	George N. Mecham.....	Omaha	104.	1947-50	Frank D. Williams.....	Lincoln
74.	1940-42	Abel V. Shotwell.....	Omaha	105.	1947-50	Thomas J. Keenan.....	Geneva
75.	1940-42	Frank M. Colfer.....	McCook	106.	1948-51	Laurens Williams.....	Omaha
76.	1941-43	Virgil Falloon.....	Falls City	107.	1949-51	Joseph H. McGroarty	
77.	1941-43	Joseph C. Tye.....	Kearney				Omaha
78.	1941-47	Earl J. Moyer.....	Madison	108.	1949-54	Wilber S. Aten.....	Holdrege
79.	1937-37	C. J. Campbell.....	Lincoln	109.	1948-50	Abel V. Shotwell.....	Omaha
80.	1938-38	Harvey Johnson.....	Omaha	110.	1949-55	Paul L. Martin.....	Sidney
81.	1939-39	James M. Lanigan.....	Greeley	111.	1949-55	Joseph C. Tye.....	Kearney
82.	1940-40	E. B. Chappell.....	Lincoln	112.	1949-51	Earl J. Moyer.....	Madison
83.	1942-45	Fred J. Cassidy.....	Lincoln	113.	1950-	Harry A. Spencer.....	Lincoln
84.	1941-41	Raymond G. Young.....	Omaha	114.	1950-56	Paul P. Chaney.....	Falls City
85.	1942-48	Max G. Towle.....	Lincoln	115.	1950-	Paul Bek.....	Seward
86.	1942-42	Paul E. Boslaugh.....	Hastings	116.	1950-52	Clarence A. Davis.....	Lincoln
87.	1942-45	John E. Dougherty.....	York	117.	1951-55	Barton H. Kuhns.....	Omaha
88.	1942-49	Yale C. Holland.....	Omaha	118.	1952-	Thomas C. Quinlan.....	Omaha
89.	1943-45	Robert R. Moodie.....	West Point	119.	1951-52	George B. Hastings.....	Grant
90.	1941-45	B. F. Butler.....	Cambridge	120.	1952-53	Laurens Williams.....	Omaha
91.	1943-46	Frank M. Johnson.....	Lexington	121.	1953-54	J. D. Cronin.....	O'Neill
92.	1944-49	Floyd E. Wright.....	Scottsbluff	122.	1954-	Norris Chadderdon.....	Holdrege
93.	1945-50	John J. Wilson.....	Lincoln	123.	1954-56	John J. Wilson.....	Lincoln
94.	1945-48	Robert B. Waring.....	Geneva	124.	1955-	Wilber S. Aten.....	Holdrege
95.	1944-46	George L. DeLacy.....	Omaha	125.	1955-	F. M. Deutsch.....	Norfolk
96.	1945-47	Virgil Falloon.....	Falls City	126.	1955-	Clarence E. Haley Hartington	
97.	1945-49	Leon Samuelson.....	Franklin	127.	1955-	R. R. Wellington.....	Crawford
98.	1946-48	Harry W. Shackelford		128.	1955-	Alfred G. Ellick.....	Omaha
			Omaha	129.	1954-55	Jean B. Cain.....	Falls City
99.	1946-48	Paul F. Good.....	Lincoln	130.	1955-	Hale McGown.....	Beatrice
100.	1947-48	Joseph T. Votava.....	Omaha	131.	1956-	C. Russell Mattson.....	Lincoln
101.	1947-48	John E. Dougherty.....	York	132.	1956-	Barton H. Kuhns.....	Omaha