

1955

Proceedings of the Nebraska State Bar Association House of Delegates Meeting, 1955

John J. Wilson

Nebraska State Bar Association

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PRESIDENT JOHN J. WILSON

**1955 OFFICERS OF THE
NEBRASKA STATE BAR ASSOCIATION**

President

JOHN J. WILSON
Lincoln

Chairman of the House of Delegates

JEAN B. CAIN
Falls City

Secretary-Treasurer

GEORGE H. TURNER
Lincoln

EXECUTIVE COUNCIL

John J. Wilson	Lincoln
Julius D. Cronin	O'Neill
Lyle E. Jackson	Neligh
Norris Chadderdon	Holdrege
Joseph C. Tye	Kearney
Paul L. Martin	Sidney
Harry A. Spencer	Lincoln
Paul P. Chaney	Falls City
Paul H. Bek	Seward
Barton H. Kuhns	Omaha
Thomas C. Quinlan	Omaha
Jean B. Cain	Falls City

HOUSE OF DELEGATES

EXECUTIVE COUNCIL MEMBERS

John J. Wilson	Lincoln
J. D. Cronin	O'Neill
Lyle E. Jackson	Neligh
Norris Chadderdon	Holdrege
Joseph C. Tye	Kearney
Paul L. Martin	Sidney
Harry A. Spencer	Lincoln
Paul P. Chaney	Falls City
Paul H. Bek	Seward
Barton H. Kuhns	Omaha
Thomas C. Quinlan	Omaha
Jean B. Cain	Falls City

SECTION DELEGATES

David R. WarnerDakota City
Jesse D. CrannyOmaha
Robert R. MoodieWest Point
Albert SchatzOmaha
John L. BartonOmaha
Vance E. LeiningerColumbus

EX-OFFICIO MEMBERS

Clarence A. DavisLincoln
Laurens WilliamsOmaha

ELECTED DELEGATES

FIRST DISTRICT

Clyde BartonPawnee City

SECOND DISTRICT

T. Simpson MortonNebraska City

THIRD DISTRICT

David DowLincoln
C. Russell MattsonLincoln
Elmer M. ScheeleLincoln
Robert Van PeltLincoln

FOURTH DISTRICT

George B. BolandOmaha
Edwin CassemOmaha
Harry B. CohenOmaha
Gerald E. CollinsOmaha
Raymond M. Crossman, Jr.Omaha
Alfred G. EllickOmaha
Robert G. FraserOmaha
Daniel J. GrossOmaha
Joseph T. VotavaOmaha

FIFTH DISTRICT

Charles F. AdamsAurora
Joseph C. HranacDavid City

SIXTH DISTRICT

Donald F. SampsonCentral City
Charles H. YostFremont

SEVENTH DISTRICT

Robert H. DowningSuperior

EIGHTH DISTRICT

John E. NewtonPonca

NINTH DISTRICT

Ralph S. KrygerNeligh
Donald D. MapesNorfolk

TENTH DISTRICT

Lawrence DunmireHastings
S. W. MogerClay Center

ELEVENTH DISTRICT

Ernest A. OndracekGreeley
Carl E. WillardGrand Island

TWELFTH DISTRICT

M. H. WorlockKearney

THIRTEENTH DISTRICT

Milton C. MurphyNorth Platte
William A. Stewart, Sr.Lexington

FOURTEENTH DISTRICT

Cloyd E. ClarkElwood

FIFTEENTH DISTRICT

George A. Farman, Jr.Ainsworth

SIXTEENTH DISTRICT

Robert R. WellingtonCrawford

SEVENTEENTH DISTRICT

Hans J. HoltorfGering

EIGHTEENTH DISTRICT

Hale McCownBeatrice

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

Wednesday, October 5, 1955

The House of Delegates was called to order in Hotel Paxton, Omaha, Nebraska, at 9:30 o'clock A.M. by Chairman Jean B. Cain of Falls City.

JEAN B. CAIN: Gentlemen, the House of Delegates will now be in order, and this is the roll call by Secretary George H. Turner.

(Roll call by Secretary George H. Turner.)

JEAN B. CAIN: There being a quorum present, we will proceed with the order of business.

The following committees have been appointed.

Rules and Calendar, Donald F. Sampson, Central City, chairman.

Committee on Hearings: C. Russell Mattson, chairman; Charles F. Adams, Aurora; Carl Wilbard, Grand Island; Milton C. Murphy, North Platte; Hans J. Holtorff, Gering.

The duties of these committees, I believe, are understood by the committees. The Committee on Rules and Calendar has charge of the order of business and any changes that are made in reports and so forth must be approved by the Rules and Calendar Committee.

The Committee on Hearings will receive resolutions which will be referred to it as presented and it will act on those resolutions and report back later this afternoon.

Your attention is called to the fact that only delegates are privileged to have the floor at this meeting. Anyone having a resolution who is not a member of the House of Delegates must refer that resolution to the Committee on Hearings and it must first be presented to that committee. That committee will report to the House of Delegates.

If there are no objections, the deliberations of this House of Delegates will be governed by Roberts Rules of Order.

If the calendar is as printed and meets your approval, a motion to that effect is in order.

DONALD F. SAMPSON: I move that the calendar as printed be adopted for the program of this business meeting.

VOICE: Second.

JEAN B. CAIN: Gentlemen, you have heard the motion.

Are there any remarks? The motion is that the calendar as printed be accepted.

All in favor say aye.

Opposed, no. The motion is carried.

The next order of business is a statement of the president of the Association, Honorable John J. Wilson.

PRESIDENT JOHN J. WILSON: Gentlemen, there is not much to report at this time, but there are two items that I would like to have you give serious consideration to.

During the year we have tried to arrange for newspaper publicity. Columns have been prepared and have been furnished to the newspapers, and what I have to say in this regard should be a matter of first order for each and every one of you.

Reference has been made in the report of the Committee on Public Service to the newspaper columns which are being furnished to all of the newspapers of the state. These are columns devoted to legal subjects and are designed to make the readers of the papers aware of the fact that legal problems are involved in nearly every phase of everyday living.

The columns are well prepared and interesting. As of now three separate releases have been made. Some of the papers of the state have welcomed these columns, while others have rejected them entirely. Some editors regard them as advertising and have written us letters criticizing the columns. Some editors have written constructive letters of criticism, while other letters received by me and our Secretary border on the insulting.

Some of the editors have voiced opposition to the use of our columns because lawyers do not advertise, even to the extent of carrying a professional card in the newspapers. This is a matter over which we as local lawyers have no control. The use of professional cards in newspapers is not permissible under the canons of ethics under the American Bar Association.

Under our constitution these canons are the rules of conduct for the Nebraska lawyers.

The canons are now in process of being revised, and it may well be that this restriction will be relaxed, but until a change is made we are bound to respect them.

We know that the officers of the Nebraska Press Association are opposed to the use of these columns and are exercising influence to see that member papers do not use them. By contrast, the Press Association officers in Missouri favor the plan, and as a result one hundred seventy-one newspapers in Missouri

are using columns prepared by the Missouri State Bar Association, and Kansas has had a similar experience.

The value of these columns is best tested by the fact that the greatest farm paper in the midwest, the *Nebraska Farmer*, has eagerly welcomed our column, and commencing with the first issue of that paper in November legal columns prepared by your Association will be a regular feature of that paper.

Already we have in the hands of the publishers of the *Nebraska Farmer* sufficient articles for a six months publication. More are in the process of preparation, and the *Nebraska Farmer* is willing and prepared to make our legal discussions a valid feature for years to come.

The same situation should exist as to the country weeklies, but it does not. This publication of Bar Association columns can be a success in Nebraska as it has been in other states. It will succeed however only if you see that it does. It is a problem of everyone in this room.

The articles are prepared and are being sent out by our secretary every two weeks. You can get them in your local paper if you will make the effort.

This is something about which each of you must see his own editor and put the thought directly to him that this is preventive law rather than trying to create law business.

This phase of public relations is your job, not the job of your officers or the Executive Council. If each of you would go to your local editor and tell him that you want this material used, I doubt that many will refuse. They may call it advertising; we do not think it is. Rather, it is a sincere effort on the part of your Association to make the general public aware of the fact that legal rights and liabilities are attached to nearly everything we do. In this respect if the editor in your town wants to take a purely selfish view and classify these columns as advertising, for which he would like to be paid, it might do no harm to remind him that he already receives a considerable amount of legal advertising and that as to some notices that we now publish in his columns, just as effective service could be had by posting a notice on a telephone pole.

A word from you who live in the area served by the papers might change the picture. Much of the public relations program can be done by your officers and your Committee on Public Relations, but this phase of the activity is yours and yours alone. Its success and failure really depend on what you are willing to do about it, and, gentlemen, that is a serious matter, a fight

that might exist, but which we don't want; but I believe that by sitting down and visiting with these editors, this job can be carried over. If we carried paid advertising the expense would exhaust our treasury. There are some three hundred newspapers in this state, and if you carried a sizeable ad of twenty or twenty-five dollars in each newspaper your dues will be used for institutional advertising and nothing else.

If we thought that this was advertising it would be a different story. Other states have felt that it is not advertising, that it is only preventive medicine, telling the public how to guard their everyday living.

The other matter is in connection with a Mineral Law Institute held in Boulder, Colorado, during the month of July. When we were advised that a Mineral Law Institute was going to be held in the Rocky Mountain area it was too late to have an Executive Council session so as to be a co-sponsor of this institute.

But your Executive Council directed that the president and secretary of your Association attend this institute to see whether it merited our sponsorship, to see the value which it could have, and whether it was successful or not.

If I am not mistaken there were something like twenty-five states represented at this first institute held between the 21st and 23rd of July. Lawyers from practically every oil company were present, or, rather, nearly every oil company had it's chief counsel present.

The different types of mineral concerns had representatives there. It was thought that if two hundred and fifty registered it would be a success. Over five hundred and fifty registered.

It was one of the greatest institutes that I have ever attended. There were some twenty-five from Nebraska there. I am sure more would have been there if they had had ample notice or known the magnitude of the institution. Everyone present thought it was something that should be made a permanent organization.

At two different luncheons the representatives of the various states and the law schools got together and felt that a non-profit organization should be incorporated with representation to the Bar Associations that were the sponsors, and giving the law schools a right to have representation.

It is to meet again next year in Boulder, and I am firmly convinced that while all the lawyers in the state may not want to attend such an institute, we do have many lawyers who today are practicing oil law. We have some mineral law, and this is one

opportunity at no expense to the Bar Association to be a part of a great institution.

I therefore have prepared a resolution which I would like to have the House of Delegates consider.

"Whereas, the first meeting of the Rocky Mountain Mineral Law Institute, held at Boulder, Colorado, between July 21st and July 23, 1955, proved to be an outstanding success and drew an attendance far in excess of the expectations of the original sponsors of such institute, and

"Whereas, it has been determined that the Rocky Mountain Mineral Law Institute shall become a permanent organization, incorporated by the sponsors thereof, with all the states in the area interested in the mineral law participating, and

"Whereas, the Nebraska State Bar Association has been asked to join as a sponsor the Rocky Mountain Law Institute, and having been assured that no financial obligation was entailed by such sponsorship,

"Be it now resolved, that the House of Delegates of the Nebraska State Bar Association approve the sponsorship of the Rocky Mountain Mineral Law Institute by the Nebraska State Bar Association, and the officers of the Nebraska State Bar Association be authorized and empowered to sign the articles of incorporation of such institute and arrange for representation of this Association upon the governing body of the institute."

PRESIDENT WILSON: I move the adoption of the resolution, Mr. Chairman.

C. RUSSELL MATTSON: I second the motion.

HARRY B. COHEN: Mr. Chairman, is this institute sponsored by our Association or is it sponsored by the University?

PRESIDENT WILSON: Mr. Cohen, each Bar Association, it would be Kansas, Missouri, Wyoming, Montana, North and South Dakota, and Nebraska, and maybe there will be one or two other states, will have a representative, and each law school within those states will also be given the opportunity to be a sponsor or member of the corporation.

It was started last year by Dean King of Colorado Law School and sponsored by some of the major oil companies who have district or home offices in the city of Denver.

But it will be taken out of their hands and put in the hands of a group where everybody has an equal voice in conducting the institute in the future.

HARRY B. COHEN: Well, the point I make is, it would be

run and sponsored and operated by either Bar Associations or law schools.

PRESIDENT WILSON: Well, it probably will have about fifteen or twenty directors or representatives on the board and it will be run by them; both Bar Association representatives and law school representatives.

JEAN B. CAIN: All in favor of the motion indicate by saying aye.

Opposed, no. The motion to adopt the resolution prevails.

We now have the report of the secretary-treasurer, both as secretary and treasurer.

GEORGE H. TURNER: It was quite a pleasure for once to be able to report as secretary-treasurer that we are not in the red as has been the practice for a number of years.

The books of the Association have been audited by the firm of Martin and Martin, certified public accountants of Lincoln. They report that the audit covers the period of October 1, 1954 to September 24, 1955. We closed the books for the Association year six days early in order to permit an audit to be made and a report ready for submission at the annual meeting. Had we waited until the 30th of the month we probably could not have had the report because our meeting this year is so early in October.

Cash receipts during the period amount to \$42,391.95.

Disbursements \$39,737.43, producing an excess of receipts over disbursements of \$2,654.52.

This amount is reflected in the cash balance which increased from \$653.25 at the close of the last audit on October 1, 1954 to a present total of \$3,307.77 as of the close of this audit period.

The principal items of receipts of course are the dues of members, amounting to \$37,430.00 for active members, \$4,865.00 for inactive.

The auditors break down the disbursements into classes. They report that the major items of disbursements are salaries and payroll tax, \$10,326.30. Office supplies, printing, postage and stationery, \$1,561.18.

Officers' expense, \$2,298.55. Expense of the delegates to the American Bar Association, \$1,016.66.

The annual meeting expense, \$4,857.08.

Publication of the Nebraska Law Review, \$4,958.61.

Activities of the Public Service Committee, \$4,556.43.

The cost of our Tax Institute last December, \$2,266.58.

All cash receipts were deposited in the bank, receipts for dues were verified by the auditors by reconciling the membership cards issued by number.

The bank balances were verified by independent correspondence with the banks. Cash disbursements were verified by an examination of the cancelled checks and when feasible by an inspection of the original documents supporting the disbursements.

In the opinion of the auditors the funds of the Association have been properly accounted for during the period under review.

As to the cash balance on hand, Mr. Kotouc, the chairman of the Committee on Budget and Finance, will later in the day report the recommendations of that committee as to the handling of a cash balance.

Mr. Kotouc is unable to be here this morning, but I will ask Mr. Sampson to have his item laid over until afternoon.

JEAN B. CAIN: What will you do with the report?

JUDGE SPENCER: Move it be approved.

JEAN B. CAIN: It is moved that the report of the secretary-treasurer be approved and adopted.

Is there a second to the motion?

THOMAS C. QUINLAN: I will second the motion.

JEAN B. CAIN: Are there any remarks?

All those in favor of the motion will indicate by saying aye.

Contrary by saying no. The report is approved and adopted.

We will now receive resolutions from delegates. Anyone have any resolutions to present?

Again I call attention to the fact that anyone who is not a delegate can submit their resolutions to the Committee on Hearings.

JOSEPH T. VOTAVA: Mr. Chairman, upon the request of some attorneys I will present this resolution.

“Resolved, that the House of Delegates of the Nebraska State Bar Association approve the amendments of Section 4 of Article VIII of the Nebraska state constitution which will be submitted to the people in 1956 at the general election under the recently enacted law L.B. 307, which measure 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 matter on November 8, 1956.”

As you probably know, the constitution prohibits the remission of any taxes. That's Article IV, Section 4—Section 4, Article VIII. Other states have a statute of limitations on delinquent real estate taxes.

The amendment to the constitution which was authorized by the last legislature will be voted on in 1956, and this is to simply give it our backing.

I shall present the resolution to the Resolutions Committee.

GEORGE H. TURNER: You are introducing it as your own?

JOSEPH T. VOTAVA: I will sponsor it, yes, sir.

JEAN B. CAIN: Then it does not need to go to the Resolutions Committee; you can move its adoption.

JOSEPH T. VOTAVA: Some of you attorneys, I think, know more about the matter that is involved, particularly those of you who examine a lot of abstracts.

I think that the subject is rather simple and does not need much consideration; and I therefore move the adoption of this resolution by this body.

THOMAS C. QUINLAN: I second the motion.

JEAN B. CAIN: Are there any remarks?

DONALD F. SAMPSON: Mr. Chairman.

JEAN B. CAIN: Mr. Sampson of Central City.

DONALD F. SAMPSON: Point of order. Is that motion in order at this time?

JEAN B. CAIN: It is so ruled that the members of the House of Delegates can introduce resolutions direct from the floor without being referred to the Committee on Hearings. Is that correct, Mr. Turner?

GEORGE H. TURNER: That is correct.

JUDGE SPENCER: I move as a substitute motion that the resolution be referred to the Committee on Resolutions for study and recommendations.

VOICE: Second the motion.

JEAN B. CAIN: You heard the substitute motion, that the resolution be referred to the Committee on Hearings.

Are there any remarks?

All those in favor of the substitute motion indicate by saying aye.

Opposed, no. The motion is carried.

Are there any other resolutions to be submitted?

(There was no response.)

REPORT 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 including amendments to the original reports 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

In accordance with the resolution of this committee adopted in 1954 recommending that the governor convene a conference on administrative procedure in the State of Nebraska, Governor Crosby late in 1954 established such a conference and designated Honorable Paul White, District Judge of Lincoln, chairman. The governor appointed nineteen members of the bar, including four members of this committee, to assist Judge White in this work, and it is contemplated that the conference will complete its work and draft legislation for consideration at the 1957 session of the legislature. It is anticipated that the Governor's Conference Committee will prepare an administrative procedure act for presentation to the legislature.

This committee has tendered the Governor's Committee full cooperation in this project, and conferences have been held with Judge White with reference to such assistance. Your chairman and Judge White have met with Governor Anderson, and he has agreed that the conference should continue with its work. It is expected that the members of our committee will be called upon by Judge White to assist in the studies involved in this program. A subcommittee of this committee headed by Mr. Franklin L. Pierce has continued the studies reported by this committee in 1950 regarding appeals from administrative agencies. There is great need for simplification and uniformity in this field, and it is hoped that legislation which may be proposed will reflect this need.

The President's Conference on Administrative Procedure completed its work this year and adopted forty-four recommendations for improvement of administrative procedure on a federal level.

In recent years one agency of the state, the Railway Commis-

sion, has adopted and placed in effect a set of Rules of Practice and Procedure, copies of which were distributed to the bar. Certain states such as California and Massachusetts have adopted administrative procedure legislation.

It is recommended that this special committee be continued for the next year in order that its assistance and cooperation may be available to the Governor's Conference.

Bert L. Overcash, Chairman
Paul P. Chaney, Co-ordinator
George C. Holdrege
Louis A. Holmes
Walter D. James, Jr.
Russell E. Lovell
Jack W. Marer
Franklin L. Pierce
Robert E. Powell
William A. Sawtell, Jr.
Einar Viren
David D. Weinberg
Richard D. Wilson

The report of the Committee on American Citizenship was presented by Lloyd L. Pospishil, chairman of the committee. The report was amended after discussion by eliminating the recommendation of the Committee on American Citizenship with respect to the award of individual citations, and was adopted as amended. The full report of the Committee on American Citizenship follows:

Report of the Committee on American Citizenship

Your Committee on American Citizenship recommends the adoption of a program in which every Nebraska lawyer will be encouraged to participate. The objectives of this program are four-fold: (1) To furnish unto interested lawyers an even greater incentive to participate in numerous activities, the general purpose of which is to promote a high standard of citizenship, especially among the youth of this state; (2) To compile statistics concerning such activity by the lawyers of Nebraska; (3) To apprise the general public, through the office of the public service director, of the tremendous amount of such service which is being gratuitously rendered to the public by the Bar; and (4) To grant appropriate recognition unto those lawyers, who, during the past year, have done the most to develop and foster American citizenship in their respective communities.

In order to facilitate the effective administration of such a program, it is recommended that the president of the Association, with the cooperation of the previous chairman of the Committee on American Citizenship, appoint one lawyer from each of the judicial districts of Nebraska, and one member at large who will serve as chairman of that committee. This would constitute a committee of nineteen members. Each member from a judicial district would, in general, be in charge of that district.

The committee would prepare an appropriate letter to be forwarded to each lawyer in Nebraska, in which there would be enclosed a questionnaire, seeking information concerning the activities of that particular lawyer, as well as other lawyers in that area, in the field of citizenship. Upon the completion and return of such questionnaire to the chairman of the committee, an effort would be made to ascertain which lawyer in each judicial district has made the greatest contribution in the promotion of citizenship in that district during the past year. Reliance would be made, not only upon the questionnaires, but also upon the personal knowledge of the committee member from that district, as well as from such other sources as the American Legion, which likewise is active in this field in practically every community in the state. When the chairman will have received all of this information, he would forward all that which pertains to the lawyers of a given district, to the chairman from that district for study, analysis, and recommendation. Such chairman would then present to the committee the five most representative lawyers, indicating the order in which he makes his preference. The Committee on American Citizenship would meet at a later date in order to select the most worthy representative from each district, based upon his activities during the previous year.

The eighteen lawyers thus selected would then be recommended to the Nebraska State Bar Association for awards to be presented to them either at the opening session of the annual meeting or at the time of the annual banquet, in the discretion of the officers and House of Delegates of this Association. The award would be in the nature of a citation for outstanding accomplishments in the field of American citizenship. The presentation would be made by the chairman of the Committee on American Citizenship.

The public service director would assist in sending out the letters and questionnaires to the lawyers of Nebraska. The questionnaires would be returned to the chairman of the committee. The director also would assist in sending out a follow-up letter, if

necessary, and in obtaining the citations for presentation at the annual meeting. He could utilize all of the information secured in this manner by apprising the general public of the great service which the lawyers of Nebraska are rendering in the various communities each year. Especially could he send to each newspaper in the judicial district an account of the accomplishments of the lawyer honored from that district for that year.

This committee would assist in the maintenance of an effective speakers bureau among the lawyers of the state. Each member of this committee would be chairman of his own judicial district. He, in turn, could organize each county in his district for this purpose, as well as for any other purpose in order to better achieve the objectives of the Committee on American Citizenship.

Such a program, if properly administered, should cause the public to hold the legal profession in higher esteem, and should result in giving credit where credit is due. It should also provide a greater incentive among lawyers, so inclined, to participate to an even greater extent in the development and promotion of high standards of American citizenship. Lawyers, since time immemorial, have done much in this direction, such as, for instance, writing the Declaration of Independence and the Constitution of the United States; in the field of legislation and public administration; in combating Communism and subversive activities; in gratuitously assisting aliens to become citizens; in honoring individuals who have become U. S. Citizens; in assisting on local board, such as school, selective service, village, city and veterans boards; in providing legal assistance, both in the office and in the courts, to indigent parties; in Boy Scout work; in assisting with oratorical and essay contests on the American Constitution and the American way of life, junior baseball, Boys' and Girls County Government; Boys' and Girls' State; in speaking on Memorial Day and on other dedicatory occasions; in eliminating corruption in government and juvenile delinquency; in conscientious law enforcement, and in assisting young people in their efforts to become good and law abiding citizens. The specific phases of activity along this line are legion, and the lawyers have participated in all of them but, for some reason, the Bar has not been given proper credit or recognition therefor, and therein it seems that our public relations program may have broken down.

Attached to this report is a suggested letter and questionnaire to be forwarded to each member of the Bar immediately after the annual meeting, should this report be approved and adopted by the Association.

The committee has concluded that the reports, previously submitted by similar committees, would probably be unworkable, especially without the very active participation of the public service director therein, because, too much reliance was placed therein on the cooperation of the schools of the State of Nebraska who, in the opinion of the committee, are already overloaded with extra-curricular projects continually being submitted to them for consideration by outside organizations. It was felt that reliance should not be placed on the cooperation of the schools as a basis for the activities of this committee but rather on the lawyers of Nebraska who, as individuals, could continue to render a great service in the field of American citizenship. *It, therefore, is recommended that the report of previous committees for the years of 1953 and 1954 be set aside and that, in lieu thereof, the instant report be adopted for immediate action.'*

Lloyd L. Pospishil, Chairman
 Paul H. Bek, Coordinator
 C. M. Kingsbury
 John M. Brower
 Thomas M. Davies
 Clarence C. Kunc
 John F. McCarthy
 John H. Keriakedes
 L. R. Frerichs
 Frank J. Mattoon
 Robert C. Bosley

CITATION

KNOW ALL MEN BY THESE PRESENTS: That the NEBRASKA STATE BAR ASSOCIATION does hereby proudly recognize and highly commend

JOHN DOE

for distinguished service rendered by him in the field of AMERICAN CITIZENSHIP during the past year.

Dated this..... day of....., A. D., 19.....

.....
 President, Nebraska State Bar Association.

.....
 Chairman, Committee on Citizenship.

(Seal) .
 Attest:

.....
 Secretary-Treasurer.

Dear Fellow Attorney:

In Re: *Committee on American Citizenship.*

The Nebraska State Bar Association has just adopted a program on American citizenship in which every lawyer in the state can participate, if he wishes to do so. The details of that program were set out in the official report of the Committee on American Citizenship at the last annual meeting of this Association. Please refer to it for information and guidance.

Even though lawyers, since time immemorial, have rendered great service to their communities, especially in the field of American citizenship, yet unfortunately the legal profession as such, is not held in high esteem by the general public. One of the purposes of this program is to correct this erroneous impression on the part of the lay public.

This committee seeks information concerning the numerous activities in which Nebraska lawyers participate, the general effect of which is to improve the standards of American citizenship. The enclosed questionnaire is for this purpose. *Please complete it and return it to the undersigned.* The committee then will compile and analyze all of this information. Or if you know of other lawyers in your community who are entitled to recognition for their work in this field, please give us their names.

The public service director will utilize so much of this information as will apprise the general public of what lawyers have been doing and are doing in this field. Certainly this should tend to improve our public relations.

On the basis of this, and other reliable information, *one lawyer from each judicial district* who has done outstanding work in this field will be recognized. Such recognition will be made at the annual meeting of the Association (where a citation will be presented), and in the newspapers of the judicial district in which that lawyer resides. This should provide an even greater incentive for lawyers to render service in this field. It also should place the legal profession in higher repute with the general public.

The period for which this report is to be made will be from July 1, 1955, to July 1, 1956. Therefore please return the questionnaire on or before July 15, 1956.

The success or failure of this program will depend entirely upon the cooperation of the Bar. Your assistance in this regard,

therefore, is earnestly solicited and will be deeply appreciated.

Sincerely yours,

Chairman, Committee on American
Citizenship, Nebraska State Bar
Association.

LLP/dw
Enc/

Name:

Address:

Judicial District:

QUESTIONNAIRE REGARDING YOUR ACTIVITIES IN
THE FIELD OF PROMOTING AMERICAN CITIZEN-
SHIP FROM JULY 1, 1955, to JULY 1, 1956.

(Note: If the space allotted is inadequate, please furnish addi-
tional information on a separate sheet of paper).

1. LEGISLATION:

- (a) Did you serve in Congress or the legislature?
- (b) If so, for what periods?
- (c) What legislation did you sponsor and/or support which would be conducive to improving American citizenship?

2. JUDICIAL ACTIVITY:

- (a) Do you hold a judicial position?
- (b) If so, describe it.
- (c) Did your work tend to improve the administration of justice, or eliminate crime, corruption and/or combat juvenile delinquency?
- (d) If so, in what manner?

3. ADMINISTRATIVE WORK:

- (a) Have you held an administrative post?
- (b) If so, what kind and during what periods?
- (c) Did your work tend to improve the efficiency of administration of government or "clean up" graft and corruption?
- (d) If so, in what regard?

4. MEMBER OF ORGANIZATIONS AND COMMITTEES:

- (a) Name the organizations and committees of which you are a member.
- (b) As a member of such organizations or committees, just

what have you done to improve the standards of American citizenship?

5. AMERICANISM VS. COMMUNISM:
 - (a) Have you engaged in any activity, the basic purpose of which was to combat Communism and subversive activities?
 - (b) If so, just what have you done?
6. VETERANS:
 - (a) If you are a veteran of a war, have you, as such, done anything to improve the standards of American citizenship?
 - (b) If so, just what did you do?
7. PUBLIC SPEAKING:
 - (a) If you have done any public speaking, did you speak on such occasions and subjects as would foster American citizenship?
 - (b) If so, in what manner and to what extent?
8. YOUTH ACTIVITIES:
 - (a) Have you been a leader in youth activities, such as Boy Scouts, junior baseball, Boys' and Girls' County Government, contests on the American constitution, etc.?
 - (b) If so, just what have you done in this connection?
9. CITIZENSHIP CANDIDATES:
 - (a) Have you gratuitously assisted citizenship candidates?
 - (1) If so, to what extent?
 - (b) Have you arranged to honor individuals who have just been granted their citizenship?
 - (1) If so, in what manner and to what extent?
10. ACTIVITIES ON LOCAL BOARDS:
 - (a) Have you served on local boards, such as school boards, selective service boards, village boards or city councils, veterans service committees, or as service officer?
 - (b) If so, describe the character and extent of this activity on your part.
11. GRATUITOUS LEGAL ASSISTANCE:
 - (a) How much legal service have you rendered gratuitously both in the office and in the courts in behalf of indigent persons?
 - (b) Describe the nature and the extent of it.
12. MISCELLANEOUS COMMUNITY ACTIVITIES:
 - (a) Detail just what you have done.

13. OTHER LAWYERS DESERVING RECOGNITION:
 - (a) Give their names and addresses.
 - (b) Short resume of their activities.
14. REMARKS:

Report of the Committee on Cooperation with the American Law Institute

The report of the Committee on Cooperation with the American Law Institute was presented by Judge Harry Spencer, chairman of the committee. The report, which was approved by the House of Delegates, follows:

The thirty-second annual meeting of the American Law Institute was held at Washington, D. C., on May 18, 19, 20 and 21, 1955. The chairman of the committee was in attendance for the four days.

The material covered at the sessions were the Uniform Commercial Code, Federal Income, Estate and Gift Tax Statute, Restatement of the Law, which included Tentative Draft No. 3 of Agency, Tentative Draft No. 2 of Trusts, and Tentative Drafts No. 3 and No. 4 of the Model Penal Code. As previously reported, the 1952 session officially adopted the Uniform Commercial Code. The 1955 session considered some amendments set out in Supplement No. 1 which had been approved by the editorial board. As of this date, only one state, Pennsylvania, has adopted the code. It is the understanding of your committee that some amendments are being offered in Pennsylvania and that there is some work being done on the code in New York State. Inasmuch as the code is designed to replace a substantial number of Uniform Acts in that it comprehensively covers sales, commercial paper, bank deposits and collections, bulk transfers, warehouse receipts, bills of lading and documents of title investment securities and secured transactions, it is the thought of your committee, as expressed previously, that it would be unwise for us to recommend the adoption of the code in Nebraska until its adoption and use in some of the more highly commercialized states had demonstrated its general acceptance.

Tentative Draft No. 10 of the estate and gift tax part of the Federal Income, Estate and Gift Tax Statute was submitted, discussed and approved with some minor changes.

Tentative Draft No. 3 of the Restatement of the Law, Second, of Agency was presented by Dean Seavey and discussed at length

by the membership. Some suggestions were made which are to be further considered by Dean Seavey.

Austin W. Scott, the reporter for Restatement of the Law, Second, of Trusts, presented Tentative Draft No. 2 which included two Chapters—Chapter 1, "Definitions and Distinctions," and Chapter 2, "The Creation of a Trust." These also were discussed at length and were tentatively adopted by the Association.

Herbert Wechsler, the reporter on the Model Penal Code, Louis B. Schwartz and Paul W. Tappan, associate reporters, presented Tentative Draft No. 3 and Tentative Draft No. 4 of the Model Penal Code. Tentative Draft No. 3 covered proposals for the sentencing and treatment of young adult offenders under the Model Penal Code. This was discussed at great length but no definite action was taken. This material will undoubtedly be covered by a further draft at a subsequent session.

Tentative Draft No. 4 of the Model Penal Code covered Articles 1, 2, 4 and Article 207. Article 4, "Responsibility," was discussed at some length, as was Article 207 covering "Sexual Offenses." With specific reference to sexual offenses, the crime of adultery is eliminated from the Model Penal Code, as is sodomy between two competent adults. The latter created considerable controversy but was adopted by a small majority of those present. The debate, however, was such that I am certain that the reporter will discuss this matter further with the editorial board and it is possible that changes will be made at a later session.

The institute is continuing and expanding its work in the field of continuing legal education. This is a joint project with the American Bar Association. It is suggested that those of our members who are not familiar with this program on continuing legal education should familiarize themselves with the publications of this committee. It is hoped that there will be a display of these publications at our annual meeting.

It is the opinion and recommendation of your committee that the Committee on Cooperation with The American Law Institute continue to keep in close touch with the work of the institute, lending such service as it is capable of in the promotion of its work in procuring for the members of the Bar and the public the greatest possible benefits; that future committees consider the fact that the restatements are undergoing revision and that further work should be done on the Nebraska Annotations to the Restatements; and, further that the committee be authorized, at Association expense, as deemed advisable, to have a member there-

of in attendance at the next annual meeting of the American Law Institute.

Harry A. Spencer, Chairman
Chauncey E. Barney
Robert H. Beatty
Kenneth B. Holm
Lyle E. Jackson
L. R. Stiner
John W. Yeager
Harvey M. Johnsen
Robert G. Simmons
Laurens Williams

Report of the Committee on Crime and Delinquency Prevention

The report of the Committee on Crime and Delinquency Prevention was presented by Alfred G. Ellick, chairman. Each of the several recommendations of the committee was submitted separately and all were approved by the House of Delegates. The report of the committee follows:

Your Committee on Crime and Delinquency Prevention has met three times in Lincoln since the last meeting of this Association and sub-committees have met elsewhere on a number of occasions. Our work has been divided into the following fields.

PAROLE AND PROBATION

Under the chairmanship of Robert A. Nelson a sub-committee prepared and drafted a bill to create a state-wide probationary system. This was recommended by our committee in its 1953 report and the recommendation was approved by the Bar Association at its annual meeting in that year. The bill prepared by Mr. Nelson and his sub-committee was introduced as L. B. 210. Without detailing its provisions, suffice to say that it created a state probation system, the cost of which would be borne by the state instead of by the individual counties, and which would be supervised by the Department of Justice. A hearing on the bill was held before the legislative judiciary committee, at which time members of our committee took an active part in explaining its provisions and the need for its enactment. At the same time a hearing was held on L. B. 268 which was largely prepared by Judge Stanley Bartos and which divided the state into eleven separate probation districts.

Both bills were eventually killed in committee. We believe that this was extremely unfortunate, since there seems to be no dispute whatsoever about the dire need of a state probation system. The only problem arises out of the mechanics of setting one up. The bill sponsored by our committee was first submitted to Hon. C. G. Perry, chairman of a committee appointed by the District Judges Association to prepare a similar bill, and special pains were taken to draw the bill in such a way that it would not be objectionable to members of the judiciary. We realize the problem is a difficult one and that there are many conflicting viewpoints which must be reconciled. Nevertheless we believe the ultimate objective is extremely worthwhile and should be pursued.

We recommend, therefore, that this committee continue its efforts toward drafting and securing the adoption of a bill which will establish a state-wide probation system.

REVISION OF LAWS RELATING TO SEX OFFENDERS

Under the chairmanship of James F. Brogan of Madison a subcommittee of our committee spent considerable time studying the laws of this state relating to sex offenses. A tremendous amount of material was gathered together relating to this problem and the views of judges, law enforcement officials, correctional institution officials and others were obtained. No over-all revision of our sex psychopath laws was proposed for the reason that there was insufficient time to do so. However, our committee was instrumental in securing the defeat of L. B. 84 and L. B. 85 which would, in our opinion, have weakened rather than strengthened our procedures for dealing with sex offenders. We endorsed L. B. 542 which changed the definition of a sexual psychopath.

This is a problem which currently is causing a great deal of concern, and sometimes even hysteria. As lawyers it is our duty to make certain that a proper perspective and balance is maintained so that, on the one hand, sex offenders are properly punished or treated as the individual case may require and, on the other hand, their legal rights are protected. *We recommend further study of our laws relating to sex offenders with a view toward determining whether corrective legislation should be introduced at the next legislative session.*

JUVENILE DELINQUENCY

In this committee's report of last year we made certain concrete recommendations and proposals dealing with the responsibility of lawyers in the field of juvenile delinquency. We pointed

out the lawyer's unique position in domestic relations problems and the tremendous opportunity he has to encourage families to remain intact so that children can be reared in a home-like and religious atmosphere. Approximately 85 per cent of all cases of juvenile delinquency can be traced to some fundamental defect of family structure. We also pointed out the lawyer's responsibility in adoption cases and dependency hearings.

While we believe that most lawyers, as individuals, are making some contribution to community efforts to combat juvenile delinquency, our studies have shown that in their professional life neither individually nor collectively are they offering much help in solving this problem. A survey of a number of midwestern states reveals that in only one instance has the state bar association any kind of an educational program in this field. The American Bar Association only this past winter decided to place the subject under the jurisdiction of its family law section. It is apparently another indication of the reluctance of lawyers to act in concert to help solve a common problem.

We recommend a program, under the sponsorship of this committee, to inform attorneys of their responsibilities in this field and of the many ways in which, during the course of their professional practice, they can help combat juvenile delinquency.

OTHER MATTERS

We are pleased to report that largely through the efforts of William J. Hotz, Jr., of our committee the American Bar Association's Special Committee on the Administration of Criminal Justice has tentatively selected Nebraska as one of the first states to be studied in its survey project. The survey, if authorized, will be financed by the Ford Foundation and should prove of great benefit to the lawyers of this state.

Other matters have been recommended in previous reports upon which our committee took no action this year. Among these is the transfer of the criminal investigation division from the Highway Department to the Department of Justice; also passage of a medical examiner's bill which would result in the employment by the state of a trained medico-legal investigator who would be on call to any county in the state to help in the investigation of a violent or unknown death. *We recommend that steps be taken by the committee to secure the adoption of these proposals.*

Alfred G. Ellick, Chairman
James F. Brogan
John E. Deming

Robert G. Fraser
Jack H. Hendrix
William J. Hotz, Jr.
Robert A. Nelson
Louis J. Patz
Theodore L. Richling
James I. Shamberg
Hugh Stuart
William H. Line
Harry N. Larson

The report of the Committee on County Law Libraries was presented by Joseph T. Votava, chairman. The report, which was approved by the House of Delegates, follows:

Report of the Committee on County Law Libraries

The committee held a meeting at Grand Island on December 9, 1954. Most of the committee members were present. The meeting was also attended by last year's committee chairman, Mr. Charles B. Paine. Mr. Paine not only gave us the benefit of his experience but also turned over to us a complete survey made by his Committee of the County Library Situation.

The survey does not portray a very encouraging picture. There are some county libraries. Some additional libraries are being installed but progress is very slow. An analysis of the survey compels only one conclusion: If the lawyers in the county actually want a central library, a library is started and maintained. County commissioners almost invariably cooperate by appropriating all or matching funds to start and continue such a library. The statutes to that end are adequate. The only thing lacking is a real desire of the local attorneys to want a central library.

Acting upon the foregoing conclusion so clearly disclosed, your committee decided that a program of education is the only way to further the idea of county libraries. Therefore we announced that any member of the committee would be available to discuss the matter at any of the county or regional meetings of the Bar; that apparently there is no burning desire for a county library is evidenced by the fact that no county or regional association placed the subject on its program.

As a further means of convincing the lawyers that they cannot practice law without law books readily available, and that a county library is the only feasible method to that end, your com-

mittee decided in each issue of the *Nebraska Bar Journal* to have an article on this subject. As you have noted, such articles are being published. This appears to be the best way to bring home to the lawyers the benefits of a central library and ignite in the hearts of some of them a desire to have it.

We believe that every average county should have a library and that eventually it will have it; but first the lawyers in the community must be convinced of the needs and benefits of such a library.

Lawyers are constitutionally conservative and hold on to the past. Older lawyers especially, who have either accumulated a large library or who have practiced law with a limited number of law books, are hard to convince. The future of central libraries rests with the younger members of the Bar who realize the need of a full working law library and who feel the initial cost and expense of subsequent maintenance. These younger lawyers are the ones who must take the lead in this project.

Only an educational program will move the lawyers to action. Lawyers cannot be forced; but facts do convince them. *We therefore recommend that the committee be continued and that the need and benefit of a central library be brought home to our lawyers again and again and again by discussions before Bar meetings and by articles in our Journal.*

Joseph T. Votava, Chairman
Joseph Ach
Edward Asche
Leslie Boslaugh
Lloyd E. Christensen
John C. Coupland
O. E. Drake
Donald C. Hosford
Joseph C. Hranac
Earl J. Lee
J. Jay Marx
Raymond B. Morrissey
Bernard B. Smith
Wayne O. Stoehr
Archibald J. Weaver

The report of the Special Committee on the Investigation and Disposition of Charges was presented by Clarence A. H. Meyer, chairman of the committee. The report, which was approved by the House of Delegates, follows:

Report of the Special Committee on Rules Governing Investigation and Disposition of Charges

The House of Delegates at its meeting of October 13, 1954, approved the proposal of the Special Committee recommending amendment of Section 7-114, Reissue Revised Statutes, 1943, and the committee therefore arranged for the drafting and introduction of the necessary bill at the sixty-seventh session of the Nebraska legislature. The bill, L. B. 27, was referred to the Committee on Judiciary, and representatives of your Special Committee appeared before the legislative committee on behalf of the bill. It was passed early in the session and signed by the governor.

The House of Delegates at its 1954 meeting also adopted a motion providing that the Supreme Court of Nebraska be requested to give consideration to amending Article XI of the rules creating, controlling and regulating the Nebraska State Bar Association, to the end that the disciplinary procedure therein set forth be improved. In accordance with those instructions, your Special Committee prepared recommended changes to Article XI, and these were submitted to the Judicial Council, since that group is charged with the duty of making recommendations tending to the simplification of the pleadings, practice and procedure of the judicial system of the State of Nebraska. We then met with the Judicial Council on June 17, at their invitation, and at that time a final draft of proposed changes was agreed upon, and this draft was submitted to the Supreme Court with the recommendation of the Judicial Council that it be adopted by the court.

The draft was adopted by the Supreme Court on June 24, 1955.

Early in 1955 there came to the attention of your Special Committee a revised draft of the proposed Rules of Court for Disciplinary Proceedings prepared by a committee of the American Bar Association. This draft was considered by the committee, but since adoption of those proposals would entail such a fundamental change in the procedure now followed in this state, it was the conclusion of the committee that their adoption should not be considered at this time.

We recommend that the Special Committee on Rules Governing Investigation and Disposition of Charges of the Nebraska State Bar Association be dissolved.

Wilber S. Aten
Donald F. Sampson
Daniel Stubbs

Varro E. Tyler
Arthur A. Whitworth
Raymond G. Young
Clarence A. H. Meyer, Chairman

**Appendix to Report of Special Committee on Investigation
and Disposition of Charges**

AMENDED ARTICLE XI

ARTICLE XI.

INVESTIGATION AND DISPOSITION OF CHARGES

1. **DISTRICT COMMITTEE ON INQUIRY; MEMBERSHIP; TERM.** The Supreme Court shall appoint a Committee on Inquiry in each district court judicial district, of not fewer than three (3) members and two alternates who shall serve for such term as shall be designated. One member shall be designated as chairman, and one as vice-chairman to serve as chairman in the event of the disqualification or unavailability of the chairman. Where the chairman determines that a regular member is disqualified or unavailable, he shall select an alternate to serve.

2. **ADVISORY COMMITTEE; MEMBERSHIP; TERM.** The Supreme Court shall appoint a committee to be known as the Advisory Committee, which shall consist of one member from each Supreme Court judicial district and a chairman at large. The members of such committee shall serve for such term as shall be designated.

3. **INITIATION OF CHARGES.** (a) All charges of unprofessional conduct on the part of any member of the Association shall be first made to the Committee on Inquiry in the district where such member resides, or to the secretary-treasurer of the Association or the clerk of the Supreme Court who shall forward them to the proper Committee on Inquiry; but in all cases where such committee has information of conduct appearing to be unprofessional it shall forthwith undertake the investigation provided for in Section 5 of this Article even though charges have not been filed with the committee. (b) Where the initial charges are lodged with a Committee on Inquiry such committee shall forthwith advise the secretary-treasurer of such fact.

4. **COMMITTEE ON INQUIRY; DISQUALIFICATION OF MEMBERS; POWERS OF ADVISORY COMMITTEE.** (a) In the event that the chairman is unable to assemble a full committee because of unavailability or disqualification of regular members

and alternates, or where a majority of the members of the committee, for reasons stated request it, the chairman shall forthwith report the matter to the Advisory Committee for disposition, and such committee shall have power to (1) direct that the members of said Committee on Inquiry who are not disqualified shall proceed and determine such matter, and in that connection the Advisory Committee may review and disallow claims of disqualification by members and alternates of Committees on Inquiry; or, (2) direct that the matter shall be referred to some other Committee on Inquiry in which case the Committee on Inquiry to which it is so referred shall have full power and jurisdiction to the same extent and in like manner as if said matter had arisen in its district and had been originally lodged with it; or, (3) take jurisdiction of and determine said matter to the same extent and with like power as the original Committee on Inquiry might have done if no disqualifications existed as to any of the members thereof; or, (4) direct the appointment of an investigator, who shall submit his report, as directed by the Advisory Committee, either to a Committee on Inquiry or to the Advisory Committee, after which such committee shall proceed with appropriate disposition of the charges.

(b) The investigator referred to in subdivision (4) above shall be selected by the secretary-treasurer, with the approval of the president. Investigators shall be paid their expenses and such per diem as may be approved by the president.

(c) When charges are lodged with a Committee on Inquiry, or with the Advisory Committee, the committee concerned shall report progress on handling of the charges to the secretary-treasurer on the last day of the first full calendar month elapsing after receiving the charges and each month thereafter, and shall similarly report final disposition of the charges. If such report is not received by the fifth day of the month, the secretary-treasurer shall request that the report be forwarded forthwith, and if it is not received within ten days thereafter he shall report such fact to the court. At the direction of the president, the secretary-treasurer shall similarly advise the court if the reports received by him indicate unreasonable delay at any stage in the handling of disciplinary proceedings.

5. COMMITTEE ON INQUIRY; INFORMAL INVESTIGATION. It shall be the duty of the Committee on Inquiry, upon having information of or upon receiving charges of unprofessional conduct on the part of a member, to make an informal and private investigation of the matter; and upon being satisfied that

any such information is without foundation or that such charges are without merit, the committee shall take no further action except to dismiss the charges; but if it is not so satisfied, the Committee on Inquiry shall forthwith advise the secretary-treasurer of such fact and may, if it deems it advisable, request the appointment of an investigator. If the president approves the request for an investigator, one shall be selected and paid in accordance with the provisions of Section 4 (b) of this Article.

6. **ADVISORY COMMITTEE; INFORMAL INVESTIGATION.** In case the Committee on Inquiry shall determine that there is no reasonable ground to believe the members charged guilty of an offense which justifies disciplinary action, the person or persons making the initial charges may lodge with the clerk of the Supreme Court an informal charge supported by affidavits or other prima facie evidence. The clerk of the Supreme Court shall thereupon obtain from the Committee on Inquiry the written charges, statements, answer, affidavits or documents filed with it and a report of the said Committee on Inquiry, and shall refer all of such documents to the Advisory Committee for review and recommendation.

7. **COMMITTEE ON INQUIRY; FORMAL CHARGES; HEARINGS; POWERS; REPORT.** (a) If, however, a Committee on Inquiry, after making said informal and private investigation, concludes that there is reasonable ground to believe that the member against whom the charges are made is guilty of an offense which may require and justify disciplinary action, said committee shall immediately reduce or cause the charges to be reduced to writing in the form of a simple, unsworn statement, specifying with particularity the facts which constitute the basis thereof, and shall serve a copy of said written charges upon the said member; and the committee shall hold a hearing upon twenty (20) days' notice to the said member and the person making the charges, at which hearing the parties may be heard and may file with the committee any statement, answer, affidavit or document and produce other evidence. At all such hearings, the investigator, if one be appointed in the case, shall at the request of the committee conduct the examination of the witnesses and introduction of evidence for the committee. Notice of the time and place of hearing shall be given to the parties by registered mail addressed to their last known residence or place of business. The committee or the chairman thereof may continue and adjourn hearing and proceedings from time to time and in case where such orders of continuance or adjournment are made the committee or chairman shall give notice thereof to the party making

the charges and respondents by registered mail or personal notice unless such parties were present in person or by counsel when such order of continuance or adjournment was announced.

(b) If the Committee on Inquiry finds that there is reasonable ground to believe the said member guilty of the misconduct charged, it shall thereupon transmit to the clerk of the Supreme Court the committee's report of investigation, a transcript containing the charges, and any statement, answer, affidavits or documents submitted and filed, and shall accompany the same with a complaint prepared, verified by any member or members of the committee, and ready for filing in the Supreme Court. The complaint shall be made in the name of the state on the relation of the Nebraska State Bar Association.

8. **ADVISORY COMMITTEE; REVIEW OF RECORD; REPORT.** The clerk of the Supreme Court shall thereupon refer the entire record including the report of the Committee on Inquiry, the transcript and the complaint to the Advisory Committee for review. The Advisory Committee shall have authority to hold further hearing at which the person or persons making the initial charges and the member charged shall have a right to be heard; but the Advisory Committee may direct disposition of the charges and complaint without further hearing. If the Advisory Committee determines that no probable cause for disciplinary action exists, it shall so report to the clerk of the Supreme Court and the matter shall stand dismissed unless otherwise directed by the Supreme Court. If the Advisory Committee determines that probable cause for disciplinary action exists, it shall transmit its report, the report of the Committee on Inquiry, the transcript, and the complaint submitted by the Committee on Inquiry, together with such amendments thereto as to it may seem proper, to the clerk of the Supreme Court who shall forthwith enter the same upon the docket of the court as an original action.

9. **COMMITTEE—POWER OF SUBPOENA AND TO ADMINISTER OATHS.** Committees on Inquiry and the Advisory Committee within their respective jurisdictions are empowered to issue writs of subpoena, including subpoena duces tecum, in the name of the State of Nebraska, requiring the attendance and testimony of witnesses and parties, and the production of records, books and papers, at hearings before said committees; to administer oaths to parties and witnesses and to take their sworn testimony or their unsworn statements as the committee may decide; and to certify to this court, for appropriate action by the court, any refusal of a party or witness to comply with the requirements of a subpoena or to testify or answer questions at a hearing.

10. Unless requested by the member charged neither the hearings, records or proceedings of the Committee on Inquiry or of the Advisory Committee shall be made public, nor shall any publicity be given thereto prior to the filing of a complaint in the office of the clerk of the Supreme Court.

11. No complaint in any case shall be filed with the Supreme Court until charges shall have first been presented to the Committee on Inquiry and considered by the Advisory Committee as herein provided.

12. Upon the filing in the Supreme Court of a complaint for disciplinary action as contemplated and provided by this Article against a member of the Association, the Supreme Court in its discretion may either designate the attorney general or appoint any attorney of the court to prosecute the action. The attorney general or attorney so appointed may in his discretion prepare and file an amended or new complaint, and in case he has in his possession evidence which in his opinion warrants disciplinary action on any additional charge or charges, he may incorporate such additional charge or charges in the complaint and prosecute same regardless of the fact that such new charge or charges have not been presented to the Committee on Inquiry or considered by the Advisory Committee.

13. Actual expenses incurred by the District or Advisory Committees in connection with hearings prior to the filing of a complaint in the Supreme Court shall be borne by the Association.

14. In addition to the duties heretofore imposed upon the Advisory Committee, the said committee shall confer and advise with the Committees on Inquiry, and shall promulgate uniform rules of practice and procedure for the hearings and disposition of charges before such committee. The Advisory Committee is further empowered in its discretion at the request of any member of the Association, to express its advisory opinion or give its interpretation upon rules of professional conduct where such question has not been previously determined and is not pending in any proceeding for a determination thereof.

15. The provisions of this Article shall be cumulative and not exclusive.

The report of the Committee on the Judiciary was presented by Robert Van Pelt, chairman of the committee. The report, which was approved by the House of Delegates, follows:

Report of the Committee on Judiciary

The Committee on Judiciary concluded for 1955 to put forth its greatest effort in the drafting and support of the bills recommended by last year's committee. These provided for an increase in the judicial salaries of district and supreme Court judges and for a retirement system for those judges. The salary bill was introduced by Senators Brower, Beaver, Bedford, Adams and Cole as Legislative Bill No. 58. The retirement bill was introduced by Senators Kotouc, Martin and Otto as Legislative Bill No. 38. Legislative Bill No. 58 was referred to the Miscellaneous Appropriations Committee and Legislative Bill No. 38 was referred to the Judiciary Committee. Members of your committee assisted in the presentation of these bills to the legislative committees. The bar is also deeply indebted to the Honorable John W. Delehant, United States District Judge for Nebraska, who made an appearance and excellent presentation on behalf of each of these bills.

We are pleased to report that both bills with amendments that were approved by the committee and others interested in the legislation, were enacted and were signed by the governor. Each becomes effective September 18, 1955.

We will not prolong this report by setting forth the names of the members of the legislature and others who rendered valuable support in the enactment of this legislation. It was pleasing to the committee, however, to find widespread support among both laymen and lawyers for this legislation. The officers of the District Judges Association and its legislative chairman were at all times most cooperative.

The committee felt that the effectiveness of its efforts should not be diluted by supporting bills other than the two above named. We did assure the county judges and their association that if they did not receive deserved consideration from the 1955 legislature that the committee would recommend that the Bar Association assist them in presenting their matters to the 1957 legislature.

We recommend that the Bar Association cooperate with the County Judges Association in their 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.

Charles F. Adams
Auburn H. Atkins
Robert A. Barlow
Jean B. Cain

Thomas F. Colfer
James D. Conway
E. B. Crofoot
J. D. Cronin
Lowell C. Davis
George L. DeLacy
Robert H. Downing
Daniel J. Gross
Maynard M. Grosshans
Earl Hasselbalch
Maurice S. Hevelone
Leon L. Hines
Thomas J. Keenan
William H. Lamme
James A. Lane
Alexander McKie
Robert R. Moodie
T. Simpson Morton
Earl J. Moyer
George A. Munro
Milton C. Murphy
Greydon L. Nichols
Kenneth M. Olds
William S. Padley
William B. Quigley
Alfred D. Raun
Varro H. Rhodes
Philip H. Robinson
Merle M. Runyan
Ernest S. Schiefelbein
Abel V. Shotwell
George A. Skultety
Walter H. Smith
Edward L. Vogeltanz
Robert Van Pelt, Chairman

The report of the Committee on Legal Aid was presented by Robert M. Spire, chairman. The report, which was approved by the House of Delegates, 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 Omaha Legal Aid Clinic is jointly sponsored by the Creighton University College of Law, the Omaha Bar Association, and the Omaha Barristers Club. The office of the clinic is located in the Creighton College of Law building.

The Lincoln Legal Aid Clinic is jointly sponsored by the Nebraska University College of Law, the Lincoln Bar Association, and the Lincoln Barristers Club. The office of the Clinic is located in the Nebraska College of Law building.

The Legal Aid Clinic of Cheyenne County has been newly organized during the year under the guidance of eight members of the Cheyenne County Bar Association. The work of the clinic is handled by volunteer members of the Cheyenne County Bar Association on a rotating basis.

The purpose of these three clinics is to provide free legal aid services to persons who are financially unable to pay for legal services which they require. *It is the opinion of your committee that necessary legal aid services are being rendered satisfactorily in the three areas in which these clinics operate. Your committee repeats its prior recommendation that local Bar Associations should designate certain of its own members to handle legal aid services on a rotating basis. In this connection, your committee urges local Bar Associations to follow the example set this year by the Cheyenne County Bar Association in order that proper legal aid services may be available throughout the state.*

Edward F. Carter, Jr.
Albert W. Crites
Robert V. Denney
Tyler B. Gaines
Joseph Ginsburg
Richard Hunter
Lynn D. Hutton, Jr.
Sam Klaver
Ralph S. Kryger
Milton A. Mills, Jr.
Robert D. Moodie
Charles B. Paine
C. Firman Samuelson
Rodney R. Smith
Thomas C. Quinlan, Coordinator
Robert M. Spire, Chairman

The report of the Committee on Legislation was presented by Theodore J. Fraizer, chairman of the committee. The report, which was approved by the House of Delegates, follows:

Report of the Committee on Legislation

The Committee on Legislation devoted its interest during the 1955 session of the Nebraska legislature to those measures which previously had received favorable recommendation by the various committees of this Association, the Executive Council and the Judicial Council.

The committee has been composed largely of individuals who were chairmen of special committees of the Association or who had expressed particular interest in certain legislative matters.

The several recommendations of the Judicial Council were embodied in Legislative Bills 170, 171, 172, 173, 174, 175, 176, 177, 178 and 179, all of which have been enacted into law.

The recommendations of the Judiciary Committee for increases in the salary of our judges were enacted into law in L. B. 58, and that for a judge's retirement plan was adopted in L. B. 38. The responsibility for the adoption of these measures was due largely to the activities of Mr. Robert Van Pelt, who is a member of this committee and is also chairman of the Judiciary Committee.

A provision that municipal judges must be qualified members of the bar in good standing was approved in L. B. 494.

In L. B. 27, certain details in disbarment procedures were amplified.

Mr. J. A. C. Kennedy particularly interested himself in L. B. 49 which modified the required vote for corporate reorganization.

The taxation section proposed implementing changes in the inheritance tax laws which was the responsibility of Flavel A. Wright, and which are now found in L. B. 275 and 276.

The original recommendations of the Oil and Gas Law Committee were introduced in L. B. 198, but later withdrawn when the proposals contained in this bill were embodied in other oil and gas legislation sponsored by the industry. Mr. Floyd E. Wright coordinated these matters in behalf of his Oil and Gas Committee with members of the industry.

Although all of the foregoing legislative bills which have been proposed or sponsored by the Association received favorable action, certain other measures did not become law. These were a proposal in L. B. 210 for a statewide parole system; an expert witness proposal in L. B. 332; a tort claims act, L. B. 350, and a proposal that a surviving spouse may receive wages of the deceased employee up to \$500.00, free of debts.

Legislative Resolution 43 recommending to the Congress of the United States the adoption of the Reed-Walter amendment to Article V of the U. S. Constitution was referred to the Legislative Council Committee for study.

The proposed recodification of the Nebraska highway laws was deferred because the proposed Uniform Vehicle Code was still under revision by the national commissions interesting themselves in this subject.

Several individual lawyers made recommendations to the committee which were received after the House of Delegates determined which measures should receive the support of the Association. These proposals which are worthy of further study involve the waiving of privilege in Sec. 25-1207, R. S. Neb. 1943, and clarification of the Mechanics Lien Law in Sec. 52-101, R. R. S. 1943.

We recommend for consideration the formulation and adoption of an interpleader procedure which would largely follow the federal rules, including jurisdictional amount.

We also recommend for consideration the matter of the authority of guardians, appointed and qualified under authority of other jurisdictions, being able to receipt for payments due under Nebraska workmen's compensation benefits, and from estates being administered in Nebraska without requiring the procedures set forth in Sec. 38-801, R. R. S. Neb. 1943.

Charles F. Bongardt
 O. E. Cassem
 George A. Healey
 J. A. C. Kennedy
 Clarence A. H. Meyer
 Robert Van Pelt
 Flavel A. Wright
 Floyd E. Wright
 Theodore J. Fraizer, Chairman

JEAN B. CAIN: The report of the Joint Conference of Lawyers and Accountants. Mr. J. D. Cronin. Could you make your report at this time, Mr. Cronin?

JULIUS D. CRONIN: The Committee on the Joint Conference between Lawyers and Accountants has not taken any action nor has there been any activity this past year due to the uncertainties incident to the effort nationally to change the regulation with respect to who may practice tax law.

Some years ago however either the Bar Association or the

accountants instituted the practice of having the two committees meet at a dinner meeting in an informal gathering for the purpose of discussion of common problems.

Last year it was the Bar Association's turn to entertain the committee from the Accountants Association, but due to circumstances beyond our control no meeting was held.

This year, and last month, we did have a joint meeting here in Omaha between the two committees. No action of any kind was taken, but mutual problems were discussed. That is the only activity of the committee for the past year.

JEAN B. CAIN: You move the adoption of the report?

JULIUS D. CRONIN: I move the adoption of the report, Mr. Chairman.

VOICE: Second the motion.

JEAN B. CAIN: Are there any remarks?

(There was no response.)

JEAN B. CAIN: All in favor of the motion indicate by saying Aye.

Contrary No.

The motion is carried.

At this point in the proceedings of the House of Delegates the following action was taken:

JEAN B. CAIN: Mr. C. Russell Mattson, chairman of the Committee on Hearings, has an announcement he would like to make at this time.

Mr. Mattson.

C. RUSSELL MATTSON: Mr. Chairman, if the committee would meet with me at the table designated for our convenience during the luncheon period, I think we can dispose of at least this one resolution before us.

JEAN B. CAIN: Is there anything else to come before the House of Delegates at this time? It seems that there are no other committee chairmen available for reports this morning. We had hoped to get some of those reports out of the way this morning because there will be some reports this afternoon that will take some time.

DONALD F. SAMPSON: Mr. Chairman.

JEAN B. CAIN: Mr. Sampson.

DONALD F. SAMPSON: At what time during our program do you wish to take up any new matters or suggestions of members of the Association?

JEAN B. CAIN: I think now would be a splendid time for that.

Won't you come forward so that they can all hear you, Mr. Sampson?

DONALD F. SAMPSON: Mr. Chairman, gentlemen. Two or three years ago I know a number of you who are here were on the committee that recommended an increase in the Bar Association dues. I was very much in favor of it. One of the purposes was that we would have a public service director and considerable talk about putting out the pamphlets for distribution to the public.

A number of those pamphlets have been put out, five, I think, to be specific. I think they are fine. We bought one of the display cases and pamphlets and have had them in our office, and the reaction, the acceptance and comments, and, I might say, the business that they have brought have been wonderful. I am very much in favor of it.

We felt that it was no more than good public relations that those pamphlets be put in other places where they were available to the public. Some discussion this morning about the difficulty that you have getting things into the newspapers, getting things before the public. We thought that placing them in banks was a splendid place. It so happens that we do not have any banks in our country who are practicing law; they are all cooperative with the lawyers. They welcomed and appreciated the display racks and pamphlets.

It gives the Bar Association, it seemed to us, an opportunity to disseminate these pamphlets to a wider segment of the public than was possible just by having them in our own offices. Now I come to the purpose of my remark.

On the face of the display box it says "Distributed by courtesy," I believe, "of the Nebraska State Bar Association," or something like that. It says the same on the bottom of each of the pamphlets, but we lawyers have to pay for them. It is not very much, I will grant that, a penny apiece, but it just seems to me that that was one of the purposes of raising our dues. They are not going to do any good as long as they are lying down in the

secretary's office in Lincoln. It just does not seem to me that the individual lawyers who would take the initiative in getting them distributed ought to have to carry even the penny apiece financial burden in addition to paying their dues. And I believe if it is proper I would offer a motion that the Nebraska State Bar Association pay for or furnish the pamphlets free of charge to members of the Association for distribution in their offices or at public appearances made by them or in other public institutions.

JEAN B. CAIN: Is there a second to the motion?

LAURENS WILLIAMS: Mr. Chairman.

JEAN B. CAIN: Mr. Williams.

LAURENS WILLIAMS: I rise to a point of order. I believe that under our articles only the Executive Council can decide how the Association's money shall be spent.

I would suggest the form of your motion might be changed in the form of a recommendation or request of the council, but I believe that is up to the council.

JEAN B. CAIN: Any other remarks?

PRESIDENT WILSON: Mr. Chairman.

JEAN B. CAIN: Mr. Wilson.

PRESIDENT WILSON: Having been chairman of the Public Service Committee one year and president of your Association another year, these pamphlets came up during my year as chairman of a Committee on Public Service and were distributed primarily during my year as the president, and the second issue of pamphlets are now published.

It is a question of what you are going to use your money for. It has not been uncommon to have orders of a thousand or more pamphlets come in from lawyers. If we would give each lawyer who wants to display these racks and these pamphlets one thousand, they cost the Association fifteen dollars. We are charging ten dollars per thousand but we are spending fifteen dollars. If we spend fifteen dollars of every lawyer's dues on these pamphlets and racks, then we have five dollars with which to run your Association.

Now it is a question the manner in which the Association should be run. It has been the custom of some of the associations and some of the county organizations to take up a small collection and buy the display racks and buy the pamphlets and make them available. When banks buy the pamphlets we have been charg-

ing them the actual printing. When we have been furnishing them to the lawyers for display we have been charging them a penny apiece.

It is just a question of how your funds are going to be used. We can spend twenty-five thousand dollars very easily furnishing these pamphlets which I think are wonderful. I know in my office many persons are picking them up. Clients like them. I think it is a wonderful thing, but I believe that is part of the public service that the lawyers are going to have to carry on for themselves, and I say that not to start a discussion but just as a matter of explanation.

When this was discussed the first time by the Public Service Committee a year ago we wanted to know just how far the Bar Association could go in furnishing free pamphlets. A recommendation was made to the Executive Council that twenty-five free pamphlets could be given to each member of the Bar and not break the Bar Association on the theory that lots of them would not ask for the twenty-five free copies. If each lawyer asks for twenty-five copies we are then financially embarrassed to carry on your institutes, to carry on your other public service work, and it is up to the Executive Council then to decide how they are going to spend your money which comes in the nature of dues for an entire program for this Association.

I think it is out of the question to furnish them free beyond the twenty-five. Just sit down with your pencil and start figuring how much it would cost us, and I think everybody could come up with the answer. I wish we could furnish them free, and I wish we had some way to furnish them.

Now the Lincoln banks and the Omaha banks have in many instances bought in quantities of ten thousand each and have furnished them as a part of their public service. The Scottsbluff Bar, for instance, took up a small collection among the lawyers and made them available to the banks at the expense of the lawyers of the Scottsbluff Bar. That has been true of other Bars.

That is something that I think has to be left to the Executive Council, but I want to answer you as to where I think your money is going if we carry out our idea, which I think is a good one, Don, but it's a financial impossibility.

JEAN B. CAIN: Are there any other remarks?

HALE MCCOWAN: I propose a substitute motion that the matter of the distribution and cost of the pamphlets be referred to the Executive Council for their consideration.

JEAN B. CAIN: Do I hear a second?

VOICE: Second.

JEAN B. CAIN: Are there any remarks?

JEAN B. CAIN: All in favor say aye.

Opposed, no. The motion is carried.

The report of the Committee on Public Service was presented by Elmer M. Scheele, chairman of the committee. The report, which was approved by the House of Delegates, follows:

Report of the Committee on Public Service

Your Committee on Public Service has attempted in the past year to carry on a comprehensive public relations program.

This program is designed to develop a better understanding between the public generally and the lawyers of the state with respect to the service lawyers are qualified to provide the public. We have also tried to educate the public to recognize situations in their daily lives in which they would do well to engage the services of a lawyer. We have tried to convince the public that the legal profession is dedicated to public service.

We recognize that a planned program in public relations can never be a substitute for exemplary conduct on the part of bench and bar. We have tried to present a dignified display to the public of the true meaning of the law, courts and lawyers. We have solicited and encouraged the assistance of local bar associations in carrying out this day to day program.

We feel that the term "public relations" is only another name for what clients and the general public think of us as lawyers. We have attempted to foster and develop a better understanding between lawyers and the public generally.

After a proposed program had been carefully worked out by the members of the Public Service Committee its details and estimated cost were presented to the Executive Council of the Nebraska State Bar Association on December 12, 1954. This program as approved by the Executive Council has since been carried into effect.

1. *Pamphlets.* Three entirely new pamphlets for public distribution have been prepared, printed and distributed.

a. "*Will You Be Next?*" This pamphlet prepared in its original form by William H. Meier of Minden, Nebraska, describes in laymen's terms what to do in case of an automobile accident and advises the public how to safeguard their driver's license. 10,000 copies have been printed and are available for distribution.

b. "*Buying and Selling Real Estate*" was written by John B. Cassel of Ainsworth, Nebraska, and 10,000 copies have been printed.

c. A special pamphlet designed for the private use and edification of our members only and not for public distribution entitled "*Confidentially Mr. Attorney, Take a Look in the Looking Glass*" was written by Robert R. Wellington of Crawford, Nebraska. A sufficient supply to furnish each member of the Association with a copy of this pamphlet has been printed and distributed to members only.

10,000 reprints each of the original pamphlets "*Joint Tenancy*" and "*Wills*" have been printed along with 5,000 reprints of the pamphlet "*Are You Sure You Want to Sign That?*" 25 copies of each pamphlet intended for public distribution will be furnished each member without charge and additional copies are available at one cent each. Requests should be addressed to Secretary George H. Turner.

2. *Pamphlet Racks.* A quantity of handsome fabricated pamphlet racks has been obtained. These are intended for use in distributing the pamphlets through the medium of displaying them as handouts in law offices, banks, trust companies, building and loan associations and other public places. An adequate supply is available at a cost of \$2.00 each postage prepaid. Orders should also be addressed to Secretary George H. Turner.

3. *Jurors Manual.* 20,000 copies of a revised and "dressed up" pocket size Manual for Jurors in Nebraska have been printed. 20,000 copies of the original manual have been distributed as a public service to persons called as jurors in the district courts of Nebraska. Over 2,000 copies have been furnished at the request of 117 schools throughout the state for use in classes in which the principles of our jury system are taught.

4. *Television Programs* have been an innovation during the past year. Viewers on KMTV Omaha's "Better Living" afternoon program have seen 15 Bar Association-sponsored bi-weekly programs. The time for this program has been donated by KMTV. Subjects included in some of the pamphlets together with other matters intended to acquaint the public with the value of a lawyer's services have been presented by members of the Association

from various parts of the state. A similar series of 10 programs has been presented over KHOL-TV, Axtell, Nebraska. The favorable public response of these programs has been indicated by a flood of requests for copies of the Bar Association pamphlets.

5. *Legislative Bill Service.* Another innovation during the past year was the weekly furnishing of a mimeographed synopsis of each bill introduced in the 1955 session of the Nebraska legislature. This service showed the nature of all bills introduced and the standing of each bill during its consideration before committees and on general and select file. The service also listed the sections of the statutes amended or repealed by bills introduced at the end of each month. A sampling of the members indicates that the members feel this service is worthwhile and desire that it be continued each year the legislature is in session. Our president, John J. Wilson deserves special recognition for his efforts in the preparation and distribution of this service.

6. The committee continued its cooperation with the extension department of the University of Nebraska in furnishing lawyers for speakers at various farm study group meetings. The work of the Speakers Bureau was continued and with the cooperation of lawyers throughout the state a large segment of the general public was reached.

7. *News Items.* Twenty-six special news items have been prepared and are available for publication in daily or weekly newspapers throughout the state. A sample story is captioned "Should You Have a Will?" It is urged that all of our members contact the editors of their local newspapers in an effort to obtain a wide circulation of these news items.

We have continued to receive excellent general news coverage in both the daily and weekly press throughout the state. Each member can be of service in promoting a continuation of the excellent press relationship the Association now enjoys.

8. During the past year the Association's film "Living Under Law" has been shown 23 times, including a showing at Boys State. The committee has been searching for a suitable new film but as yet has not purchased one. A film "Decision for Justice," a 26-minute dramatization of one of Chief Justice John Marshall's most famous decisions *Marbury vs. Madison* is on loan for a period of 90 days. This film was originally shown on nationwide television as part of du Pont's "Cavalcade of America" series. This film is available and may be obtained from Secretary Turner at any time prior to December 1, 1955.

9. *Recommendations.* All of the recommendations made by the previous Committee on Public Service have been complied with during the past year. It is recommended that the present program be continued in full force and effect as a minimum public service program to be supplemented in any manner the new committee shall deem advisable and in the best interests of the Association.

Milton R. Abrahams
 John B. Cassel
 James J. Fitzgerald
 William H. Meier
 Pliny Moodie
 Henry Grether
 Robert R. Wellington
 Elmer M. Scheele, Chairman

The report of the Committee on Unauthorized Practice was called up for consideration in the absence of James J. Fitzgerald, chairman of the committee. Since the report of the committee contained no recommendation, the report was received and filed. The report of the committee follows:

Report of the Committee on the Unauthorized Practice of Law

Your Committee on the Unauthorized Practice of Law reports as follows:

Your committee followed up on the citation against the George S. May Co. discussed in last year's report, and one of the members of the committee, Robert G. Simmons, Jr., was appointed as a special assistant attorney general with authority to follow the matter through.

One other reference has been received by the committee from the Executive Council but the facts developed to date are not sufficient to warrant any concern by the Committee on Unauthorized Practice. At the present time, the matter is being held by the committee to determine if there are additional facts which should be considered. It is hoped that a final recommendation may be forthcoming before the annual Bar Association meeting.

J. D. Cronin, Coordinator
 H. L. Blackledge
 Ernest A. Hubka
 Daniel D. Jewell
 Donald F. McGinley

Daniel E. Owens
C. M. Pierson
Robert G. Simmons, Jr.
James J. Fitzgerald, Jr. Chairman

The report of the Committee on Expert Medical Testimony was presented by George Healey for Earl M. Cline, chairman of the committee. The report, which was approved by the House of Delegates, follows:

Report of the Special Committee on Expert Medical Testimony

Such of the members of this committee as were able to be present met with a committee from the Nebraska State Medical Association on January 10, 1955. Present at the meeting, representing the Nebraska State Medical Association, were Dr. Harold S. Morgan of Lincoln, Dr. J. P. Gilligan of Nebraska City, Dr. Harley Anderson of Omaha, Dr. William Wright of Creighton, Dr. Earl Leininger of McCook and Merrill C. Smith of Lincoln.

The subject of medical expert testimony was discussed in full, and following this meeting, a draft of a bill was made, and the same was introduced at the last session of the Nebraska state legislature. Hearings were held on this bill, and the bill was killed by the committee to which it was referred.

Earl Cline, Chairman
George A. Healey
George Boland
Earl J. Moyer
Fred S. White
Harold A. Prince
Frank A. Hebenstreit

The report of the Committee on the State Tort Claims Act was presented by George Healey, chairman of the committee. The report, which was approved by the House of Delegates, follows:

Report of the Committee on Tort Claims Act

A Tort Claims Act was prepared and the bill introduced in the 1955 legislature. Although it was presented to the committee, it met opposition, and the Judiciary Committee failed to let the bill go out of committee.

This committee feels that such a State Tort Claims Act is an advisable thing for Nebraska, an improvement over present procedure, and a desired method for handling such claims.

It is the recommendation of this committee that the matter be given thought by the House of Delegates at its next meeting.

James H. Anderson
George B. Boland
John E. Dougherty
Frederick H. Deutsch
Daniel J. Gross
Ralph D. Nelson
George Healey, Chairman

The report of the Committee on Legal Education was presented by O. E. Shelburn, chairman. After discussion it was agreed that, since the report of the committee contained no recommendation, it should be received and filed. At a subsequent session of the House of Delegates it was moved that the reception of the report of the Committee on Legal Education be withdrawn and that the report be referred to the 1956 Committee on Legal Education for further consideration. This motion prevailed.

The report of the Committee on Budget was presented by Otto Kotouc, Jr., chairman of the committee. The statement of Mr. Kotouc in submitting the report follows:

MR. CAIN: The report of the Committee on Budget and Finance, Otto Kotouc of Humboldt, Nebraska, chairman.

OTTO KOTOUK: Our secretary-treasurer, George H. Turner, advises that the Nebraska State Bar Association has unexpended funds this year approximating three thousand dollars. In recent years our Association has not been so financially fortunate.

Therefore as a committee we recommend that a sum of perhaps two thousand dollars be segregated in a sinking fund and invested in U. S. saving bonds. It is anticipated that in subsequent years additional funds may be similarly set aside. Scholarships to Nebraska law schools may be granted from the income of this fund, or the income expended to otherwise promote the objectives of our Bar Association.

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

JEAN B. CAIN: Do I hear a second?

JOSEPH T. VOTAVA: I'll second it.

JEAN B. CAIN: Are there any remarks?

JEAN B. CAIN: All those in favor of the motion say aye.

Opposed, no. The motion is carried.

The report of the Advisory Committee was presented by Raymond G. Young, chairman. The report, which was received by the House of Delegates, follows:

Report of Advisory Committee

During the year the Advisory Committee held meetings on October 16, 1954, March 26, June 18 and September 23 and 24, 1955.

Further evidence was taken by it in three cases, and records reviewed by it in three other cases of proceedings before Committees on Inquiry. The committee rendered six advisory opinions. It considered two applications for reinstatement and decided to adhere to its policy of not appearing in support of or resistance to such applications unless otherwise directed by the Supreme Court.

The Chairman of the Advisory Committee, as a member of the Special Committee on Rules Governing Investigation and Disposition of Charges, attended and participated in the meetings of the Special Committee which prepared recommended changes in Article XI of the Supreme Court Rules. Such proposed changes were submitted to and approved by the Judicial Council. The amended Article XI which embodies the Revised Rules on Investigation and Disposition of Charges was adopted by the Supreme Court on June 24, 1955, and appears at Pages 32 to 36 of the program of this annual meeting.

In substance, the changes made are as follows: Each Committee on Inquiry will consist of three members and two alternates. Charges may be lodged with the Committee on Inquiry, the secretary-treasurer of the Association, or the clerk of the Supreme Court. The lodging of charges with a committee is to be reported to the secretary-treasurer of the Association. The determination of claims of disqualification is simplified. In appropriate cases investigators may be employed. Upon request an investigator may examine witnesses and introduce evidence before a Committee. Committees are required to make frequent periodical reports of matters pending before them.

It is believed that the amendments represent important improvements and will result in more efficient and expeditious administration.

During the year the Supreme Court rendered judgment of disbarment in three cases, and administered censure in one case. One complaint is pending in court, awaiting report of the referee.

A summary of the activities of the District Committees on Inquiry follows:

In nine of the eighteen districts no charges were made and no matters are pending. These are Districts 1, 5, 7, 8, 9, 10, 14, 15 and 18.

Minor disagreements were satisfactorily adjusted, one in each of Districts 7, 11 and 16.

One case is pending in District 2.

In District 3 (Lincoln) formal hearings were had in two cases. Both were dismissed for lack of merit. One case decided by the committee resulted in the filing of a complaint in the Supreme Court. Two matters of disagreement were satisfactorily adjusted. Investigation resulted in two dismissals for lack of merit. Two matters of minor importance are under investigation.

In District 4 (Omaha) four meetings were held. Four matters were disposed of by dismissal or adjustment. One formal complaint was filed and two matters are presently under investigation.

In District 6 investigation resulted in two dismissals for lack of merit.

In District 12 charges are pending in one case. One matter which was referred from District 11 because of the disqualification of the Committee of that District was dismissed because of insufficient evidence.

In District 13 in two cases formal hearings were had, complaints were prepared and, with the transcripts, were sent to the clerk of the Supreme Court. One of the cases is now pending in the court, the other before the Advisory Committee.

The Advisory Committee recommends that each chairman call a meeting of the regular and alternate members of his Committee on Inquiry for the purpose of discussing and making a study of the Amended Rules, and of formulating questions or sug-

gestions to be submitted to the Advisory Committee as an aid to it in preparing rules for a simplified and uniform procedure.

Plans are being made for a conference to be held at a central point in the state, at which the members of Committees on Inquiry and of the Advisory Committee and other interested lawyers may discuss and consider ethical problems and disciplinary procedures. Suggestions as to time, place and subject matter of such conference will be gladly received by the Advisory Committee.

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

The report of the Committee on Oil and Gas Law was presented by Dan Monen for James D. Conway, chairman of the committee. The report, 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 previous Special Committee on this subject made a very extensive study of oil and gas law changes. The 1954 committee was headed by Mr. Floyd E. Wright, chairman. The 1955 committee took steps to follow this report and the recommendations made by the previous committee and received valuable assistance from Mr. Paul L. Martin, a member of the Executive Council, in this regard. A number of bills were drafted covering the subject matter of the 1954 report and recommendations, and Mr. Paul L. Martin and your chairman appeared before the committees of the legislature in connection with these bills. We were not successful in obtaining legislative committee approval on all of these bills, but quite a lot of the subject matter was accepted and approved, and adopted by the legislature as law.

Without going into the details of the bills passed, they are enumerated as L. B. 36, L. B. 37, L. B. 59 and L.B. 62, all of which became law in September of 1955.

Valuable assistance was rendered the committee by Senators A. A. Fenske, Otto Kotouc, Sr., Donald F. McGinley and D. J. Cole.

There was also introduced and passed L. B. 548 which concerned the authority to enter pooling and unit agreements on school lands.

COMMENT

The legislature also enacted L. B. 216 which is known as the severance tax on oil and gas, and provides for a levy of 2 percent upon the value of such oil and gas taken from the ground, which law is effective commencing January 1, 1956. The benefits of this tax inures to the permanent school fund as established in Article 7, Section 4 of the constitution of the State of Nebraska.

Your committee took no part in this legislation, as it had no authority from the Bar Association to do so. The same is reported herein merely for information concerning legislation enacted which concerns oil and gas matters.

Recommendation No. 1 of the predecessor committee concerned appropriate legislation for the need of a conservation law. The oil and gas industry independently drafted appropriate legislation for a conservation act and the members of this committee were invited to an open meeting in Lincoln, Nebraska, on December 1, 1954, covering this subject matter. Your committee did not participate in the drafting of the proposed legislation as it was felt that the industry and its various counsel were far better equipped to propose this legislation due to their experience in other states on conservation legislation concerning oil and gas.

When the conservation law (L. B. 34) came up for consideration before the committee of the legislature, your chairman and Mr. Paul L. Martin, member of the Executive Council, appeared before the committee consistent with the report and recommendations approved at the annual meeting of the Bar Association on October 13, 1954.

A controversy arose in this legislative hearing and opposition to the bill was voiced by a number of independent producers principally concerning the pro-ration feature of the bill, which is also referred to as ratable take. The introducers of the bill in open committee hearing amended the bill to eliminate this particular feature, but other controversies existed even after the elimination of this feature which may be summarized by saying that certain Nebraska producers objected to being policed by legislation concerning the drilling and production of oil and gas in Nebraska.

The Committee of the Legislature hearing this bill killed the bill in committee.

It was expressed by some opposing the bill that it was too early to adopt a conservation law in Nebraska. While this matter is a subject for the industry itself and the legislature, there are many features of a so-called conservation law pertaining to legal procedure that the members of the Bar would be vitally interested in, and if and when a conservation law is to be adopted, the Special Committee on Oil and Gas Law can be of valuable assistance concerning the legal procedure phases of such a bill.

It is, therefore, recommended that in connection with any future proposals of a conservation law bill that the legal procedure phases thereof be closely studied by members of the Special Oil and Gas Committee and appropriate action be taken by said committee with reference to the legal procedure parts of the bill.

The new committee to be appointed following this annual meeting will, of course, have a full year to study matters, concerning oil and gas and make appropriate recommendations with reference thereto, and make recommendations for submission to the next session of the legislature commencing in January of 1957. This special committee should be continued in the future due to the fact that the oil and gas industry is rapidly developing in the State of Nebraska, and many legal problems concerning oil and gas will originate in the future in which the members of the Bar will be vitally interested and in which the Nebraska Bar Association should take an active interest.

Arthur O. Auserod
 Robert J. Bulger
 L. M. Clinton
 Daniel Monen, Jr.
 Wendell E. Mumby
 John W. Stewart
 S. E. Torgeson
 Ivan Van Steenberg
 John H. Wiltse
 James D. Conway, Chairman

The House of Delegates next received the report of the Committee on Hearings, which was presented by C. Russell Mattson, chairman. The report of the committee follows:

JEAN B. CAIN: The next report is the Committee on Hearings and Resolutions, C. Russell Mattson, chairman.

C. RUSSELL MATTSON: Mr. Chairman and members of the

House of Delegates. Your Committee on Hearings met and considered matters to be referred to it.

The only matter to be considered by the committee was a resolution offered to the House of Delegates by Honorable Joseph Votava. This relates to the Association approving a proposed amendment of the Section 4, Article VIII of the constitution of Nebraska, which would permit legislative action to absolve real estate taxes and assessments delinquent ten years or more.

The resolution also relates to the lawyers being urged to explain the measure to the voters before November 8, 1955.

Upon consideration your committee reports that it recommends opposition to adoption of the resolution, feeling that it contains subject matter which should have neither the approval or disapproval of this Association.

JEAN B. CAIN: The report will be accepted and filed.

C. RUSSELL MATTSON: Our recommendation related to a resolution of Mr. Votava, and I suggest that some action be taken. We merely recommended opposition, and I think it calls for a vote now from the House on the resolution itself.

JEAN B. CAIN: Is there a motion on it?

C. RUSSELL MATTSON: Well, Mr. Votava moved the adoption of the resolution this morning and then it was referred to us. We have reported it back, recommending opposition to adoption of the resolution.

JUDGE SPENCER: He had moved adoption but there was a substitute motion that took the place of the motion, so there is nothing before the House.

C. RUSSELL MATTSON: I move that the report of the Committee on Hearings be adopted.

JUDGE SPENCER: I second the motion.

JEAN B. CAIN: It has been moved and seconded that the report of the Committee on Hearings be adopted.

Are there any remarks?

(There was no response.)

JEAN B. CAIN: All in favor say aye.

Opposed, no. Motion carried.

JEAN B. CAIN: The House of Delegates will stand adjourned.

NEBRASKA STATE BAR ASSOCIATION

THURSDAY MORNING SESSION

October 6, 1955

The opening session of the 56th annual meeting of the Nebraska State Bar Association was called to order at 10 o'clock A.M. in Hotel Paxton, Omaha, Nebraska, by President John J. Wilson of Lincoln.

PRESIDENT WILSON: Gentlemen, the 56th annual meeting of the Nebraska State Bar Association will now come to order. Invocation will be pronounced by the Reverend Edward W. Stimson, minister of Dundee Presbyterian Church.

REV. EDWARD W. STIMSON: Let us pray. Almighty God, Lord of justice and righteousness, who throughout all ages has sought to educate and discipline Thy children in the ways that are right, and of whose pure justice all our laws and justice are human approximations, we invoke Thy blessing upon this meeting of the Nebraska Bar Association.

Inspired by Thy spirit, may we catch anew the vision of higher justice, renew our ideals for practice at the Bar and in the counseling room; that principle may ever take precedence over expediency, and that divine balance between justice and mercy may be more clearly seen.

Make us faithful in the performance of our civic duty to the highest we know, as Thou dost ever inspire our best. We pray humbly in Thy name. Amen.

PRESIDENT WILSON: The address of welcome this morning will be delivered by Tom Kelley, president of the Omaha Bar.

Mr. Kelley.

THOMAS P. KELLEY: Mr. Chairman, on behalf of the Omaha Bar and the city of Omaha, it gives me great pleasure to welcome you back again for the Bar Association meeting, the 56th annual meeting.

It is always a great pleasure to renew old acquaintances and make some new ones every year, and we certainly hope that you enjoy your stay with us this time.

We also hope that if we can be of any assistance to anyone, that you do not hesitate to call on us.

PRESIDENT WILSON: Thank you, Tom.

The response by Murl Maupin of North Platte.

MURL MAUPIN: President Wilson, Mr. Kelley, ladies and gentlemen of the Nebraska Bar Association. It is a pleasure to have this opportunity of responding to the words of welcome of the president of the Omaha Bar Association. We are indeed thankful to you, we of the outstate Bar, for the trouble and the efforts that you have gone to provide the program we have ahead of us.

I, in examining the program, noticed that it has been prepared with care and considerable thought, particularly from the standpoint of the type of social entertainment and the timing of the events.

It is noted that this evening we have the cocktail hour, where probably preparations will be made for the Kaffee Klatch to follow tomorrow morning for the ladies.

"Kaffee Klatch," as you know, in the language from which the term comes means coffee with gossip.

So without further ado I again thank you. I am sure that you have arranged a delightful social program to go with this splendid program which we have for the Association.

We are indeed grateful to you. Thank you.

PRESIDENT'S ADDRESS

At this point in the program of our annual meeting it is required by the constitution of our Association that the president deliver an address. Since I am a believer in supporting the constitution, I shall endeavor to comply with this requirement.

At previous annual meetings I have observed that some of our presidents in the past have, at this point, modestly turned the duty of presiding over to a vice-president who then proceeded with great dignity to introduce the president so that he in turn might proceed to make an address. This I shall not do for two reasons. First, I feel no urge of modesty which requires me to ask another to introduce me. You have probably guessed from the proceedings so far in which capacity I address you. The second reason is that under our present form of organization there are no vice-presidents.

In scanning the records of the proceedings of the association in earlier years, I find that presidents in the past have devoted themselves to such learned subjects as "The Sufficiency of

the Common Law"; "The Grim Condition" and "Guides to Constitutional Construction." Sprinkled along the way have been not a few presidential addresses suggesting ways of improving the judiciary.

I have decided that while a learned address might be of some interest to some of you, a more useful service can be rendered if I spend my allotted time in rendering an account of my stewardship during the period you have honored me by permitting me to serve as your president.

My address shall be in the nature of a report of the state of affairs of your association and accomplishments achieved during the past year. I find in my contacts with our members that many of the members would like to know more about the way your organization operates, and for that reason let me briefly describe your Association to you.

The officers of your Association consist of a president, chairman of House of Delegates and secretary-treasurer. There is an Executive Council and also a House of Delegates.

The Executive Council consists of one member from each Supreme Court judicial district, three members at large, the immediate past president and the president and chairman of the House of Delegates.

The House of Delegates is composed of thirty-five delegates elected from eighteen district court judicial districts, the eleven members of the Executive Council, two association delegates to American Bar Association and the six section chairmen.

This is the second year the House of Delegates has functioned. It is its duty to receive and act upon the reports of all committees of the Association which they did yesterday, thereby leaving time available during the two days of our annual meeting for section meetings. The section reports are also subject to approval by the House of Delegates.

The Executive Council is the executive organ of your Association. It has sole authority to approve expenditure of funds and contracting obligations. It constitutes the nomination committee, provides programs and entertainment, fixes compensation of officers, fills vacancies in offices, authorizes clinics and provides the program at the annual meeting.

Your Association has sponsored many clinics and institutes for which no charge has been made. It has made available certain publications without cost, including the weekly log or bill digest

during the past legislative session. Speakers are furnished to your district bar meeting upon request and the expenses of such speakers are paid by your Association.

There are eighteen committees whose functions cover nearly every conceivable task that could be wished for and all did a magnificent job trying to do for you those things which will improve your Association and your relations with the public generally.

Two clinics were held during the year. The first was the annual federal tax clinic which held instructive meetings during December at Alliance, Grand Island and Omaha under the leadership of the Section on Taxation, and the other clinic was on new legislation which consisted of one-day meetings held at North Platte, Kearney, Lincoln and Omaha.

A Section on Practice and Procedure and a Section on Municipal and Public Corporations are meeting for the first time this year. The Executive Council appointed the Executive Committees for these sections and helped them organize. Each has a wonderful program for you at their first meeting this afternoon.

I want to call your attention to the work of the Committees on Judiciary and Legislation. Their reports are printed in the annual program and need not be discussed in detail here. After several attempts in the past, salaries of the judiciary were raised and a retirement system for judges was adopted. A splendid tribute is also due the nine members of your association who served in the last legislature, who, with your support, succeeded in these fine accomplishments.

Many other committees were successful in their attempts to have legislation either enacted or defeated. The efforts of these lawyers are worthy of your commendation. Their reports show their activities in detail.

At the beginning of my year as president, I outlined my duties into the following four fields:

1. The Association and what could be done for it;
2. The judiciary, and what accomplishments we might make;
3. To carry on a legal educational program for lawyers; and
4. The individual lawyer.

It is my thinking that what we did for your Association, we did for each member thereof. We are the only organization dedicated to justice. It has often been said the bench is no better than its bar. We can be proud of such a fine organization and

of the high standards and fine bench. We must be careful, whether lawyer or judge, that we do not leave a mar or stain on the trestleboard.

In Nebraska every lawyer and judge is proud of his position and almost universally is held in high esteem by the public and his fellowman.

The public relations of the Bar Association can only succeed so far as everyone is willing to help. Like a good reputation, good public relations must be earned. No paid advertising, no press agency or public relations committee and no public service program can substitute for a sound lawyer-client relationship. If people are to have faith and confidence in you as lawyers, they must first know a lawyer and appreciate what he can do. Thus the individual lawyer-client relationship is the doorway to public respect and good will.

During the past year we have attempted to express to the public what lawyers can do and to make it easier for the public to acquaint themselves with lawyers.

There are two television stations carrying items of public interest in legal matters. KMTV, Channel 3 at Omaha, on the "Better Living Program," and KHOL-TV at Axtell have made their stations available. Both programs are of the "interview" type, conducted by a moderator from the station staff who discusses with a lawyer, furnished to the program by your Association, some legal topic of interest to the public. The moderator and the lawyer participant each receive a script for the program prepared by your Committee on Public Service which is the basis of the interview. It is not expected that either be bound by the exact language of the script. Both are free to present the program in their own words.

The stations have been most helpful in placing the programs in the hands of extremely competent moderators and the lawyers who have been asked to participate have responded generously. We appreciate the interest these two television stations have stimulated in this field. These programs are being well received by the public, judging by the correspondence received by your secretary.

We now have columns appearing in some of the weekly newspapers in the state. The columns are directed to problems which might happen to anyone. These columns are designed to warn the public of possible legal complications in every-day life. They constitute "preventive law." They state that they are for the

purpose of informing the public and not to advise the public. Each column suggests to the reader that he should consult his lawyer about any problems he might have.

The *Nebraska Farmer*, with the largest circulation of any farm paper in our area, will be soon carrying bi-monthly legal articles for reader interest which has been prepared on behalf of your Association. The first article will appear in the early November, 1955, issue. These articles will be more in detail than the articles in the weekly papers. They will be properly illustrated and will be attractive in their makeup.

Two new pamphlets of interest to clients have been distributed to you during the past month, as well as the pamphlet "Confidentially, Mr. Attorney." The Public Service Committee spent many hours on these publications, and if properly distributed they will help cement good will with the public and will bring clients to your office.

Your president and secretary have met with various committees of the Nebraska State Bankers Association during the winter months, and as a result of these contacts we began to really know each other and understand the mutual problems of the two professions. Your Association was asked to furnish speakers for various bankers' meetings, and we have received many fine remarks for the cooperation accorded them. The speakers were highly praised.

When the time for introduction of bills in the legislature was approaching, the Nebraska State Medical Association, through an appropriate committee, and the Committee on Expert Medical Testimony of your Association met in a joint conference to work out an expert medical-testimony bill. The bill was prepared and approved by the Nebraska State Medical Association and the Executive Council of your Association. The bill was introduced in the legislature. While the bill sponsored by the joint committees met with defeat, fine professional relations began to be formed, and now the lawyers and medics feel that they need each other's support. In this regard the legal section of the American Bar Association is holding a legal-medic clinic in Omaha on October 17th. Member of your own Association are appearing with other distinguished experts in the fields of law and medicine.

During July of this year a mineral law institute was held at the University of Colorado in Boulder, Colorado. It was sponsored by the Colorado Bar Association, Colorado Mining Association, Rocky Mountain Oil & Gas Association and University of

Colorado School of Law. Your Association was asked to join as a sponsor, but due to the short notice of the institute we were unable to have a meeting of the council and secure authorization for such sponsorship. However we were accorded the status of sponsors and have been asked to be a part of a nonprofit corporation to sponsor annual mineral law institutes. This was one of the finest institutes I have attended. The registration exceeded the hopes of the committee more than two-fold. It was declared a success and will be conducted again next year in Boulder. I hope that all lawyers interested in oil and mineral laws will attend. Despite the late announcement this year, Nebraska was well represented.

The Supreme Court was requested to act upon the report of the Committee on Rules Governing Investigations and Disposition of Charges which recommended some changes in the disciplinary procedure. The court approved the changes. The changes appear in the appendix to the report of the Committee on Rules Governing Investigations and Disposition of Charges. Much credit is due the members of the committee for this work as well as to the members of the Advisory Committee and the members of the Judicial Council. I have a strong feeling that these changes will provide a more workable procedure to avoid the public criticism we have sometimes received due to excessive delay in the conduct of disciplinary proceedings.

It was my pleasure to attend the mid-winter and annual meetings of the American Bar Association. The National Conference of Bar Presidents met before each of these meetings. Many helpful suggestions were made by representatives of other associations, and by threading these new ideas into our program we can keep abreast of plans for an ever-helpful Association.

I attended the annual meetings of the State Bars of Kansas, South Dakota and Missouri as the representative of your Association. Every courtesy that could be offered was accorded Sue and me. We enjoyed their hospitality and exchanged ideas on how an organization for lawyers should be conducted. Public service was of the utmost importance in their future plans and must be the major item in ours.

One of the highlights of my year as your president was to be one of the honored guests of the Nebraska State Medical Association where I was accorded a place on the program and given an opportunity to address their assembly. The time has come when the members of our professions should be working toward the same end. I think we are making progress.

The officers and some members of your Association have been serving in an advisory capacity for the Northwest Regional meeting at the American Bar Association to be held in St. Paul, Minnesota, October 12-15, 1955. Meetings of this character enable lawyers to meet other lawyers and to acquaint themselves with new views on legal subjects. A fine program has been planned and all are urged to attend.

Since this is the two hundredth anniversary of John Marshall, who was a remarkable human being, Revolutionary soldier, statesman, diplomat and "the Great Chief Justice of the United States" from 1801 until 1835, let us commemorate the enduring contributions he made to our national heritage.

John Marshall, fourth chief justice of the United States, was a product of the Virginia frontier. He was born on September 24, 1755, in a long cabin deep in the forest of a portion of Prince William County, Virginia.

After service in the Revolutionary War, John Marshall turned to law and politics.

He soon became a leading member of the Richmond bar, noted not for his mastery of precedents or statutes but rather for a supreme skill in isolating the crucial point of a case, and in addressing to that point an argument beginning with a premise of broad principal and proceeding by rigorously logical steps to reach the inevitable conclusion that favored his client's cause.

At the persuasion of George Washington, Marshall ran for Congress and served one term in the House of Representatives. He declined the office of secretary of war but became President Adams' secretary of state. In that capacity he virtually presided over the affairs of the expiring administration while President Adams spent his time at his ill wife's side. The grateful President then nominated Marshall as chief justice and the Senate confirmed the nomination, although without enthusiasm even from the Federalist members.

Although Marshall's appointment to the Supreme Court attracted little favorable reaction, his role as chief justice soon became evident. He tried to protect the court and the federal judiciary generally against attacks by members of the new Jefferson administration and Congress, who viewed the courts as a stronghold of the defeated Federalists. He persuaded his colleagues on the court to reduce the number of their separate opinions in deciding cases in favor of single opinions for the court as an entity, and he strove to achieve unanimity among his brethren. He suc-

ceeded to a remarkable degree in moulding the court to his own image, which was accomplished by subtle and persuasive qualities of leadership.

The tenure as chief justice was not serene. Almost the entire period was one of conflict involving the court in great issues of the day. Sometimes the conflict was with the Executive. Near the beginning the court was pitted against the President in a tense struggle for power that was disguised as a minor lawsuit.

It will be remembered that in *Marbury vs. Madison*, Marshall's opinion disposed of the case on jurisdictional grounds—the court could not grant a writ of mandamus since the pertinent provision of the Judiciary Act, which purported to add to the court's constitutional, original jurisdiction was unconstitutional in this respect. Thus it can be said that there was no occasion to consider the question whether a cabinet officer was amenable to such a writ. But Marshall did, and where he came out we all know. He formulated his conclusions as follows:

. . . where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possessed a constitutional or legal discretion, nothing can be more perfectly clear, than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear, that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

To say that this pronouncement was gratuitous is now quite academic. The vitality of its influence is the important thing, and there can be scant doubt that, like the decision of the English judges in the famous case of *Ashby vs. White*, it has been a stout support for the rule of law. It has meant in round terms that executive officers, subordinate only to the President himself, are answerable in the courts of law for denial of the legal rights of an individual. This is also a landmark case on the power of a court to hold an act of the legislature unconstitutional.

While serving as chief justice, there were many important decisions by the court which have influenced our government.

In another famous case, *McCulloch vs. Maryland*, where the interpretation of the Constitution and the doctrine of implied powers were involved, Chief Justice Marshall said:

The people of all the States have created the general government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented

in congress. and, by their representatives exercise this power. When they tax the chartered institutions of the States, they tax their constituents, and these taxes must be uniform. But when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and must always exist, between the action of the whole on a part, and the action of a part on the whole; between the laws of government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.

If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers. is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all The nation, on those subjects on which it can act, must necessarily bind its component parts.

It was in such cases just cited and many others which were decided while Marshall served as chief justice that have been important factors in developing and maintaining the historic liberties of the people of the United States.

It is for these reasons that a wider public knowledge and appreciation of the work and achievements of such a great chief justice are desirable today in order to strengthen the moral, social and political structure of our nation, and to help in the preservation and protection of the lives, liberties, and property of all our people.

It is proper and fitting that we dedicate a part of our annual meeting to the memory of John Marshall for the inspiring role he played in our national life.

Today I hope you will all attend the luncheon in this room where the Honorable John D. Randall, chairman of the House of Delegates of the American Bar Association, will address the members in commemoration of the life of John Marshall and will introduce a film titled "Decision for Justice." The film is based on the case of Marbury vs. Madison in which the court established its right to declare acts of Congress invalid.

It has been a great pleasure and a wonderful experience for me to be president of this fine organization. My tasks were eased by the help of my good friend and your able and efficient secretary, George H. Turner. His staff has been most helpful

at all times. My contacts with the lawyers of this state and the many friends I met through bar activities of other states and the American Bar Association will be a lasting memory. Please accept my thanks for all the help and assistance you have given me this past year. It has been greatly appreciated.

PRESIDENT WILSON: We will now have the report of the secretary-treasurer.

Report of the Secretary-Treasurer

GEORGE H. TURNER: It is somewhat of a pleasure to be able for once at least to report that we operated exclusively with black ink this year, which is a little unusual.

The accounts of the Association have been audited by the firm of Martin and Martin, certified public accountants of Lincoln, and it covers the period October 1, 1954, to September 24, 1955. We closed the Association year six days early in order the auditors might complete their examination of the books in time for a report to be made at this meeting.

The audit discloses that cash receipts during the period amounted to \$42,391.95 and the cash disbursements \$39,737.43, which produced an excess of cash receipts over disbursements of \$2,654.52.

This amount is reflected in the cash balance which increased from \$652.25, as of the close of the previous audit in October of '54, to a balance of \$3,307.77 at the close of this audit. The principal items of receipts, of course, were the dues of members, and amounted to \$37,430.00 from active members and \$4,865.00 from dues of inactive.

Principal items of disbursements mentioned by the auditors are salaries and payroll taxes of \$10,326.30; office supplies, printing, postage and stationery, \$1,561.18; officers' expenses, \$2,298.55; the expense of the representatives of the Association in the House of Delegates of the American Bar Association, \$1,016.16; the expense of the 1954 annual meeting, \$4,857.08; the publication of the *Nebraska Law Review*, \$4,958.61, which incidentally includes, as you know, the total cost of the publication of the one issue of the *Review* which contains the proceedings of our annual meeting; the expense for the public service program, \$4,556.43; and the expense of the December Tax Institute, \$2,266.58.

All the cash receipts were deposited in the bank, receipts for dues were verified by reconciliation with the membership cards

issued. The bank balances were verified by independent correspondence with the bank; cash disbursements were verified by examination of cancelled checks, and, when feasible, by inspection of the original documents supporting the disbursements.

The report concludes; "In our opinion the funds of the Association have been properly accounted for during the period under review."

This report was submitted yesterday to the House of Delegates, where it received approval; and was also submitted yesterday afternoon to the Executive Council for its approval.

PRESIDENT WILSON: We will now have the report of the American Bar Association delegates. The Honorable Clarence A. Davis and Laurens Williams.

CLARENCE A. DAVIS: As one of the two delegates of this Association to the American Bar Association it has been my privilege for three or four years now to give a report of the annual meeting of the American Bar Association.

I have particularly enjoyed it and enjoy that privilege this year because it is such a good excuse to come home and see assembled here such a tremendous group of acquaintances. There is hardly anybody in the room that I do not call by his first name.

The 77th meeting of the American Bar Association was held this year in Philadelphia, as you probably know. I think that the Association rather outdid itself because of the celebration of the John Marshall bicentennial. That was a tremendously impressive meeting. A lot of you were there; many more of you, of course, were not. But Philadelphia after all is the original cradle of American liberty and of the government of the United States.

So you have in the first place of course all of the background of Independence Hall and of the events that grew out of the early days of Philadelphia, so there rises first an emotional stimulating appeal from those circumstances.

Then our friend Lloyd Wright was President of the American Bar this year. He has been to many of our conventions here, and many of you know him. I think Lloyd as President rather outdid himself, with the aid, of course, of a lot of people, the Board of Governors and so on. But it is the first time in the history of the American Bar when there were present at one session, at one meeting of that Association, the President of the United States, the Vice-President of the United States and the Chief Justice of the United States.

The ceremony in celebration of Marshall held on the mall of Independence Hall, which incidentally is to become a great national shrine right in the heart of Philadelphia, ultimately to be several blocks square, with these old buildings as the focal point of the shrine, where addresses by the President of the United States and the Vice-President of the United States before a crowd estimated at twenty-five to thirty thousand people, stretching away for hundred of yards in every direction, was a very, very inspiring thing.

Those of us who were there, I am sure, will never forget that setting and the occasion for it.

Now the American Bar Association is growing constantly to be a great institution. Many of you belong to it. Many more of you do not, I am sorry to say. The American Bar Association has a membership now well past fifty thousand, perhaps fifty-five, but after all there are about two hundred thousand lawyers in the United States. I never miss an opportunity to say that it is only through the American Bar Association, and it ought to be an organization that represents more than a majority of the lawyers of the United States, that the protection of the law can make itself heard in the councils of the nation. We do very well as it is, and I think that the American Bar Association by and large has the confidence of the Congress and of the public, that after all we are still subject to the attack that it is just a minority group.

The American Bar, as you know, and I repeat time and again, is just as democratic in organization as is the Nebraska Bar Association, governed by a plan of a House of Delegates on a representative basis, which as you know we have largely adopted here in our own state, and consequently I think all of us owe to the profession which nurtured us and to the greatest profession in the world an obligation to support the American Bar Association.

Now I can not hope here in the very few minutes that I want to report from the Philadelphia meeting to even enumerate the tremendous number of matters that come before the House of Delegates of the American Bar. After all there are numerous sections of the American Bar, each of them in turn highly specialized and divided into sub-committees and sub-sections. There are literally dozens of committees for special purposes of one kind and another. Short of taking the agenda of the House of Delegates and about a day's time, I do not think anyone could give you any rundown on what happens at a meeting of the House of Delegates of the American Bar. All that Laury Williams and

I can hope to do is take three or four of the things that appealed to us as high spots and give you some idea of what goes on.

We undertook to divide the fields just a little bit, so I am going to tell you in just a few words of the Section of Administrative Law, because that field on a nation-wide basis is the thing which profoundly affects the practice.

So far in Nebraska we have not been afflicted with quite as much legislation through administrative agencies as has been the country at large. Yet the procedures that are necessary to maintain due process in the connection with the extension of government by administrative legislation are things worthy of the careful thought of all of us.

It is largely the American Bar Association's sponsoring of the administrative procedure act which brought some order out of the chaos that existed after the setting up of these numerous agencies, largely during the '30's. As time goes on the question is how we can refine that still more to keep the legal processes behind the fences, with which we are all familiar.

This year as you probably know from the papers the Hoover Commission has completed its report on government operations throughout the government, and, among others, legal process and procedures in government.

I will not discuss it all, the very elaborate plan which that commission set up for the institution and control and regulation of the legal staffs of the various government departments, including the Department of Justice, to try to keep some harmonious system working between the various departments as they function throughout the country. But the commission has gone much farther in an attempt to aid this administrative law question by suggesting without recommendation, unanimously, at least to the commission, the establishment of an administrative court which in turn would have jurisdiction over many of the appeals of these in the so-called independent agencies and administrative tribunals. That is far too elaborate to discuss even in any one day's address, let alone in the few minutes I am to report to you. But it marks another march down the road towards maintaining due process of law and towards maintaining an orderly system of law under the administrative process.

It has seemed to me as this thing goes on, as we lawyers from time to time shudder more and more about the lack of regularity, about the inadequacy of the hearings which we are afforded, about the possible prejudice of hearing examiners and

the people who are hearing these, and the—I want to say partisan, but I don't mean politically partisan—the tendency of the agency to sustain its own people at all stages. The more of that we see the more the Bar reacts toward the judicial process.

Now they come with the suggestion of administrative court, and I have felt that we are approaching the time when it is quite possible that the administrative procedure is going to be absorbed into and become a part of the judicial processes of the United States. The sooner that day comes in my judgment the better, because this judicial process of ours has been developed over several hundred years, and I do not think we are going to improve it by any supposed shortcuts.

So much for that general subject.

Then of course the whole field of unauthorized practice is still a hot subject in the American Bar Association. I am leaving to Laury the discussion of those phases of what we call unauthorized practice in connection with taxes and treasury. I would just like to tell you, however, the American Bar Association is very active against unauthorized practice in the real estate field, banking field, the insurance field, where we are now looking into the question of gratuitous advice that is so freely given in connection with the estate planning and the writing of insurance policies. That field is getting a lookover, and that one I know treads on toes of lawyers that are right in this room.

So it goes, and again I repeat that the only way to handle these things, is to handle them on a top level on a national basis. It is pretty difficult to handle them locally.

The other thing Jack discussed very well in his presidential address and in the remarks that he made that followed is the John Marshall celebration.

It is not too often that we get such a logical opportunity to portray the place of the legal system in organized society, the place of the lawyer, and the fundamentals of the American constitutional system as we get in connection with this commemoration of the birth of John Marshall.

As mentioned already, the American Bar Association celebration, I think Jack has done very well in bringing it to us here, but we all know that organized society cannot exist as we know it without an independent judiciary and without the supremacy of that judiciary as an independent umpire free to restrain the executive just as freely as it is to restrain the individual.

That is so fundamental and so basic, yet I am shocked as we go about the country to find out how little of that fundamental conception our youngsters, and some not so young, have acquired as they have gone through our educational system.

So this year we have a great opportunity right here in Nebraska, utilizing the celebration of Marshall's birth as our excuse to hold meetings in high schools and before various other groups emphasizing the theme of *Marbury v. Madison*, if you will, the general theme of necessity of judicial supremacy to maintain an organized society. Into that, of course, fits exactly the anti-communist theme where there is no restraint upon executive and arbitrary power.

It seems to me that the local Bar Association, the county Bar Associations of the state, would render a very great service to themselves and to the profession of the law and to the ultimate welfare of the country if they would take as their project the presentation to the schools and the various other groups of these various fundamental things that we all know so well. It seems to me that that is a program which reflects credit upon us, and which can be very easily undertaken simply by a few aggressive members of the Bar in their home towns, explaining what this business of the law and this business of the judges is all about in language that people can understand.

That is the theme of the American Bar Association this year. It is the theme of this Association as the president has laid it down, and I hope you will make it your theme.

Now that is pretty fragmentary, but I am glad to have the opportunity to say I am glad to be back with you. Thanks.

PRESIDENT WILSON: Thank you, Mr. Davis. And now we will have Laury Williams' report.

LAURENS WILLIAMS: Mr. President, members of the Nebraska State Bar Association. I have been attending annual meetings of the American Bar Association for 10 these many years, and while I have realized over these years that, as Clarence has indicated, the American Bar Association is a great and growing organization, it was not until the honor and the privilege came to me of representing the Nebraska State Bar Association in the House of Delegates of the American Bar Association that I really began having an appreciation of first the scope of the activities of the American Bar Association, and secondly, the importance to the American lawyer of each of those activities.

As Clarence has indicated, the membership of the Association

has been growing. I can give you a precise figure. As of August 25th the American Bar Association had 58,002 members with fully paid-up dues. That was a substantial increase. Over 7,700 applications for membership were processed during the past year. But here in Nebraska unfortunately we haven't been keeping pace. There were 2,327 active members of this Association eligible for membership in the American Bar Association as of the close of the last fiscal year of the American Bar Association, but only 603 Nebraska lawyers or 25.9 percent of the Nebraska lawyers were members of our great national professional organization.

We ranked twenty-third in the forty-eight states in the percentage of our members who were members of the American Bar Association.

The American Bar Association Membership Committee had set up quotas for new members last year. Our quota was eighty-five and we had forty. I suggest to you that we need to put forth a little more active effort in the line of membership in this great organization.

It takes a lot of money to operate the American Bar Association. Last year the income of the Association almost exclusively from dues was about eight hundred thousand dollars, but the expenditures including that of the *American Bar Association Journal* ran, I believe, within about thirty thousand dollars of the income. While it is true that the dues are an element of expense for all of us, it seems to me that we owe a duty to our profession to lend our financial aid through membership, as well as our aid in other ways, to the national organization which speaks for us. Whether we are members or not, they are going to speak for us; and when we are members we have a voice in determination of what they say. So I want first to suggest to you who are not members that there may be something of an obligation to become a member.

First of all, the annual meetings. I think no lawyer can attend an annual meeting of the American Bar Association without coming away feeling that he has had true spiritual uplift as a result, and he has gained much of very practical experience which will be of real value to him in his daily practice. That is true no matter in what area of the law your particular interests lie because the annual Bar Association sections and committees embrace, I assure you, every field and phase of the law. At the annual meetings you have the opportunity to hear some of the most effective and able lawyers in the country, who are

expert in particular fields advise you, so to speak, of better ways, easier ways to do a better job for your client.

The annual meetings of the Association are scheduled well in advance. Next year it will be held at Dallas, Texas, August 27th to 31st. Now while it gets warm in Texas, the Texas delegation kept assuring us that everything in Dallas is air conditioned. So next year it is Dallas, August 27th to the 31st.

Then the following year the American Bar Association repeats what it did back in the 1920's. We first meet in New York City about July 8th for the business meeting, and then adjourn for about two weeks, when we reconvene in London, England.

Now here is a beautiful opportunity to take that trip abroad and have Uncle Samuel pay a substantial part, depending on your tax bracket, of the expense of that European trip that your wife has always wanted to take.

In 1958 Los Angeles, California; and in 1959, Washington, D. C.; and in the meantime, of course, the regional meetings continue. Next week one will be held at St. Paul, Minnesota, and then November 27th to the 30th at New Orleans, Louisiana.

This year marked the active opening, so to speak, of the American Bar Center in Chicago, staffed by approximately one hundred full-time employees of the American Bar Association.

There too is housed the American Bar Foundation. In fact the Foundation owns the building, which, by the way, cost approximately \$1,750,000, and which was given one of the outstanding architectural awards this past year because of the beauty of the building, its functional set-up and the fact that it is very efficiently designed, and yet carries with it great dignity, great beauty.

You don't have to be a member of the American Bar Association to see that building. I suggest that any lawyer who would spend an hour or two would invest it wisely when you are in Chicago by taking the time to go out and go through that building. It is magnificent. I believe it will make you extremely proud not only of our profession but of your national organization.

The American Bar Association, or Foundation, has now started several major projects. First of these is a study of the administration of criminal justice in the United States, something which I think we'll all agree is long overdue. Then they are starting a study of canons of ethics to determine if there should

be revisions. They are preparing a source book on the background of rights of citizens under the Bill of Rights and under our Constitution. Another study is being undertaken in cooperation with the National Conference of Commissioners on Uniform State Laws in certain areas. I wanted to get that in order to say one of the greatest honors which has come to Nebraska lawyers in the past year has been the election of Barton H. Kuhns of the Omaha Bar to the presidency of the National Conference of Commissioners on Uniform State Laws. A very great tribute to one of our very great lawyers.

Turning now, I want to make one other thing clear. The Federal Bar Association, of which Clarence Davis has just been elected president, is a national organization of over two hundred lawyers, most of them career people in government. That is a great honor also.

Now I want to talk for just a moment about the problem of social security for lawyers. That has been a matter of interest and concern to the profession since 1938. The traditional stand of American lawyers has been that we want no part of social security, that it is a type of government regimentation which will, how I have never understood, somehow control the American lawyer so that we will lose our traditional independence.

That stand has obviously been changed. Many, many lawyers, and I know there are lot of them in this room, some of them on the platform, desire social security coverage and have had it for many years by simply converting what were retainers into salaries, et cetera. Obviously some of the younger men at the Bar see the problem differently than do the older members of the Bar,

At the February meeting of the House of Delegates of the American Bar in Chicago, the House of Delegates in part reversed the previous stand of the Association and endorsed social security for lawyers on a voluntary basis, on the basis that each lawyer might decide for himself whether he wanted coverage under social security.

Those of us who have had some occasion to look at the problem of social security coverage not from the standpoint of the member of the profession or of individuals but from the standpoint of government will, I think, in the main agree with those members of Congress, who have lived with this problem, some of them since its infancy, who find it very difficult on an intellectual basis to understand how it can be a rational approach when no other profession and no other people in America are

given the optional coverage, Christian Science practitioners, I think, are the only exception. The whole concept of social security from the government standpoint is mandatory coverage.

Now the American Bar Association House of Delegates, I think, is obviously aware of the problems created in the area I have mentioned, and so at the Philadelphia meeting they adopted a resolution which in effect asks each state Bar Association to poll its members, to submit questions which will be prepared by the Board of Governors of the American Bar, so that each lawyer may voice his own personal opinion as to what he wants. That poll undoubtedly will be taken by our State Association. It will be very helpful to the House of Delegates of the American Bar Association to have a full and complete return on that poll. I hope that when it comes out every Nebraska lawyer will fill out that questionnaire and send it in, so that those of us who represent this Association in the House of Delegates may be governed in our voting by the will of the majority of our lawyers here.

Now this problem of social security cuts into the next problem I want to mention, and that is the problem of retirement income for self-employed.

As you know, for many, many years the tax law has permitted employers to create pension plans for employees and take current tax deductions for the contribution they make to the pension fund. The individual employees are not deemed to receive any taxable income until the time comes when they receive, usually after retirement, their annuity, their pension from the fund. This, of course, in a time of high surtax brackets is a very important tax benefit, because not only is there deferment of tax on the current contribution of the employer, but there is additionally no tax currently on the earnings, the increment to and of the fund itself. So those two things combine to mean that the dollars in profit of an employee under a pension plan are normally very much greater than they would have been if, instead of pension, the employee received additional salary in amount equal to the contribution made in his behalf by his employer. That type of thing has enabled corporate executives, for example, to create for themselves substantial retirement plans on a tax-free basis.

This year is the first time that Congress has apparently begun to look with some favor on that type of plan, because the Ways and Means Committee this year, by divided vote, it is true, adopted a modified plan which would permit lawyers if included in social security on a mandatory basis, which is where social se-

curity comes into this, to set aside up to ten percent of their earned income annually on certain qualified investments tax free, with a maximum of seventy-five hundred a year and a maximum of one hundred thousand during their lifetime.

Now contrary to what you read in the press, that bill was not reported out to the House of Representatives. It has simply been voted on by the committee, put into what is called the "Bob-tail Bill." I venture to express an opinion that it will not be reported out in the current form. I expect Ways and Means will reconsider each of the bills currently in that, so that the future of the bill is in doubt. Yet it is started; it is on the way; progress has been made. I feel that is all I can say about that. If you want the details I will be glad to get all the testimony in full detail on it.

Now a word about continuing legal education, the joint undertaking of the American Law Institute and the American Bar Association, the joint committee of the two groups. We want to mention that Harvey Johnson of our own Bar was one of the charter or original members of that committee.

This year we started publication of a new practical magazine for the general practitioner. It is called *The Practical Lawyer*. You can find the details about it at the display booth outside.

When that project was undertaken and under consideration we decided that if we could get five thousand subscriptions we would be on the way, and it would be a great thing. There are now over twelve thousand subscribers. We have so many requests for back issues from lawyers who started buying it at the third or fourth or fifth issue that we are out of print. We did not print enough. I commend it to you. I suggest that you get a copy and take a look at it. I suspect that twenty-five thousand American lawyers are going to be subscribing to that "how to do it" practical handbook approach that is in that magazine.

It is not *Law Review* style. There are plenty of learned erudite *Law Review* articles. These are practical articles in the field of the general practitioner. I want to mention that the American Bar Association group life insurance program now has been adopted and is in effect. If you want the details write to headquarters in Chicago.

Now Clarence assigned me, apparently without my realizing it, Circular 230. Since I am in the middle of the government side. I'm going to refrain, except to say that what happened this year in the area, as far as the recommendations and urging of the accountants that Circular 230 be amended, is that nothing

has happened. The Treasury Department has not as of now taken any steps to change or amend Circular 230.

Finally I want to simply say that I think that in my professional life nothing has done so much, has contributed so much, nothing has so enriched, I think, my professional life as has membership and participation in the affairs of the Nebraska State Bar Association and the American Bar Association. The two complement each other.

I suggest to you also that few things have more enriched my personal life than have membership and participation in the affairs of those two organizations, because of the friendships and personal relationships developed in the course of it. So I want to conclude by urging that every Nebraska lawyer who is not currently a member of the American Bar Association become such. He will find his professional and personal life better, in my view, as a result of it. Thank you very much.

PRESIDENT WILSON: Thank you, Laury, for this fine report of the activities of the American Bar Association.

We now have a report on the House of Delegates meeting of yesterday, Mr. Turner.

GEORGE H. TURNER: Jean Cain, the Chairman of the House has asked me to make this report in his stead.

Report of the Chairman of the House of Delegates

The House of Delegates met on Wednesday, October 5, 1955, to receive and act upon reports of Committees of the Association. The first order of business was a report by the president of the Association, John J. Wilson, who at the same time introduced a resolution concerning the endorsement by the Nebraska State Bar Association of the Rocky Mountain Mineral Law Institute. The resolution was adopted in the following form

WHEREAS the first meeting of the Rocky Mountain Mineral Law Institute held at Boulder, Colorado, July 21 to 23, 1955, proved to be an outstanding success and drew an attendance far in excess of the expectations of the original sponsors of such institute, and

WHEREAS it has been determined that the Rocky Mountain Mineral Law Institute shall become a permanent organization incorporated by the sponsors thereof with all states in the area interested in mineral law participating, and

WHEREAS the Nebraska State Bar Association has been

asked to join as a sponsor of the Rocky Mountain Mineral Law Institute, and having been assured that no financial obligation was entailed by such sponsorship,

BE IT NOW RESOLVED that the House of Delegates of the Nebraska State Bar Association approves sponsorship of the Rocky Mountain Mineral Law Institute by the Nebraska State Bar Association, and the officers of the Nebraska State Bar Association be authorized and empowered to sign the Articles of Incorporation of such institute and arrange for representation of this Association upon the governing body of the institute.

The House received the report of the Committee on Administrative Agencies and approved its recommendation that the committee be continued in order that it might assist and be available to the Governor's Conference on Administrative Procedure.

The report of the Committee on American Citizenship recommended a program of issuing citations for service to members of the bar and also contained a recommendation that the reports of previous committees for the years 1953 and 1954 be set aside and approval previously given thereto be rescinded. The latter part of the committee's recommendation was adopted but the House declined to approve the proposed program of issuing citations to members of the bar for civic activity.

The recommendation of the Committee on Cooperation with the American Law Institute that this committee keep in close touch with the work of the American Law Institute and render such service as possible to that organization was approved. The House also approved the recommendation of the committee that consideration be given to the publication of possible annotations to the Restatement. The House also approved the recommendation of the committee that a member be designated to attend the annual meeting of the American Law Institute.

The House approved the several recommendations of the Committee on Crime and Delinquency Prevention. These recommendations are:

1. That the committee continue its efforts toward drafting and securing the adoption of a bill which will establish a state-wide probation.
2. That further study be made of our laws relating to sex offenders with a view to recommending corrective legislation.
3. Sponsorship by the committee of a program to inform attorneys of their responsibilities combatting juvenile delinquency.
4. That the transfer of the State Criminal Investigation

Division from the Highway Department to the Department of Justice be approved, together with a law relating to medical examiners.

The recommendation of the Committee on County Law Libraries that the committee be continued was approved.

The chairman of the Committee on the Revision of Rules Governing Disciplinary Proceedings reported that substantial amendments to the rules had been adopted by the Supreme Court, and recommended the dissolution of the committee. This recommendation was adopted.

The House of Delegates approved the report of the Committee on the Judiciary and received the statement of the chairman advising that a test case is contemplated to determine the validity of LB 38, the Judicial Retirement Act.

The reports of the Committees on Legal Aid and on Legislation were approved.

Mr. Sampson discussed the distribution of pamphlets and moved that this distribution in the future be without cost to the members of the bar. Mr. McCown moved as a substitute that the question of the distribution of pamphlets be referred to the Executive Council. The substitute motion prevailed.

The House approved the report of the Committee on Public Service and received the report of the Committee on Unauthorized Practice.

The report of the Committee on Expert Medical Testimony was presented by Mr. George Healey in the absence of the chairman, which report was received, and on motion of Mr. Healey the House voted to continue the committee.

The report of the Committee on State Tort Claims Act was adopted. The reports of the Committee on Legal Education and the Advisory Committee were received and filed.

Chairman Otto Kotouc of the Committee on Budget and Finance reported for that committee with the recommendation that in view of the favorable financial condition of the association the House of Delegates recommend to the Executive Council that \$2000.00 be placed in a sinking fund and invested in U. S. Savings Bonds with the expectation that additional funds be added in subsequent years, the proposed sinking fund to provide scholarships to further the objectives of the Association. The motion was adopted.

The report of the Committee on Oil and Gas Law was adopted.

C. Russell Mattson, chairman of the Committee on Hearings, reported that the committee had met to consider the resolution offered earlier by Mr. Votava in the following language:

RESOLVED that the House of Delegates of the Nebraska State Bar Association approve the amendment of Section 4 of Article 8 of the Nebraska state constitution which will be submitted to the people in 1956 at the general election under the recently enacted LB 307; which measure 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 matter on November 8, 1956.

The Committee on Hearings reported as follows:

"Your Committee on Hearings met to consider matters to be referred to it.

"The only matter to be considered by the Committee was a resolution offered to the House of Delegates by Hon. Joseph Votava. This relates to the association approving a proposed amendment to Sec. 4 Article 8 of the constitution of Nebraska which would permit legislative action to absolve real estate taxes and assessments delinquent ten years or more. The resolution also relates to the lawyers being urged to explain the measure to the voters before November 8, 1956.

"Upon consideration your committee reports that it recommends opposition to adoption of the resolution, feeling it contains a subject matter which should have neither the approval nor disapproval of this Association."

It was thereupon moved that the report of the Committee on Hearings be adopted. The motion carried.

PRESIDENT WILSON: We will now have a report of the Judicial Council by Honorable Edward F. Carter, chairman of the council.

Report of the Judicial Council

The Judicial Council has held three one-day meetings since the last annual meeting of this Association. It has considered many matters pertaining to court procedure during that period. The council, with the approval of the Supreme Court, submitted ten proposed procedural changes to the legislature, all of which have been enacted into law. Briefly described, these statutes provide:

L. B. 170: An act providing for the removal of garnishment

proceedings to the district court when the amount or value in controversy is in excess of the maximum jurisdiction of the inferior court.

L. B. 171: An act providing for the transfer of the personal property of a deceased person without judicial proceedings where the value of the estate, less liens and encumbrances, does not exceed seven hundred dollars.

L. B. 172: An act providing the time and manner of taking an appeal to the Supreme Court from a ruling of the district court on a motion for judgment notwithstanding the verdict or granting or denying a new trial. The effect of this statute is to fix the time for such appeal from the rendition rather than the entry of the final order.

L. B. 173: An act providing that the clerk of the district court may settle and sign a bill of exceptions whenever for any cause the judge before whom the case was tried has ceased to hold that office.

L. B. 174: An act providing in a proceeding to obtain a license to sell real estate for the payment of debts in a decedent's estate matter that homestead rights shall be there determined.

L. B. 175: An act restating the qualifications of jurors, for the drawing of additional key numbers in counties of three thousand population or less, and for striking women from key-number lists in counties where women may not be called as jurors.

L. B. 176: An act limiting the exemption of voluntary firemen and those engaged in militia duty in time of peace.

L. B. 177: An act providing for the appointment of a guardian of the estate of a mentally ill or incompetent person who is a non-resident of the state and is possessed of property in a county of this state.

L. B. 178: An act providing that investment or reinvestment of the proceeds of sale of real estate of a ward shall be made by the guardian in accordance with existing laws, subject to the approval of the county court having jurisdiction of the guardianship.

L. B. 179: An act providing one method of procedure for the recovery of taxes, or any part thereof, that are for any reason invalid.

In addition to the foregoing, the Judicial Council revised the disciplinary procedure provided for in Article XI of Chapter IV of the Rules of the Supreme Court at the instance of a committee

of this Association. The revision was submitted to the Supreme Court and was adopted on June 24, 1955, and became effective as of that date. The purpose of the revision was to eliminate the weaknesses of the procedure and expedite the handling of the investigation and disposition of charges.

Many suggestions are before the council for future consideration. It will serve no useful purpose to recite them here because of the very indefinite status they presently occupy.

Once again I would like to voice the feeling of the council that members of the bar are too indifferent to this most important work. The fault may be ours in that a proper procedure has not been found to get the work of the council before the bar generally. We must rely, in part at least, upon the lawyers and judges to call to our attention procedural defects that ought to be remedied. New situations requiring new procedures or the revision of antiquated procedures are more likely to be discovered by those engaged in the practice. We desire that such instances be called to our attention in order that corrective measures may be brought about.

Until the creation of judicial councils, there was no systematic effort to evaluate the operation of the courts and no organized effort to consider improvement. In the code states, of which Nebraska is one, the tendency toward archaicism was augmented by reason of the divided authority between the legislature and the courts. The legislature was charged with the regulation of judicial procedure while the courts decided only the merits of controversies. This has magnified procedure to the dignity of legislative acts and, as members of the legislature are not usually conversant with court procedure and the innumerable decisions and interpretations which their laws evoked, procedures other than judicial sprang up to the detriment of lawyers and the dissatisfaction of litigants. To alleviate this situation the judicial council was created to provide an official and continuous agency constantly engaged in providing information about the courts, in weighing the possibilities of more effective administration, and, where found, offering concrete proposals for improvements in the administration of justice. Confidence in the courts requires that the people securely feel that the administration of justice is accomplished with efficiency and integrity.

Legislative action with reference to judicial procedure in this state had its beginnings largely in the imitation of legislation from other states without adequate study of its basis or the conditions it was designed to meet, and the tinkering with details

without an overall plan of improvement. We need to know that which is universal and that which is local, a distinction that has been given too little consideration.

The procedural law for the administration of justice in this state is basically sound. It is not the purpose of the Judicial Council to embark upon a crusade for its reform. Any such program must originate elsewhere. But the needs of a changing social, economic and industrial order must be met if lack of confidence in the courts is to be avoided. No one person can do it alone the Judicial Council cannot do it alone. The collective intelligence of all members of the bar is needed. It is for this reason that we urge you to lend your aid to the work of the Council. Efficiency and economy in the administration of justice will tend to eliminate the growth of competitive agencies and thereby result in keeping law business in the hands of lawyers where it belongs. Greater confidence in the efficiency and integrity of courts will likewise tend to eliminate commissions and agencies as a substitute for judicial processes. We must be able to accept the responsibilities to the satisfaction of the public if we are to merit the confidence of those who entrust us with adjustment of disputes and controversies.

Edward F. Carter
Chairman, Judicial Council.

PRESIDENT WILSON: The secretary-treasurer will now report the result of the election of officers for the ensuing year.

GEORGE H. TURNER: Mr. President and members. Following the directions of the constitution, the Executive Council made nominations for the office of president, chairman of the House of Delegates, and member at large of the Executive Council three months ahead of this annual meeting and caused notices to be sent to all members. No opposing candidates having been nominated, nominees of the council of course are elected automatically. They are Wilber S. Aten, president; Hale McCown, Beatrice, chairman of the House of Delegates; and Clarence E. Haley, Hartington, member at large. They will be installed tomorrow.

PRESIDENT WILSON: At this point in the program we will receive the report of the Committee on Memorials by C. L. Clark, chairman of the committee.

Report of Committee on Memorials

Your committee regrets the necessity of reporting that since our last annual meeting twenty-eight (28) members of the Bar of Nebraska have received their final summons to answer for their

accomplishments and activities while sojourning among us. All of them proved faithful in the discharge of their duties to both the courts and their clients. They made lasting contributions to the fair and impartial administration of justice. They were devoted to the ideals of our free institutions of government. They left their influence upon the ever-developing field of the law. We cherish in our memory the personal qualities of these colleagues who will not again be our associates or adversaries. Their success in their chosen profession is not to be measured by their individual material gains, but rather by the fact that they have advanced and raised to a higher plane the just and equitable administration of the laws of this state and nation, all of which benefits our citizenry as a whole.

It is our knowledge of their loyalty and their integrity, and in recognition of their personal responsibility to their clients and to the communities in which they labored, that prompts this brief report.

The twenty-eight departed brothers of whom I speak with deepest reverence are:

R. E. BANNISTER, Cozad
HARVEY A. BRUBAKER, Nelson,
ARCHER M. BUNTING, Lincoln,
ALLEN G. BURKE, Bancroft,
FRANKLIN J. CALLAHAN, Kansas City, Missouri,
D. O. DWYER, Weeping Water,
WILLIAM M. ELY, Ainsworth,
MILTON R. FROHM, Omaha,
SIDNEY T. FRUM, South Sioux City,
EDWARD R. HARVEY, Portland, Oregon,
WILLIAM C. HEELAN, Valentine,
WALTER M. HERBERT, Lincoln,
LADD J. HUBKA, Beatrice,
EDWARD F. LEARY, Omaha,
PALMER MCGREW, Lincoln,
BERNARD A. MARTIN, Omaha,
BAYARD H. PAINE, Grand Island,
HAROLD A. PALMER, Omaha,
SIDNEY C. POSKA, Lincoln,
PENROSE E. ROMIG, Alliance,
THOMAS P. SHANAHAN, Talmage,
CHARLES M. SKILES, Lincoln,
WILLIAM SUHR, Grand Island,
CHARLES A. SWEET, Palmyra,

GEORGE M. TUNISON, Omaha,
L. L. TURPIN, Omaha
ARTHUR R. WELLS, Omaha
PERRY M. WHEELER, Omaha,

Your committee believes it to be fitting and proper that we honor these deceased members by pausing in this session and arising and standing silent for a moment in their memory.

PRESIDENT WILSON: Thank you, Mr. Clark. We will now recess until the next meeting of the assembly tomorrow afternoon.

SECTION PROCEEDINGS

Thursday, October 6, 1955

SECTION ON PRACTICE AND PROCEDURE

John L. Barton, Esq.
Chairman

“Some Aspects of Discovery Under the Federal Rules
of Civil Procedure”William E. Knepper, Esq.
Columbus, Ohio
Member Knepper, White, Richards,
Miller and Roberts

“The Trial of Lawsuits and the Perils of Over-
Trial”Lester P. Dodd, Esq.
Detroit, Mich.
Member Crawford, Sweeny, Dodd and Kerr

SOME ASPECTS OF DISCOVERY UNDER THE FEDERAL
RULES OF CIVIL PROCEDURE

By

William E. Knepper

When Mr. Justice Murphy said that “The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure,” he made one of the understatements of the last decade. That comment appears early in the opinion in *Hickman vs. Taylor*, 329 U.S. 395, 67 Supp.Ct. 385, 91 L.Ed. 451, in which the Supreme Court was confronted with the delicate problem of trying to balance the competing interests of those who sought to pry into the privacy of their adversaries’ files on the one hand, and the fundamental proposition that public policy supports reasonable and necessary inquiries on the other.

Since the Federal Rules of Civil Procedure became effective, an entirely new and different concept of the trial of a lawsuit has thundered its way into our jurisprudence. Under the former federal practice, the pleadings were used to give notice to the adverse party of the claims of his opponent, to formulate the issues in the case, and to make such revelation as was possible of the facts to be tried. As we all know, the pleadings were most inadequate to perform such a function. Under the new rules,

however, the pleadings are restricted to the task of general notice-giving, and the deposition-discovery process is invested with a new and vital role in the preparation for trial. Commenting on this new procedure, Mr. Justice Murphy says, "Thus, civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."

The four rules which are of particular importance in any consideration of discovery are Rule 26, relating to the taking of depositions, Rule 33, having to do with interrogatories to parties, Rule 34, dealing with the production of documents and things for inspection, copying or photographing, and Rule 35, providing for physical and mental examinations of persons.

Rule 26 is particularly significant because it prescribes the scope of the examination and says that the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of relevant facts. That rule expressly states that it is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

Any party may take the testimony of any person, including any party, by deposition upon oral examination or by deposition on written interrogatories for the purpose of discovery, or for use in evidence in the action, or for both purposes. The deposition may be taken without leave of court, unless the notice of the taking is served by the plaintiff within twenty days after commencement of the action. The defendant may take depositions without leave of court as soon as the action is commenced. The theory behind the twenty-day period is to provide an opportunity for the defendant to become conversant with the action and to obtain counsel to represent him. The time from which the twenty-day period begins to run is the date of the filing of the complaint with the clerk of the court, and not the date of service.

Under Rule 26, a party is not deemed to have made a person his own witness for any purpose by taking his deposition. Of course the introduction in evidence of the deposition or any part

thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition. But even that provision is subject to a qualification, namely, that the introduction in evidence of the deposition of a party, or anyone who at the time of the taking of the deposition was an officer, director or managing agent of a public or private corporation, partnership or association which is a party will not make the deponent the witness of the party introducing the deposition.

At this point it would be well to observe that if the deposition is to be used for any purpose during the trial it should be filed with the clerk. A practice obtains in some states of taking the deposition of an adverse party to be used for discovery or for impeachment, and then the lawyer taking the deposition merely retains it in his own file until he is ready to use it at the time of trial. That is not a safe practice under the Federal Rules because some courts will refuse to permit the use of the deposition, even for impeachment, if it has not been filed with the clerk.

The rules permit a very wide scope of examination in pre-trial depositions. The Advisory Committee has said that the broad scope of examination may cover not only evidence for use at the trial, but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The committee says, "The purpose of discovery is to allow a broad search for facts, the names of witness, or any other matters which may aid a party in the preparation or presentation of his case."

The Supreme Court carried this same concept into the decision in *Hickman vs. Taylor*, wherein Mr. Justice Murphy said, "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." Thus is demonstrated this new concept of trial practice, whereby the trial in the federal courts now becomes more of a "search for truth" and less of a "battle of wits."

The general rule is that all parties over whom the court has acquired jurisdiction may be required to be present within the jurisdiction for the taking of their depositions by an adverse party. A non-resident plaintiff is generally required to be present in the district in which suit is brought, for the taking of his deposition without pre-payment by the defendant of his travel expenses. However, the trial court has the power to make any order necessary for the protection of the parties, and will ordinarily consider the hardships which might result and condition the orders for the taking of the depositions accordingly.

Under proper circumstances, upon motion of an adverse party, prepayment of travel expenses and fees of the adverse parties' counsel may be made a condition of the taking of a deposition outside of the district of the forum. A number of the district courts make specific provision for this in their local rules.

If a party serving a notice to take depositions fails to attend, then any other party or his attorney who is present at the time and place specified in the notice is entitled to reimbursement for travel expenses and counsel fees. It has also been held that a similar expense award may be made if the party giving notice fails to subpoena a witness, and as a result of the absence of the witness no deposition is taken.

Rule 33 prescribes a method by which a party may obtain information from his opponents so as to prepare for trial, reduce the possibility of surprise at trial and narrow the factual issues so as to determine what evidence he will need at the trial. This method is by written interrogatories to parties. It should also be kept in mind that under Rule 26 depositions of parties or witnesses may be taken on written interrogatories.

The scope of the interrogatories available under Rule 33 is the same as the scope of the examination by deposition under Rule 26. Interrogatories may be served after the commencement of the action, and without leave of court, except that if service is made by the plaintiff within ten days after his complaint is filed, leave of court must first be obtained, but this may be obtained with or without notice.

The rule requires that interrogatories must be answered separately and fully in writing under oath, and that the answers must be signed by the person making them. The party upon whom the interrogatories have been served is required to serve a copy of his answers on the party submitting the interrogatories within fifteen days after the service of the interrogatories unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. If the party upon whom the interrogatories are served desires to make any objection to them, or desires to try to avoid answering them, he must serve written objections thereto, together with a notice of hearing the objections at the earliest practicable time, and those written objections must be filed within ten days after the service of the interrogatories. The serving of such objections as to some of the interrogatories will not relieve the party from being required to answer the other interrogatories as to which no objection has been made. That he must do, and within time.

A party is not required to choose between interrogatories or depositions. He may have both, and in either order. However the rule does say that the court may make such protective order as justice may require and may limit the number of interrogatories or of sets of interrogatories to protect a party from annoyance, expense, embarrassment, or oppression.

While it is to be presumed that a party upon whom interrogatories are served will consult with his counsel in the preparation of the answers to those interrogatories, and that for this reason, among others, interrogatories may not be quite as effective in obtaining information as would an oral examination upon deposition, nevertheless interrogatories do have a real and substantial value in obtaining discovery. Many times at the taking of an oral deposition a party will not recall matters as to his past history, or the amounts of his expenses resulting from the injury involved in the case at bar, and similar matters. Interrogatories can obtain this information just as effectively, and with far less time and expense. Also, interrogatories may be effectively used to obtain the names and addresses of witnesses known to the adverse party, the names and addresses of persons who have taken photographs at the scene of an accident, the amounts of repair bills, medical bills, hospital bills and the like. Interrogatories may be utilized to obtain the personal background and history of a party, as well as his medical history and whether or not he has ever been involved in other accidents or other litigation.

When interrogatories are addressed to a party and he does not answer fully, he may be required to do so on motion. It has also been held that a party who declines to answer interrogatories may be precluded from offering proof at the trial and may be similarly punished where he engages in dilatory and contumacious tactics. Likewise there is authority that when a party is asked to disclose the names of persons who have knowledge of the facts out of which the litigation grows, he must disclose all of the names at the peril of being refused the privilege of offering as witnesses any whose names are not so disclosed.

It is clearly established, however, that a party cannot be compelled to state the names of all witnesses who he will offer at the trial and thus commit himself in advance as to the presentation of his case. There is a difference between an interrogatory seeking that information and one asking for the names and addresses of persons having knowledge of relevant facts.

A party being interrogated under Rule 33 is required to give

only matters within his knowledge and which are matters of fact. He is not required to express opinions or state his contentions as to matters of law or conclusions. He is not required to make research or to compile information which is not readily available to him.

Whereas, under the former practice, it was customary to use a motion to make definite and certain to procure additional information as to the case of the adverse party, the courts now generally hold that such information is to be procured by means of discovery so that the pleadings will not be encumbered with a great mass of evidentiary material.

Under Rule 34 a party may procure the inspection and right to copy or photograph designated documents, papers, books, accounts, letters, photography, objects or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 and which are in his possession, custody or control. Under that rule, also, a party may obtain the right to enter upon designated land or other property in the possession or control of an adverse party for the purpose of inspecting, measuring, surveying or photographing it, within the scope of the examination permitted by Rule 26. However such rights are obtainable only upon motion and a showing of good cause therefor, and notice of the motion must be given to all other parties. The court making such an order is required to specify the time, place and manner of making the inspection and taking the photographs and copies, and the court may prescribe such terms and conditions therefor as are just.

Under this rule the court has discretion whether to grant the order and the court has an opportunity not only to know what it is requiring the adverse party to produce, but also whether there is in fact good cause for producing it.

On a motion for discovery and inspection, the items sought must be designated, and a blanket request is not permitted. A motion for an order permitting a defendant to inspect the records of the plaintiff's treatment in a specified hospital and in any other hospitals where the plaintiff was treated does not sufficiently designate the records. There are four conditions to the relief authorized by Rule 34, and a court would not be justified in directing the production of documents or papers unless these conditions were complied with. The four conditions are: (1) "showing good cause" by the party seeking to compel the production of (2) "designated" documents, etc., (3) "which con-

stitute or contain evidence material to any matter involved" (4) and are in the possession, custody or control" of the person against whom the order is sought. *Marzo vs. Moore-McCormack Lines, Inc.*, 7 F.R.D. 378, 380.

Somewhat related to Rule 34 and yet apparently designed more for the purpose of procuring evidence than for discovery is Rule 36, which has to do with the admission of facts and of the genuineness of documents. The rule says that after the commencement of an action a party may served upon any other party a written request for the admission by the other party of the genuineness of any relevant documents described in and exhibited with the request, or of the truth of any relevant matters of fact set forth in the request. Here again if the plaintiff desires to serve the request within ten days after the filing of his complaint, leave of court must be obtained. Each of the matters of which an admission is requested shall be deemed admitted, unless, within a period designated in the request and not less than ten days after the service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed does one of two things. Such party may serve upon the party requesting the admission either a sworn statement denying specifically the matters of which an admission is requested, or setting forth in detail the reasons why he cannot truthfully admit or deny these matters; or such party may serve written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper, in whole or in part, together with a notice of hearing the objections at the earliest practicable time. As in the case of interrogatories, if written objections are made to a part of the request the remainder of the request must be answered within the period designated in the request. It is most important to bear in mind that affirmative action by the responsive party is necessary if he wishes to avoid an admission implied by his silence. The failure to respond constitutes an admission, even though the genuineness of documents had previously been denied under oath in the pleadings. Also, the answer when made must be a sworn statement of the responding party.

The last of the rules to be considered here is Rule 35, dealing with physical and mental examinations of persons. Under this rule a party to an action whose mental or physical condition is in controversy may be examined, provided good cause is shown. The rule provides that the order may be made only on motion and upon notice to the party to be examined and to all other parties, and shall specify the time, place, manner, conditions and scope

of examination and the person or persons by whom it is made. It is within the discretion of the court whether to order repeated examinations. Good cause therefor could be that the physical or mental condition of the party had changed since the day of a previous examination. Procedure under this rule requires the exchanging of medical reports. If the person examined so requests, the party causing the examination must deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. Thereafter the party causing the examination is entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. The failure to comply with this rule can result in the exclusion of the testimony of the examining or attending physician. Also, if the party examined requests and obtains a report of the examination or takes the deposition of the examiner, he thereby waives any privilege he may have had in that action or any other involving the same controversy as to the testimony of every other person who has examined or may thereafter examine him in respect to the same mental or physical condition. For a discussion of this rule, see *Sibbach vs. Wilson & Co.* 312 U.S. 1, 61 Sup.Ct. 422, 85 L.Ed. 479.

Looking generally at the discovery provisions, we find that many of the writers and many of the courts have said that they were intended to eliminate surprise from lawsuits. There is ground for debate as to whether that is good. In his interesting address, "What's So Wrong About Surprise?," 39 *American Bar Association Journal* 1075, Kenneth B. Hawkins, of the Chicago Bar, says, "Surprise is as essential to a lawsuit as anaesthesia is to surgery. Each helps to find the truth." And we may also note the language of Mr. Justice Jackson in his concurring opinion in *Hickman vs. Taylor* wherein he says, "But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary."

Those pungent statements of today cause us to look back to the comment of Sir James Wigram, in his *Law of Discovery*, written a century and a quarter ago, wherein he said that the courts of justice in England acted upon the principle "that the possible mischiefs of surprise at the trial are more than counterbalanced by the danger of perjury, which must inevitably be incurred, when either party is permitted, *before* a trial, to know the precise evidence against which he has to contend, and ac-

cordingly by the settled rules of courts of justice in this country (approved as well as acknowledged), each party has thrown upon him the onus of supporting his own case, and meeting that of his adversary without knowing beforehand by what evidence the case of his adversary is to be established, or his own exposed."

It is that conflict between the desirability of eliminating surprise on the one hand and the danger of perjury on the other which has been such a serious problem in connection with our modern theories of discovery. Professor Sunderland's answer has been that "the true safeguard against perjury is not to refuse to permit any inquiry at all, for that will eliminate the true as well as the false, but to so conduct the inquiry as to separate and distinguish the one from the other where both may be present."

The Supreme Court, in adopting the rules, took cognizance of the danger of abuse of the discovery procedures when it promulgated Rule 30, and in subparagraphs (b) and (d) thereof made provision for orders for the protection of parties and deponents, and for a motion to terminate or limit the examination. Those protective provisions apply not only to all depositions under Rule 26 but to others of the discovery procedures. In commenting on those sections, District Judge Johnson, of Pennsylvania, (*Madison vs. Cobb*, 29 F.Supp. 881, 882) has said, "In these provisions adequate safeguards are erected to prevent unjust use of plaintiff's right to take the defendant's deposition, and defendant should resort to these provisions if necessary to protect himself, rather than by arbitrarily refusing in the first instance to attend the examination."

Whether that is a complete answer may be doubted, but the fact remains that discovery is here to stay, not only in the federal courts but more and more in the courts of the several states. Surprise, as we have known it in past years, is a much less valuable courtroom tool than it used to be. Literally thousands of pages of the decisions of the courts have been devoted to the construction and analysis of these discovery rules. In this field, as in many others, the problems in each particular case must be determined on the basis of the circumstances existing in that case.

The lawyer who uses the discovery procedures to their fullest extent is bound to benefit the cause of his client, whether he be representing the plaintiff or the defendant. Therefore all of us have much to gain by thoroughly familiarizing ourselves with these rules and keeping abreast of the decisions of the courts which interpret them and apply them to particular fact patterns.

THE TRIAL OF LAWSUITS AND THE PERILS OF OVER-TRIAL

by

Lester P. Dodd

The business of trying lawsuits is a baffling business. Because it is self-proclaimed, experts on trial techniques have been finding a ready market for their wares since advocacy began.

Doubtless many of you have read Robert Graves' book, *Claudius the God*.¹ In that delightfully amusing chapter in which the Emperor Claudius recounts his experiences as a Roman Magistrate, he tells of passing each day, as he came into the Market Place from the Palace, a stuccoed building across the face of which was tarred in enormous letters:

FORENSIC AND LEGAL INSTITUTE—Founded and Directed by the most Learned and Eloquent Orator and Jurist Telegonius Macarius of This City and of the City of Athens.

Underneath this on a huge square tablet appeared the following advertisement:

Telegonius gives instruction and advice to all who have become involved in financial or personal difficulties necessitating their appearance in Civil or Criminal courts; and has a positively encyclopaedic knowledge of all Roman edicts, statutes, decrees, proclamations, judicial decisions, et cetera, past and present, operative, dormant, or inoperative. At half an hour's notice the most learned and eloquent Telegonius can supply his clients with precise and legally incontrovertible opinions on any judicial matter under the sun that they care to present to him and his staff of highly trained clerks. Not only Roman Law, but Greek Law, Egyptian Law, Jewish Law, Armenian, Moroccan or Parthian Law¹ Telegonius has it all at his fingers' ends. The incomparable Telegonius, not content with dispensing the raw material of Law, dispenses also the finished product; namely; beautifully contrived forensic presentations of the same complete with appropriate tones and gestures. Personal appeals to the jury a specialty. Handbook of brilliant rhetorical figures and tropes, suitable for any case, to be had on request. No client of Telegonius has ever been known to suffer an adverse verdict in any court—unless his opponent has by chance also drunk from the same fountain or oratorical wisdom and eloquence. A few vacancies for pupils.

Insofar as I have been able to discover, Telegonius was not only the first advocate of record to boast that he never lost a lawsuit but was the first of the self-proclaimed experts to broad-

¹ *Claudius the God*, by Robert Graves. Copyright, 1953, by Smith & Haas.

cast his ability to teach his brethren at the bar how to accomplish that same desirable end.

Seriously, of course, we all recognize that successful trial techniques cannot be acquired from books or lectures. What is one man's meat is another man's poison. Techniques and procedures that are highly successful for one lawyer may be ruinous if another attempts to use them.

In short, there are no infallible standard trial techniques. Efficient trial procedures are almost as individual as fingerprints. They are, in the last analysis, nothing more nor less than the end-product of a sound basic knowledge of the rules of evidence and procedure, an instinctive knowledge of practical human psychology, and a modicum of native intelligence. I say a modicum, because if any trial lawyer had real good sense, he wouldn't be a trial lawyer.

And so, having established that no one, least of all I, can better your trial techniques, I shall, like a true expert, attempt that very thing.

I have long believed that few lawsuits are won but that many lawsuits are lost. By that I mean simply that the cases in which a lawyer's mistakes have caused him to lose a lawsuit far outnumber those in which his brilliant affirmative acts and techniques have resulted in winning it.

In plain everyday terms of results: We will best improve our trial tactics by avoiding those mistakes which lose lawsuits.

Now what are the most common and most serious mistakes in the trial of lawsuits? I believe they fall into a group which collectively can be said to constitute Over-Trial. The over-trial of a lawsuit means simply that a lawyer has tried too hard. He has committed the cardinal sin of the duffer on the golf course—he has pressed. He has talked too much. He has offered too many witnesses. He has over-examined. He has over-cross-examined. He has over-objected. He has over-argued. He has over-acted. In short, he has given himself, his witnesses, the judge and the jury, too many chances to err.

It is utterly trite but utterly true that to err is human. We all make mistakes. After many years of trial experience I can say truthfully that I have never encountered a superman or a genius on the opposite side of the table in the trial of a law suit. Any man who talks long enough will eventually say the wrong thing. Any lawyer who tries to cover every possible contingency that may arise in a lawsuit will find that he has undertaken an

impossible task and one that must spread him so thin as to make serious mistakes a likelihood if not a certainty.

Let us minimize our mistakes by minimizing our chances to make mistakes. And let us realize that one of our best methods of minimizing our chances to make mistakes is by talking less and thinking more.

An anecdote is told of the late Senator James Watson concerning one of his early trial experiences in his native Hoosier State. It seems that on one occasion he represented one of the local citizens in a rural area in what was for that time and place an important lawsuit. The trial began with Jim alone on his side of the table but with two lawyers on the other side. Before the trial had progressed very far Jim's client came to him to inquire why their side did not also have two lawyers. Jim explained that he thought it unnecessary, but his client still did not seem to be completely satisfied. Finally, noting his client's continuing dissatisfaction, Jim asked him why he was so impressed with the fact that the other side had two lawyers. "Well," his client observed, "I've been watching how them fellows do it. One of them seems to be doing the talking, and the other the thinking. What's bothering me is—who the hell is doing the thinking on our side?"

I do not suggest that two lawyers can think better or talk less than one. I do suggest, however, that most of us can, with profit, develop a better ratio between the two activities.

And now let me try to illustrate briefly some of the perils of over-trial in relation to some of the actual steps in the trial of a lawsuit.

Recognizing, of course, that the trial of a lawsuit begins in a broad but very real sense long before you reach the courtroom, and that thorough preparation, both upon the facts and upon the law, is of primary importance, nevertheless I am confining my observations to actual courtroom procedures and am assuming that at this point you have carefully prepared your case and have a thorough knowledge of it.

You begin, assuming that you are trying a jury case, with the selection of the jury. Procedures vary, of course, in the selection of jurors. In some jurisdictions you draw your juries. In others you strike from lists. In some you examine prospective jurors yourself. In others you examine through the court. The applicable principles, however, remain the same. In some manner you are attempting to ascertain the background, the pre-

judices, the acquaintanceships or connections that may exist between the prospective jurors on the one hand and the parties, the lawyers and the witnesses on the other. You do this, of course, for two reasons: To establish the basis for possible challenges for cause and to establish a sound basis for exercising your right to pre-emptory challenges. Reasonable precautions are only good sense but over-examination or over-inquiry may be highly dangerous. Don't pry. Jurors are apt to resent it. Don't put the suggestion of racial or religious or political or economic prejudice into their minds by letting it become too apparent that it is in yours. Avoid those general, frequently provocative and usually useless questions such as: "Would you entertain any prejudice against my client because of his being of a different race?" In the overwhelming majority of all such instances the automatic answer to such a question will be "no." Men do not often admit and frequently do not consciously recognize that they possess such prejudices. If they do they will usually deny them. By asking such questions, therefore, and obtaining the almost certain answer, you have accomplished nothing except possibly to have stirred a dormant prejudice into an active one or to have left the prospective juror with a resentfully guilty feeling because you have forced him to lie.

In fact in the rare circumstance in which you might get an affirmative admission of prejudice in answer to such a question, you probably would do well to permit the juror to serve on the theory that if a man is honest and conscientious enough to recognize and admit his prejudice he is quite likely to be of the type who will lean over backward to avoid an unjust result because of them.

Avoid exhaustive examination of prospective jurors. If you are for the plaintiff don't let the jurors get the impression, as all too many lawyers permit them to do, that you are so concerned about getting a *favorable* jury that you must have a *weak* case.

If you are for the defense, don't build up the importance of the case by exhaustive examination; you may find you have succeeded only in multiplying the damages.

I find that the longer I practice law the more frequently inclined I am to indicate my approval of the first twelve jurors that take their seats with a bare minimum of examination and frequently none at all. I may be, in fact obviously am, taking certain chances is so doing. But just bear in mind that if I am opposed by a lawyer who adopts the same strategy, we are taking equal chances; we are at least starting even. But if, and usually this

is the case, I am opposed by a lawyer who does not follow that procedure but who examines exhaustively, I wind up both with the benefit of his exhaustive examination and the psychological advantage of having exhibited perfect confidence in my case, of having asked no wrong questions, of having stirred up no prejudice, of having made no enemies on the jury. In short, I have given my opponent all the opportunities to make mistakes by the simple expedient of keeping my mouth shut.

Be exceedingly sparing in the use of your pre-emptory challenges. Unless you are a better psychologist than most of us or are possessed of phenomenal luck, or both, you will frequently find that in exercising a challenge on a hunch you have succeeded only in out-smarting yourself. The sour-visaged old gentleman whom you were so certain would be for the defendant turns out to be the benevolent, warm-hearted, openhanded type that is the dream of every plaintiff's lawyer. The prim-looking spinster that you were so sure would vote to hang your client because he had had the customary two beers before the accident is herself a potential candidate for Alcoholics Anonymous.

Don't permit guesswork or hunches to multiply your chances to make mistakes. In pre-emptorily challenging a juror you give yourself one chance to help your case but you give yourself several chances to harm it. To me that is not a sound or winning percentage. If you are wrong in your appraisal of the prospective juror you have eliminated a favorable rather than an unfavorable juror. Even if you are right in your appraisal you may have eliminated an unfavorable prospect only to see him succeeded by a far more unfavorable prospect. Or you may have eliminated a poor juror at the cost of making other jurors resentful of your, to them, arbitrary exercise of your power to excuse. And finally you may find, as I so frequently have, that if you will just keep your shirt on your opponent will eventually dismiss the very fellow that you were most afraid of.

Having drawn your jury, your next step is the Opening Statement. Here you are offered a really golden opportunity to talk too much.

I assume that under the practice in your jurisdiction, as under that to which I am accustomed, counsel for each side is obliged to make an opening statement. There is thereby placed in the hands of counsel that which can be a very valuable weapon but that which can also be a very dangerous weapon.

Our Michigan Court Rule on the subject says in part:

On the trial of a cause it shall be the duty of the plaintiff's counsel, before offering evidence to support the issue on his part, to make a full and fair statement of his case and of the facts he expects to prove.

Note the language "a full and fair statement of his case and of the facts which he expects to prove," but don't take that or similar language in your own rule or statute too literally. In interpreting or commenting on that rule, our courts have recognized that "the opening statement should be brief," "should relate to *salient* facts which form the basis of the claim or defense," "should contain *ultimate* facts rather than *details* of the testimony to be adduced," and finally, and of prime significance, "any facts stated in the opening statement can be taken as an admission by the other party and thereupon need not be proved by such other party."

Thus it is apparent that caution and economy of speech are doubly important in connection with an opening statement. Not only do you run the risk of prejudicing court and jury by overstating your case, by promising more than you can prove, by making unnecessary promises of proof, etc., but you risk making legally binding admissions which can ultimately prove to be your undoing.

I have never known a lawyer to lose a lawsuit by saying too little in an opening statement. I have seen many lost because he has said too much. I can recall at least three cases in each of which I have had a motion to direct a verdict granted on my opponent's opening statement. I have on many more occasions had the court give binding instructions on some important and sometimes vital phase of the case simply because my opponent has made an ill-advised, unnecessary statement in his opening that later developed to be an important admission against interest.

No matter how carefully you have prepared your case, no matter how sure you are that your key witness has been properly horse-shedded and will testify to exactly what he has told you, he is quite likely, as we all have good reason to know, to take the stand and pour out a version of the facts which makes you glance nervously at your papers to make sure that you brought the right file with you. In many cases the version given from the witness stand, even though different than that given to you in your office, is still fundamentally truthful and sufficiently consistent with your pleadings and with your general theory of the case that your cause is not irretrievably lost. In such fortunate cases, assuming you have not previously opened your big mouth and told the jury

exactly what the witness was going to say, you have suffered nothing more serious than that acute sinking feeling in the pit of your stomach which, after all, is only a symptom of normalcy to the experienced trial lawyer. But if you have made the mistake of promising the jury earlier that the witness was going to testify to a particular detailed story, you are in for it. You have made yourself and your witness objects of suspicion to court and jury and have lost ground that can never be regained.

If you have succeeded in getting a jury sworn and an opening statement made without having talked yourself out of business, don't despair. You still have many chances. You have witnesses to examine and—God save us—some to cross-examine.

If it is your studied practice to think before you ask, to ask in such manner as to elicit only the evidence that you are trying to develop, to ask it so that it is understandable both to the witness and to the jury, to ask it in simple language, to ask it in such manner as to avoid offense, and finally to ask only necessary questions of necessary witnesses, you are already a better trial lawyer than I and I can be of no help to you on the subject of examination.

But, if you are in love with the sound of your own voice, if it is your chief purpose to convince all within earshot of your own brilliance rather than the soundness of your client's case, if you are willing to take your chances on asking a question which the witness may interpret and answer in any one of six ways, and, most vital of all, if you are willing to risk the dire consequences that so often result from putting on that unnecessary witness or asking of a necessary witness that unnecessary question, I offer a suggestion.

All of you will recall that during the war when it was so important to conserve transportation facilities for war-time needs, we were constantly confronted with the question, "Is this trip necessary?" I suggest to the earnest consideration of every trial lawyer the desirability of hanging a mental sign in his own consciousness: "Is this witness necessary?" "Is this question necessary?"

Volumes have been written and countless papers have been read by experts on the subject of cross-examination: "How to acquire the art of cross-examination," "How to be a successful cross-examiner," "The secret of successful cross-examination," etc. To my mind such titles are as suggestively misleading as "How to reduce weight without eating less," "How to learn to

play the piano in six easy lessons," "How any woman can become beautiful by using our soap."

In my view, the lawyer who sets out to acquire the "art" of cross-examination is asking for trouble. When a young lawyer embarks upon his first cross-examination he takes a risk comparable to that involved in smoking his first marijuana cigarette. The "habit" of cross-examination is much like the dope habit and about as easily acquired. If the young practitioner is fortunate enough to conduct his early cross-examinations with some degree of success, he finds it exhilarating and exciting. But he quickly finds it impossible to refrain from practicing his art upon every available subject, with the inevitable result that he has soon become an incurable addict.

And so I propose to direct my few remaining remarks on this subject not to the "how" of cross-examination but to its "when"—or, perhaps better yet, to its "if."

Obviously there can be no cut and dried formula for identifying the situations in which cross-examination is desirable, but I think we will find that the most common fall into three general categories.

The first is what, for want of a better term, I call the desperation cross-examination. While its use is not in the exclusive domain of the defense lawyer, he probably has more frequent occasion to employ it than his brother across the table. The witness has testified to a set of facts which, if unchallenged, will surely sink you without trace. You have no evidence at your command to offset it. Your one and only chance, therefore, is to try to weaken or destroy the effect of the testimony through cross-examination. This is probably the only situation in which you are ever justified in cross-examining on the basis of hope rather than expectation.

Here you may roam. Here you may hunt and fish. Here you may dig and pry. Here you may try your hand at cajolery, persuasion, suggestion or, on rare occasions, even threat. You will of course have to fit your precise methods to your own personality and to the type of witness with which you are confronted. No one can furnish you a blueprint or formula by which to proceed. Two basic points, however, are common to all. First, you must correctly identify the situation that appears to justify this type of cross-examination. In short, you must be very sure that you are confronted with an otherwise hopeless situation before you resort to desperation measures. Second, and

equally important, you must be able to judge or sense when to stop.

It will return you little profit to turn up something favorable to your case if, by the time you have done so, judge and jury, to say nothing of you and the witness, are exhausted. By the same token it will do you little good to discredit the witness or uncover weakness or defects in his testimony if you allow him to wriggle off the hook or to repair the damage through your failure to stop short of trying to extract the last drop of juice from the carcass. Just remember that anything favorable to your case you can get in such circumstances is so much velvet. Don't crowd your luck.

The second in the categories of situations in which cross-examination is often justifiable is that in which you are in possession of definite contradictory material. To set the stage for the introduction of impeaching evidence it is often necessary to lay the groundwork through cross-examination. You may have a signed statement, a letter, a telegram, a transcript of testimony given in another proceeding or other documents containing admissions or statements contrary to the witness' testimony. To the habitual cross-examiner, the possession of such material is a mandate to cross-examine. But to my mind, therein lies one of the most common fallacies encountered in the trial of lawsuits. Do not allow yourself, even in such circumstances, to be ensnared by the *habit* of cross-examination. Do not let yourself fall victim to the assumption that there is any situation where cross-examination is automatic. Before entering upon this type of cross-examination, ask yourself these questions: Is it necessary for me to lay a foundation for the subsequent use of impeaching material or testimony by cross-examining this witness? Is there any other method by which I may more safely use my material than by confronting the witness with it? Is there substantial danger that my attempted use of impeaching material or admissions against interest may backfire or offend?

In the earlier days of my practice I could no more have passed up the opportunity to confront a witness with a signed contradictory statement than I could have taken jet passage to the moon. But after several years and an all too painfully acquired knowledge of how many ways there are in which a wily and well-coached witness, suffering excruciating pain and under opiates at the time of giving the statement, can not only explain away such a trifling document but can in the process convict its user of forgery, larceny and malpractice, I more often than not allow such a document to gather mildew in the files.

Such cross-examinations invariably have elements of potential danger. An attempted impeachment that does not quite come off puts the cross-examiner in an extremely bad light. Often-times a technically successful impeachment makes a martyr of or creates sympathy for the witness and stirs up resentment against the examiner.

Approach such cross-examinations therefore with extreme caution. Be very sure of the validity of your impeaching material. Be especially wary of imputing intoxication, immorality, lack of chastity, dishonesty or criminal record. Remember that once you have embarked upon such a course there is no turning back. Remember also that once you have opened up such a subject you must appear, even if successful, to take no pleasure from it and must give the witness every opportunity to explain, justify or evade, which he frequently does to your discomfiture.

In short, if you feel that you must cross-examine in this range, do it—not apologetically, but without vindictiveness. Be ultra-fair. Be very sure of your ground and treat success then and in subsequent argument not as a victory over what may appear to the jury as a defenseless victim but as an unpleasant duty performed as humanely as possible.

The third type of situation in which cross-examination is frequently justified is that in which the witness has demonstrated by his attitude and demeanor on the stand that he is of the type which will hurt or destroy himself if given sufficient opportunity. Here as always your first problem is to determine whether the witness has substantially helped his own side or hurt yours on direct examination. Unless he has, leave him alone. Never try to gild the lily. If it is very obvious to you that the witness is of the type who will make a bad impression, the chances are that he has already done so.

If, however, it is your considered judgment that he has made a sufficiently favorable impression to require some attempt on your part to change that impression, the reasoning which impels you to that conclusion will dictate the precise methods to be employed. This general class includes the braggart who, if kept talking, will eventually disgust court and jury and destroy any confidence that might otherwise have been reposed in him. Another in this general category is the “over-coached” witness. He has memorized the answer to key questions. If he is given repeated opportunities to tell the same story in the same words, he may effectively destroy any originally favorable impression. Another in this group is the obstinate witness. He is the one who

will never agree with you even if he has to reverse his position in order to disagree. Still another is the ultra-agreeable witness. This one can't say "no." By permitting him to agree to absurdities, you permit him to destroy his effectiveness. These and many others need only to be kept talking to talk themselves into trouble. Witnesses in this category can usually be cross-examined with a minimum of risk and with a reasonable prospect of profit. But do not try these tactics on the obviously honest and intelligent witness. You can have just as much fun trying to stop a buzzsaw with your bare hands. Cross-examining in this field is probably the simplest and safest type of cross-examination in which to indulge. Do not, however, make the mistake of talking too much yourself. Merely furnish the witness the leads. Do not center attention on yourself or attempt to appear clever or brilliant. Let the witness occupy the stage. Your job is to conduct, not to play the music.

I have attempted to break down the more common occasions for legitimate cross-examination into three general classes. Undoubtedly there are others. But whether there be three or thirty, it will pay you to recognize every proposed cross-examination for what it is—a potentially dangerous experiment. Not only are you risking your own neck but you are frequently giving affirmative aid and comfort to the enemy. I believe there are many advantages, somewhat vague, perhaps, but nevertheless very real, in waiving cross-examination even where it might be of slight or moderate advantage to your case to cross-examine.

One such is the disruption of the timing of your opponent. The simple fact is that most lawyers do have the habit of cross-examination. Most lawyers arise to cross-examine as a matter of course at the close of every direct examination. Most lawyers habitually over-cross-examine. Those who are afflicted with the habit themselves tend to assume, naturally, that all others are so afflicted. When you waive cross-examination against such an opponent he must be prepared to proceed immediately with his next witness. It is surprising how often he is not quite fully prepared to do so. By crowding him, by keeping him under pressure, you disrupt his timing and his morale and hence his effectiveness.

How often have you observed the lawyer who has prepared to have two or three witnesses available for the day, assuming that because of expected lengthy cross-examination they will carry him through? When cross-examination is waived or severely restricted and he runs out of witnesses, he must either make lame

excuses, throw himself on the mercy of the court, or, what is usually worse, stall so obviously as to create a bad impression on court and jury. Of course I do not advocate waiving a necessary or desirable cross-examination for so nebulous a possibility of gain, but such a situation has often been, with me and to my profit, the deciding factor when the question of whether or not to cross-examine has seemed a very close one.

Again, have you observed how frequently a witness who has done his side no particular good on direct examination has really gone to town on re-direct? Even if your intervening cross-examination has done no harm in itself or has, perchance, shown a slight profit, you have given your opponent time to pull himself together, to think of the important questions he should have asked on direct or to cover points that had been left uncovered or confused.

At the risk of boring you with a personal anecdote, may I recall an early but still vivid experience which may serve to illustrate not only the perils of unnecessary cross-examination but also the manner in which it sometimes relieves the direct examiner of the consequences of his own shortcomings. Candor compels me to admit that out of this one neither my opponent nor I emerged with a laurel wreath on his brow.

I represented a seven-year-old plaintiff who had suffered a skull fracture and a crushing injury to his leg, resulting in amputation just above the knee. It was necessary to put in my medical proofs by deposition, and opposing counsel and I traveled several hundred miles to take the testimony of the attending physician. As a result of inexperience plus a woefully inadequate preparation on my part, the testimony on direct examination consisted of little more than a bare statement by the doctor that the boy had suffered a skull fracture from which he had made an uneventful recovery and a brief description of the amputation, from which, very obviously, there could be no recovery.

Instead of leaving well enough alone and letting me suffer the consequences of my own inadequacies, my generous adversary, who had traveled many miles at substantial expense, felt it necessary to do some cross-examining. He began by asking the doctor to assure us again that recovery from the skull fracture had been uneventful and complete. This time the doctor was not quite so taciturn. As a matter of fact I am sure he knew more about trying a lawsuit than I did. He proceeded, at length and in detail, to explain that, although the fracture had healed completely and without apparent untoward incident, such a healed

fracture left a ridge of scar tissue on the under side of the skull, constituting a potential source of irritation to the lining of the brain, which not uncommonly resulted in a meningitis, etc. Realizing by this time that he would have been much better advised to have used that eloquent two-word cross-examination, "No questions," my flustered opponent, thinking to salvage as much as possible, broke in with what was intended to be a terminal question. This time he thought surely he was asking a safe one. It went something like this:

"Well, at least, Doctor, insofar as the leg is concerned, it is gone, and the worst that can happen has happened."

I can still see the old doctor lean back in his chair and smile and hear him drawl, "Oh, I wouldn't say that."

He then went on there and at much greater length and detail on re-direct examination to bring out what any lawyer should have had the good sense to know and to develop on direct examination. He explained how youthful bones continue to grow, and in growing can push through the skin flap, requiring further bone amputations and a long period of time with all the attendant danger and pain and expense before a permanent artificial leg could be fitted.

How much the damages may have been increased by that testimony no one can know. Certainly they were increased and, even more certainly, through no skill or virtue on my part. Although admittedly my story has no hero, it certainly has a moral. The blindest hog will surely pick up plenty of acorns if you insist upon pushing a full platter under his nose.

There are many other affirmative benefits, tangible and psychological, to be gained from the judicious waiver or severe restriction of cross-examination. I shall take time to mention only one more. It has no novelty but it frequently pays dividends. I refer to the psychological advantage of a display of confidence. Confidence begets confidence. I have known many fine lawyers who, by their very quietly confident manner of declining cross-examination, have done more to convince a jury of the utter lack of merit in the witness' testimony than could have been accomplished by hours of cross-examination. When in doubt, try it. Whatever happens you will have the comfort of knowing that at least you did not ask the wrong question.

And now, gentlemen, the hour grows late. I have already trespassed too extensively upon your time and your hospitality. I have afforded you a living example of the man who talks too

much. I hope that you will profit from that example and thereby avoid the perils of over-trial.

I have been able to offer you no new nor novel nor startling ideas. I am convinced there are none in the realm of trial techniques. As long as the fundamental purpose of a lawsuit is to ascertain the facts, apply the law of the land and thereby do justice between men and among men's causes, the basic and elementary rules of right and acceptable human conduct and deportment—plus a little horse sense—will be the trial lawyer's best guide to successful courtroom behavior and methods. Be yourself. Arm yourself with a thorough knowledge of the facts and the law. Avoid the perils of over-trial. You may not win more lawsuits, but you surely will not lose as many.

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JUST COMPENSATION IN EMINENT DOMAIN PROCEEDINGS

By

Henry B. Curtis

The law of eminent domain presents an interesting contrast between the apparent clarity of the principles involved and the uncertainty in the practical application of the law.

Any law school senior can accurately expound the theory of the law, but its application raises questions which experienced lawyers and learned judges find difficult of solution.

Like every other branch of the law, textbooks have been written on the subject. In addition to Nichol's on eminent domain, the standard authority on the subject, there are two excellent books dealing with valuation. One of these is by Mr. Alfred D.

Jahr of the New York bar entitled *Eminent Domain Valuation and Procedure* and the other is Argel's *Valuation Under Eminent Domain*.

In theory the law is simple. All property is held subject to the implied condition that it must be surrendered whenever the public interest requires it. *Des Moines Wet Wash Laundry vs. Des Moines*, 197 Iowa 1082, 198 N.W. 486, 34A.L.R. 1517

In *Campbell vs. United States* 266 U. S. 368, 45 S. Ct. 115, it was said:

"The taking was under the sovereign power of eminent domain. . . and from the taking there arose an implied promise by the United States to compensate him for his loss.

Thereupon he became entitled to have the just compensation safeguarded by the Fifth Amendment to the Constitution; that is the value of the land taken and the damage inflicted by the taking . . . such a sum as would have put him in as good a position pecuniarily as he would have been if his property had not been taken. *Seaboard Airline Ry. Co. vs. United States* 261 U. S. 299, 43 S. Ct. 354, 67 L. Ed. 664. But he was not entitled to have more than that.

This power of taking private property for public use is one of three essential attributes of sovereignty without which a state cannot exist. The other essentials are the police power and the power of taxation.

None of these fundamental powers is unlimited. The police power cannot be exercised in an arbitrary, capricious or unreasonable manner; taxation cannot be confiscatory, and the power of eminent domain carries with it, either expressed or by implication, the requirement that when private property is taken for public use there must be just compensation.

The requirement for just compensation is found in the fifth and by inference in the fourteenth amendment to the United States Constitution.

It is found in all or practically all of the state constitutions. Even in those states which do not have an express constitutional requirement for just compensation, the courts have held that the owners of private property taken for public use are protected by the "due process" clause, and by the principles of natural justice and equity. *McCoy vs. Union El R.Co.* 247 U. S. 354, 38 S. Ct. 504, 62 L. Ed. 1156.

The Federal Constitution and some of the state constitutions speak only of a taking of private property. Other constitutions

provide for compensation when private property is damaged or destroyed.

The result is there is considerable divergence in the decisions as to when compensation is or is not due in cases where there has been no actual taking.

In those cases where the constitutional protection covers damages to property, a good statement of the rule was laid down by the Supreme Court of Nebraska in *Snyder vs. Platte Valley Public Power & Irrigation Dist.* 144 Neb. 308, 160 A.L.R. 1154, 13 N.W. 2d 160 where the court said:

As to land, where land is not taken, the measure is the difference in value before and after the construction of the structure causing the damage, taking into consideration the uses to which the land was put and for which it was reasonably adopted.

In *United States vs. Campbell, supra*, the court allowed damages (a) for the value of the land taken and (b) for the damage caused to the remainder of the tract by the taking, but disallowed damage caused or to be caused by the use of lands acquired from others. Said the court:

The land taken from the plaintiff was not shown to be indispensable to the construction of the nitrate plant, or to the proposed use of the other lands acquired by the United States. The damages to the remainder from the taking of a part were separable from those caused by the use to be made of the lands acquired from others. The proposed use of the lands taken from others did not constitute a taking of his property.

JUST COMPENSATION

The courts have many times attempted to define "just compensation." Some of the decisions have held that just compensation is the equivalent of "fair market value." But an objection to this definition is that there are cases where property has no real market value because there is no market for that particular type of property.

There is no absolutely satisfactory definition, but perhaps it could be said that "just compensation" is the equivalent of "true value."

In *Minn - St. Paul Sanitary District vs. Fitzpatrick* 201 Minn 442, 277 N.W. 394, 124 A.L.R. 897 it was said:

The just compensation to which the owner of property taken for public purposes is constitutionally entitled is the market value thereof at the time of the taking contemporaneously paid in money. The sum so to be paid is arrived at upon just con-

sideration of all the uses for which it is suitable, and the highest and most profitable use for which the property is adaptable and needed or likely to be needed, in the reasonably near future is to be considered to the extent that the prospects of demand for such use affect the market value while the property is privately held.

The market value of the property taken in condemnation is not measured by the benefits to, or needs of the condemnor. The question is What has the owner lost? Not what has the taker gained?

The first principle in the determination of proof of fair market value is that any evidence which can reasonably be expected to throw light on the real value of the property is relevant. The discretion of the trial court in admitting such evidence will generally be sustained. If anything, it would appear to be safer to admit rather than reject evidence of doubtful relevancy.

Evidence is relevant which is descriptive of the property and its location, physical characteristics, advantages and surroundings. *Maxell vs. Iowa State Highway Commission* 271 N.W. 883, 118 A.L.R. 862; *St. Louis I.M. & S. R. Co. vs. Macfield Co.* 94 Ark. 135, 126 S.W. 83, 26 L.R.A. (N.S.) 1111.

PROOF OF VALUE

In the determination of value there are various kinds of evidence or methods of proof which are generally accepted by the courts as relevant. These are:

1. Prior sales of the same property.
2. Sales of similar property in the vicinity.
3. Reproduction cost of building or improvements.
4. Revenue produced by property.
5. Opinion evidence as to its value.

Each of these methods of proof has advantages and disadvantages. Some may be relevant in one situation and not so under other circumstances.

Proof of sales of the same property

Under certain circumstances a prior sale of the same property would be very good evidence as to its true value. It is not, however, conclusive and in some cases may be almost irrelevant. For example, the sale must have been made within a reasonable time before the commencement of the condemnation suit. A sale or purchase made many years before would have very little evidentiary value in determining the present value. It must be

shown or at least presumed that the sale was made by a person willing to sell but not obligated to do so, and that the property was bought by a person who was willing to purchase but not compelled by ulterior motives to acquire same. That is what is meant by the willing seller and willing buyer rule. *Baucum vs. Arkansas Power & Light Co.* (Ark 1929) 15 S. W. 2d 399, *Lebanon & N. Turnp Co. vs. Creveling* 159 Tenn. 147, 17 S. W. 2d 22, 65 A.L.R. 440.

Even in those cases where it appears that the property had been purchased by the defendant owner but a short time, say six months or less, before, it would not follow that the price paid was necessarily the true value of the property. The defendant owner might have purchased the property at much less than its real value or he may have made a poor bargain. While it has been said that "sales at arm's length of similar property are the best evidence of market value," it is also true that the state may not confiscate the owner's bargain, nor be required to assume his loss. *Kinter vs. United States* 156 Fed (2d) 5.

Again, where property has been acquired by the defendant owner just a few months before the condemnation suit another factor enters the picture.

If the defendant owner receives exactly what he paid for the property and nothing more, he will undoubtedly suffer a certain loss. The legal fees and other expenses which he paid in acquiring the property are not ordinarily a part of the purchase price. Therefore, if he is allowed just exactly the purchase price the owner is going to suffer a loss. Now technically he cannot recover for such fees or expenses, but the court or jury may very well find a slight increase in the value of the property, which will thus serve to give full and complete compensation.

This problem does not exist if the owner has been able to hold the property long enough to receive some return on his investment. Even in the case of vacant or non-revenue producing property, at least the owner has had the opportunity of a possible enhancement in value.

SALES OF SIMILAR PROPERTY IN THE VICINITY

This method is perhaps a fairer and more accurate method of determining true value, because if there are enough sales of similar property in the vicinity and these sales have taken place within a reasonably short time before the condemnation suit, we have a pattern which should portray a fairly accurate picture of

the market value of the property. The disadvantage of this method is that only in exceptional cases are two pieces of property exactly alike. The location with respect to cross-streets, the condition of the buildings immediately adjacent to the property, the flow of traffic and many other factors all affect the value of property.

This method may give under appropriate circumstances an accurate picture of the value of the land, but it is obvious that one building, even though adjacent to another building, may be of entirely different value because of its construction, age or condition. Perhaps the only information which can be derived from method No. 2 is the value of the land less the building.

REPRODUCTION COST OF BUILDING OR IMPROVEMENTS

The cost of reproducing a building which is to be condemned may be very relevant, and in some cases, it may be essential in determining just compensation. There are cases where a building has little or no market value, in the sense that it is impossible to find a person or corporation which would purchase the property except for the land upon which the building is situated. In such cases the prospective purchaser would plan on demolishing the building and erecting one suitable for its owner's use. The best example of a building which has little or no market value is a church. It is seldom, though it sometimes happens, that one congregation will purchase the church of another congregation. These instances are so few and far between that we can perhaps say that a church as such has no market value. Other buildings constructed and designed for a particular use are in the same category. In such cases, after determining the value of the land upon which the building is situated, it would be necessary to determine the cost of rebuilding it somewhere else if we are to award the congregation just compensation. On the other hand, depreciation or obsolescence should be taken into consideration, as it is obvious that a building which is so old or obsolete as to have little or no value could not be considered in the same category or as having the same value as a new and modern building. While under certain circumstances value of property might be shown by the amount of insurance which the owner carried upon it, the general rule is that such evidence is immaterial. The theory and practice of insurers and insured is to make the limit of insurance much less than the value of the property, while owners are permitted to procure insurance in amounts far below this limit. The result is that the amount of insurance has no fixed or uniform relation to the value of the property it covers, and

hence does not directly tend to disclose its value. *Union Pac. R. Co. vs. Lucas*, 146 Fed. 374. Mere age is not necessarily a sign of depreciation in value, because if the building has been kept well it has been of necessity repaired from time to time so that it has to some extent preserved its reproduction value.

In estimating the fair market value of land upon which a flour mill is situated for the purpose of awarding damages in eminent domain proceedings to appropriate the land, the court may consider not only the cost of production but all the cost necessarily or reasonably expended in bringing the mill into effective working condition, all to be weighed with other evidence of value. *Banner Mill Co. vs. State*, 41 A.L.R. 1019, 240 N.Y. 533, 148 N.E. 668. But this does not include good will.

The cost of the erection of a new building on a different piece of land in which a business conducted on land taken in condemnation proceedings is to be continued cannot be included in the compensation or damages awarded. Nor in the absence of disclosures of like or closely similar constructions and conditions in all respects can it be proved as tending to show its value of the old building. *Gauley & E. R. Co. vs. Conley*, 7 A.L.R. 157 84 W. Va. 489, 100 S. E. 290.

REVENUE PRODUCED BY PROPERTY

This type of evidence can be very helpful in the determination of value. There are several things to be considered in connection with the admissibility of such evidence. They include the following:

(1) The valuation of the property should be based upon its most profitable legal use. Any reasonable future use to which the land might be adapted or applied may be considered in arriving at present market value. *Denver vs. Quick* 108 Colo. 111,113 P (2d) 999, 134 A.L.R. 1120. *Johnstone vs. Detroit G.H. & M. R. Co.* 245, Mich. 65, 222 N.W. 325, 67 A.L.R. 373.

(2) If the property is a zoned neighborhood, evidence as to the revenue which it would produce if it were unzoned is too speculative. *Long Beach City High School Dist. vs. Stewart* 173 A.L.R. 249, 30 Cal (2d) 763, 185 P (2d) 585.

(3) The revenue produced by the property, i.e., its rental, must generally be in accord with rental produced by other similar property in the neighborhood. If property is rented at an exorbitant figure, obviously that does not represent its true value any more than rental far below what the property should bring. In either

case there would probably be special circumstances which would explain the situation. If evidence of such rentals is received it is always competent to rebut by showing that the property is worth more or less than its rental figure would indicate.

Assuming that the revenue produced by a piece of property is a fair indication of its value, the court or jury may use the capitalization of income as a means of determining value.

This method involves the assumption of a fair rate of return on invested capital and then dividing the net annual return by this figure. Thus if we assume that 5% net is a normal return on money invested in real estate, and the property brings in a net of \$5,000.00 per annum, the actual value determined by this method would be \$5,000.00 divided by .05, which would be \$100,000.00. This method, however, is not nearly as simple as it seems. The money market, and hence the expected rate of return, may change; the property may depreciate; it will certainly in the course of time become more or less obsolete; and other factors will play a part. All of which means that the revenue produced by property is not necessarily a true or accurate picture of its value.

OPINION EVIDENCE

This type of evidence, like the opinions of witnesses in other cases, should be received with great caution. It is an attempt to substitute the opinion of the witness for the judgment of the court or jury. In some cases, such as medical testimony or matters involving highly specialized subjects, such evidence is relevant. On the other hand, a realtor testifying as a so-called real estate expert is not like a doctor, an electronics engineer or some highly trained specialist. In such cases the medical or other expert witness can be required to prove his qualifications. A real estate man, on the other hand, while he might be qualified to testify as an expert on the technical features of the real estate business, may not be competent to pass on real estate values. Even less is such a witness qualified to say how much a piece of property is or will be damaged by the construction of some public improvement in front or on the side of the property, or on a part thereof, when only a portion of the property is being expropriated.

In connection with the admissibility of opinion evidence, it is interesting to read a decision of the Supreme Court of Nebraska, rendered in 1881 in the case of *Fremont etc. RR vs. Whalen* 11 Neb. 585, 10 N.W. 491 where the court said:

The practice indulged in on the trial of this and other cases of

taking the opinion of witnesses as to the value of the land, subject to the location of the road over it, ought not to be permitted. A strong objection to it lies in the fact that indirectly the damages are assessed by the witnesses instead of the jury, whose duty it is, and most likely on an improper basis. It is doubtless a proper course to take the opinion of experts as to the value before it is affected by the location of the road. Thus done, the testimony on the question of damages should be confined to those matters affecting the value proper to be considered, leaving the jury to draw their own inferences therefrom unaffected by the judgment of others.

This decision was overruled a year later in *Republican Valley R. Co. vs. Arnold* 13 Neb. 488, 14 N.W. 478 where the court said:

The proper mode of assessing damages is by calling experts, men acquainted with the land and its value, and who are capable of estimating the injury sustained.

The evidence as to the valuation put upon property for tax assessment purposes is not generally admissible. These valuations are usually far below the actual value of the property and have generally not been considered in eminent domain proceedings. *Minn. St. Paul Sanitary Dist. vs. Fitzpatrick*, 201 Minn. 442, 277 N.W. 394, 124 A.L.R. 897.

In Louisiana there is also an apparent exception to this rule. It is found in the Constitution of Louisiana of 1921, Art. XVI, Section 6, which provides that lands or improvements actually used or destroyed for levee purposes shall be paid for at a price not to exceed the assessed value for the preceding year.

This is based upon the old theory that the owner of land fronting on a navigable stream or body of water owed a servitude or easement to the public to permit the building of a levee on the bank of such river, stream or other water which would protect not only the owner but also other properties in the vicinity. People bought and acquired riparian property subject to such an easement in favor of the public. *Wolfe vs. Hurley*, 46 F. (2d) 515.

Also, in Louisiana there is a decision which is somewhat at variance with the general jurisprudence. In *City of New Orleans vs. Larroux, et al*, 203 La. 990, 14 So. (2d) 812, the court held that evidence as to the assessed value of the property, though not controlling, should be considered as a factor in determining the value of the land.

CONCLUSION

To summarize briefly all of the decisions on the subject of valuation in eminent domain proceedings, it can be said that it is

and should be the object of the court to put the owner of the property taken in the same financial position he would be in if he sold the property at a time when he was willing to sell to a purchaser who was willing to buy but did not have to have the property. Actually this really should not be a difficult question to answer. A person who wishes to know what the real value of his property is can probably get a fair picture by offering it for sale at a price which he is willing to take. He should not be required to take less than the real value of the property, nor should he be entitled to enrich himself at the expense of the state or municipality. Everyone who purchases property does so with the implied knowledge that whenever the property is actually needed for public purposes it can be taken, provided he receives the true value thereof.

But human nature being what it is, the usual result is that the defendant owner will introduce or attempt to introduce every bit of evidence which he or his counsel considers favorable to their side, and the taker will, on its side, endeavor to minimize the value of the property and the resultant loss to the owner.

PROCEDURE UNDER THE NEW EMINENT DOMAIN ACT OF 1951

By

Herbert M. Fitle

The eminent domain procedure set forth in the Uniform Act of 1951 amended some 20 chapters of Nebraska statutes. It is, as named, a uniform procedure, applying to all condemnations with the exception noted in Section 76-703—that is, where it is sought to condemn property used or useful of a public utility engaged in the rendition of existing services.

With respect to the city of Omaha, a city of the metropolitan class, the procedure set forth in the Uniform Act has taken the administrative power from the city council and given it to the county court. Under the old "law" the city appointed its own appraisers and approved or disapproved their awards. The property owner appealed directly to district court. Under the new Act the condemner must negotiate, which means negotiators have to be appointed, and if negotiations fail a petition must be filed in county court, where the county judge appoints three appraisers and hearings are held. Then where the Federal Government participates, there is often the requirement that a preliminary appraisal without contacting property owners be made before nego-

tiations take place. This extends the procedure even further. But all in all the new act does benefit the property owner who is involuntarily surrendering his property.

For purposes of discussion I have divided the subject matter into three parts; *one*, negotiation, *two*, county court procedure; and three, appellate procedure. Under the *Act*, the condemner must negotiate with the condemnee before filing a petition to condemn the property in the county court of the county where the property is situated.

Section 76-704 is clear in this respect, stating:

If an condemnee shall fail to agree with the condemner with respect to the acquisition of property sought by the condemner. a petition to condemn the property may be filed by the condemner in the county court of the county where the property or some part thereof is situated.

If you represent the governmental agency condemning property, you must satisfy this requirement of the statutes. Our Supreme Court has said in effect that the condemner must in good faith negotiate with the condemnee, and that it is not sufficient that the condemner is unable to contact the condemnee personally or is unable to agree on the amount of the damages requested by the condemnee. This question has been discussed in the case of *Higgins vs. Loup River Public Power District*, which was appealed to the Supreme Court on two occasions, the first case being cited at 157 Neb. 653, 61 N.W.2d 213 and the second appeal being cited at 159 Neb. 549, 68 N.W.2d 170. Incidentally, the condemnation proceeding in the Higgins cases was instituted before the effective date of our Uniform Act. However the court in its opinion pointed out this fact and stated that the requirement is the same as far as the Uniform Act is concerned. In the first case, 157 Neb. 653, page 659 of the opinion, the court cites corpus juris on eminent domain, paragraph 318, page 895, which reads as follows:

In order to satisfy the statutory requirement there must be a bona fide attempt to agree. *There must be an offer made, honest and in good faith and a reasonable effort by the owner to accept it.*

In the Higgins cases the condemner pleaded, among other things, that it was unable to contact the condemnee. However, the court stated that there were ways of satisfying the requirement of attempting to agree before condemnation was available other than personal contact and verbal conversation of the parties.

To summarize the matter of negotiation, if you represent the condemner you had better advise your negotiators not only to

enter into negotiations with the condemnee but to make an offer with a reasonable time for acceptance, and for the record you should retain some evidence of the fact that negotiations are carried on and an offer is made.

Throughout the period for negotiations there is no duty or burden on the condemnee or the property owner to take any action. The condemnee is placed in a rather favorable position in that the condemner must approach him and must make an offer.

However if the negotiations have failed, the condemner or his representative, upon proper identification and after informing the condemnee of the contemplated action, is authorized to enter upon the land of the condemnee for purposes of examination and survey under Section 76-702 of the Act.

Now as to the practical aspects of conducting negotiations—these questionable bits of homespun advice are not guaranteed, so you take the same at your own risk.

If I represented the condemner I would attempt to get all of the information that I could get through negotiations. Get the property owner to give you his written appraisals, and of course if possible get him to sign a purchase agreement or option. But the idea is to arm yourself with all of the evidence you can get in the event that you are unable to purchase the property, because when you appear before the appraisers in county court you should be ready to present your facts and figures and offset his case if possible.

If you represent the property owner, the best thing for you to do during negotiations is nothing and a lot of it. The condemner has to approach you. He has to make an offer. You get another opportunity in county court before the appraisers if you don't like the offer.

Incidentally, the condemner almost has to present his case to the appraisers. He can't let the property owner run wild, and there are not many occasions where the appraisers aren't going to hike that offer somewhat to try to have the matter settled, so the property owner has the best deal during negotiations. I think he should keep his ears clean and his mouth shut.

So much for the negotiations. Now the procedure in county court. The condemner must proceed with a petition filed in the county court. We have always included the following elements in our petitions: 1) A statement of the authority to proceed. 2) A description of the property. 3) Names of interested parties. 4)

Attach a copy of an acquisition or necessity ordinance. 5) Allege that the condemnee failed to agree with the condemner and attach a copy of the resolution accepting the report of the negotiators and authorizing the law department to proceed.

The Uniform Act under Section 76-705 also provides the right of the condemnee to file a petition in the county court in the event that any condemner has taken or damaged property for public use without instituting condemnation proceedings. It is of interest to note that the language set forth in Section 76-705 is the same language found in our state constitution, Article I, Section 21, which provision has been given a very liberal interpretation by our Supreme Court in the case of *Quest vs. East Omaha Drainage District*, 155 Neb. 538, 52 N.W.2d 417 (March 21, 1952). The drainage district purchased a piece of property near the property owned by the plaintiff. The defendant drainage district excavated its property, leaving a cliff 40 feet in height. Among other things, cliff swallows nested in the cliff, and these swallows created noise and filth in the yard and on the person and property of the plaintiff. Plaintiff sued for damages and recovered, and this is what the court said on page 544 of the opinion:

The purchase of property by a public corporation, where it could have been acquired by the power of eminent domain, carries with it all the incidents of taking or damaging by eminent domain insofar as the question of damages by reason of the taking or damaging is concerned.

One of the incidents of taking property by eminent domain is that not only is the condemnor liable to compensate for the taking, but also is liable, by virtue of Article I, Section 21, of the constitution of Nebraska, for consequential damage to other property in excess of the damage sustained by the public at large. The words 'or damaged' in Article I, Section 21 of the Constitution of Nebraska, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property.

The point is that under the new Uniform Act the plaintiff could come in under Section 76-705 and file his petition in county court and have the damages determined by three appraisers.

The condemnee is not required to file any pleading in county court. The condemner files his petition. Now the question has arisen as to whether the condemnee can attach the petition by direct attack in county court. The cases seem to indicate the county court proceeding is merely an administrative one. Our Supreme Court discussed this question in the case of *Scheer vs.*

Kansas-Nebraska Natural Gas Company, 158 Neb. 668, 64 N.W.2d 333. And here is what the court said at page 675 of the opinion.

The securing of an appraisal of damages by appraisers appointed by the county judge is an administrative act as distinguished from a judicial proceeding. The method of appeal is procedural only and contemplates a complete new trial upon pleadings to be filed as in the case of an appeal from the county court. There can be no variance in the issues because no pleading, except the petition of the condemner, is contemplated in the administrative proceeding. The present appeal statute contemplates the filing of pleadings and the framing of issues for the first time in the judicial proceeding in the district court. The issue is not limited to the question of damages only unless the pleadings limit the trial to that issue.

In that case it was stipulated on appeal that no new pleadings need be filed and the case would be tried on appeal in the same issue as in the court below. The Supreme Court said that under those circumstances the issues on appeal would be limited to damages only.

This question was also discussed in the case of *Jensen vs. Omaha Public Power District* 159 Neb. 277, 69 N.W. 2d, 591.

In the Scheer case there was a question of proper description of the property in the petition. The court said the petition was sufficient as against a collateral attack—that is, the particular petition in that case. But in the Scheer case the court also talks about the decision in *Fremont vs. Mattheis*, 39 Neb. 98 57 N.W. 987, where the court said:

We think the petition filed with the county judge was sufficient as against a collateral attack. In *Fremont, E. & M.V.R.R.C. vs. Mattheis*, 39 Neb. 98, 57 N.W. 987, this point was discussed in the following language: Assuming the above description to be less specific than contemplated by law, objection on that ground comes too late when made for the first time after the damage has been assessed and the road constructed. It cannot be said there is not available to the land-owner in such cases an adequate remedy by direct proceeding. Without doubt the county judge is authorized to exercise the same control over the warrant or commission to the appraisers as over any other process issued by him. If the allegations of the petition are indefinite, an amendment may be allowed: and if there is no authority for the issuing of the writ, it may be quashed and set aside upon the motion of one adversely interested. . .

This would indicate that you can file pleadings in county court. However, I would go along with the language used in the Scheer and Jensen cases and say that you don't have a right to plead in county court.

Is the petition filed in county court by the condemner subject to collateral attack?

In the Scheer case the court said that in the absence of an appeal to the district court the condemner is bound by the description set forth in his petition, and if it be indefinite or inaccurate in description it is subject to collateral attack. However if the condemner appeals he is required to raise any or all issues in the district court, and if he does not he is bound by the rule of res judicata in a collateral attack.

After the condemner has filed his petition, Section 76-706 provides that the county judge shall within 3 days by order entered of record appoint 3 disinterested freeholders not interested in a like question to serve as appraisers. The county judge directs the sheriff to summon the appraisers to convene at his office to qualify and proceed with the appraisal. The county judge administers the oath to the appraisers as required by Section 76-708.

Notice of the time and place of hearing with respect to damages by the appraisers must be served on the condemnee at least 10 days prior to the hearing. Although the statute does not indicate who should sign this notice, we have had the appraisers sign the notice. Section 76-706)

The Uniform Act under Section 76-709 provides as follows:

It shall be the duty of the appraisers to carefully inspect and view the property taken or sought to be taken, and also any other property of the condemnee damaged thereby. The appraisers shall hear any party interested therein in reference to the amount of damages when they are so inspecting and viewing the property.

We have interpreted Sections 76-709 and 76-706 to mean that the condemnee is entitled to two hearings 1) on the situs of the property and 2) at a time and place determined by the appraiser. Therefore our form of notice has contained 1) the time of the inspection of the property by the appraisers and 2) the time and place of the hearing on damages by the appraisers.

The hearings by the appraisers are conducted in a very informal manner. The judge is not present and no record is made of the testimony and both the condemner and condemnee present their ideas of what the damages are to the board of appraisers.

Here is where I think the property owner should "shoot the works." He knows what the condemner's idea of value is. Now is the time for him to bring in his expert witness and present his case to the appraisers.

The property owner ought to meet these appraisers at the situs of the property also—it's another chance to him to develop his case.

If you represent the condemner you want to be prepared to offer what you have. We have had cases where the property owner came in with a new and higher appraisal. Of course it didn't help him much when we produced a copy of his lower value ideas obtained during negotiations.

After the appraisers have arrived at the amount of the awards they are required to file a report under Section 76-710 of the Uniform Act. The appraiser's report does not have to be approved by the county judge. However, the county judge does fix the amount of the appraiser's fee and the same are taxed as costs to the condemnee.

Under Section 76-711 the condemner does not acquire any interest in the property until he deposits the award with the county judge. If no appeal is taken by the condemner he will be deemed to have accepted the award unless he files an intention to abandon the procedure within 60 days of the filing of the appraisers report. If the procedure is abandoned it may not be instituted again for a period of two years.

Here's one for you to figure out. The last sentence under Section 76-711 of the Uniform Act provides as follows:

Upon deposit of the condemnation award with the county judge the condemner shall be entitled to a writ of assistance to place him in possession of the property condemned."

Section 76-714 of the Uniform Act provides as follows:

The interest in the property acquired by the condemner shall be such title, easement, right-of-way or use as is expressly specified in or necessarily contemplated by the law granting to the condemner the right to exercise the power of eminent domain. The condemner shall not dispossess the condemnee until the condemner is ready to devote the property to public use, and such title or interest as the condemner seeks to acquire shall not be complete until the property is put to the public use for which taken.

Let's take the case of a residence being condemned. Suppose the condemner pays the award into county court under Section 76-711. The condemner is entitled to a writ of assistance to place him in possession of the property condemned. Under Section 76-714 the condemner is not entitled to possession until he is ready to devote the property to public use. Can the property owner retain possession after he has accepted the award? Does he have to pay rent? Who pays the taxes?

Under Section 76-714, the property owner seems to get a "free ride" until the condemner is ready to devote to public use. Maybe this is unjust enrichment.

Upon deposit of the condemnation award the county judge shall prepare and certify under his seal of office a true copy thereof and shall transmit the same to the register of deeds of the county where the property is condemned.

With regard to the procedure in appealing to the district court after the report of the appraisers has been filed, the Act provides that either the condemnee or the condemner may appeal. The notice of appeal and the bond must be filed within 30 days after filing of the appraiser's report. This is actually the first occasion on which the condemnee files any type of filing in the county court.

The bond must be approved by the county judge. It requires one good and sufficient surety and it must contain the following conditions: 1) that the appellant will prosecute such appeal to effect without any unnecessary delays and 2) that if judgment be rendered against the appellant in the appeal, the appellant will satisfy any judgment rendered against him.

30 days after the filing of notice of appeal the county judge must prepare and transmit to the clerk of the district court a duly certified transcript of all proceedings upon payment of the fee for the same. The proceeding is docketed in district court showing the party first appealing as plaintiff and the other party as defendant, issues to be tried in the same manner as in the appeal from the county judge to district court.

The question has arisen as to who must file the petition in district court. In the case of *City of Seward vs. Gruntorad*, 158 Neb. 143, 62 N.W. 2d 537, the attorneys for the condemnee were under the mistaken impression that the condemner had to file a petition on appeal. The court in that case set forth the rule that the failure of the appellant to timely file a petition in the district court does not affect or defeat jurisdiction. However good cause must be shown for failing to file a petition in district court within 50 days from the date of filing your notice of appeal, and for the most part what is good cause is left to the discretion of the district court.

This question was discussed in the above mentioned case on page 149 of the opinion, which reads as follows:

"We construed this statute in *in re Estate of Lindekugel*, *supra*, we applied it in *in re Estate of Myers*, *supra*, and held: A

discretionary duty is imposed upon a district court to determine whether or not good cause has been shown for the failure of a party to plead within the time required, and after the court has heard the reasons of the party in default for his failure to timely plead, and in the exercise of a legal discretion has decided that no sufficient cause has been shown, this court will not ordinarily disturb the decision of the district court."

"The question then is: Was good cause shown?"

Even though the only issue you want to try on appeal is the question of damages, you still have to file your petition within 50 days after filing the notice of appeal. This question arose in the case of *Jensen vs. Omaha Public Power District*, 159 Neb. 277, 66 N.W. 2d 591, quoting from page 284 of the opinion.

Apparently the condemnee's counsel became aware of this court's opinion in the case of *City of Seward v. Gruntorad, Supra*, and sought to follow the procedure set forth therein applying to eminent domain. The condemnee's counsel takes the position that where damages constitute the only issue in a condemnation proceeding no petition need be filed in the district court. Cases are cited to sustain the condemnee's position in such respect. However, the cited cases are prior to our decision in *City of Seward v. Gruntorad, supra*, and the condemnee's position is in direct conflict with what this court said in *City of Seward v. Gruntorad, supra*, on procedure in eminent domain cases.

We had a case in Douglas County where the condemnee filed his notice of appeal but failed to file his petition in the district court within 50 days thereafter. The condemnee at an *ex parte* hearing obtained an extension of time in which to file his petition in the district court. However we moved to dismiss the case on grounds that there wasn't any good cause shown, and the court sustained our motion. The cause in that case was just about the same as the cause shown in the *City of Seward* case—that is, that counsel was confused as to the procedure to take.

You can stipulate to try the case on the same issues in district court, which means in effect that you are trying the issue of damages only on appeal. However in the absence of such a stipulation a petition must be filed.

Now if you represent the property owner you have several practical things to think about with reference to appeals. If you appeal you don't get your money, which is usually a big item. And of course you don't stop the condemner from proceeding after he has deposited his award.

Under the Uniform Act the condemner can appeal, and here

is where I think he should make his move if he thinks he is paying too much for the property. The same old story—a lot of people don't want to go through a jury trial. Sometimes they will take less money. When the condemner appeals he ties up the money. Section 76-719.

Either condemner or condemnee may appeal from the judgment of the district court to the supreme court in the manner provided by law for taking an appeal in a civil action. In case an appeal is taken either to the district court or the Supreme Court, any money deposited by the condemner shall remain in the hands of the county judge until a final judgment is rendered.

This is the condemner's "break in the ball game." If you get kicked around, exercise your right of appeal.

Summarizing, the steps in taking your appeal from county court to district court are as follows: 1) A notice of appeal must be filed within 30 days after date of the filing of the appraiser's report together with the proper bond. 2) The transcript must be ordered and the fee for the same tendered and 3) You must file your petition in the district court within 50 days from the date of the filing of the notice of appeal.

This completes a brief statement of procedure under the new Act. I have with me today one set of forms which we use, including the petition, an oath given the appraisers, the notice to the property owners and the appraiser's report which any of you may peruse after the meeting.

ASSOCIATION DINNER FOR MEMBERS

AND THEIR LADIES6:30 P.M.

PresidingJohn J. Wilson, Esq.
President of the Nebraska State Bar Association

INTRODUCTION OF DISTINGUISHED GUESTS

"1956—Peace, War and Politics"Bob Considine
New York, N. Y.
Noted Author; INS Correspondent; King
Features Columnist; Star of Radio-TV
"On the Line with Considine."

1956 PEACE, WAR AND POLITICS

By

Bob Considine

I think we are in for an extended period of peace. Our atomic

stockpile and our ability to deliver the atomic goods to any point of the earth within hours after an act of provocation has made war unthinkable. From what I've seen and heard in the master control room at SAC headquarters here at Offut, I can't conceive of Russia's lasting a full week in any all-out war with us. (China wouldn't last a day. It has no capability of waging a modern war.) The Soviet Union is rimmed by our air bases. Every major target in the U.S.S.R. and among the satellites has been identified, and reasonable facsimiles in this country may be under a mock bombing raid right now. One of the last times I was in Omaha I had Gen. LeMay on my Mutual of Omaha show and he remarked, in a casual way, that one of his planes was even then practice-bombing a section of this city. Not a soul in Omaha knew the plane was up there in the shrouds of night, too high to be seen, too high to be heard. Yet Omaha lay naked on the radar screen of that plane, and that portion of the city which was marked for destruction was theoretically destroyed. On the radar screen, that section resembled an important railroad junction far behind the Iron Curtain.

The men in the Kremlin may be cruel, conniving and contemptuous of a lot of the things we hold dear. But they're not fools, and you have only to see them eat and drink to recognize that they want to go on living and hold on to what power their predecessors amassed for them.

The great, final communist world revolution can wait, so far as these fellows are concerned. Sure, they'll keep their operatives fanned out through the world, looking for soft spots in the armor of the West, looking for political vacuums to fill. But the big pay-off doesn't have to be tomorrow. Karl Marx put no time limit on it. Neither did Lenin. Neither did the man who made these present rulers—Stalin. If there is to be a Pax Americana or Pax Atomica for twenty, thirty, even fifty years—so what? One day, they feel, the world revolution will succeed. One day, they feel, we'll go bust or be sucker enough to let down our guard, and then they can move. The present crop in the Kremlin may have died off, but the system will dredge up new leaders and bring them to the top.

At Geneva I asked Chip Bohlen, our ambassador to Moscow, to tell me something about the current Russian leaders. He said that he had given them a good study and was convinced that there is no one boss, as Stalin was boss. Bulganin, Khrushchev and Molotov sat at Stalin's feet like schoolboys, afraid to open their mouths. He chose no heir among them. He could send

12,000 Polish officers to their death in the Katyn Forest without batting an eyebrow, or starve and shoot millions of kulaks to death, or condemn millions—maybe as many as 15,000,000—to the slower death and degradation of slave labor camps.

These fellows who form the committee that succeeded Stalin look like tame people only by comparison to Stalin, one of history's most brutal despots. They are dangerous products of a system that lives on deceit. But they can be reached. They can be talked to, where Stalin could not be. With German tanks in the suburbs of Moscow early in the war and the Russian government fleeing to Kuibyshev, Stalin entertained the Polish premier at dinner in the Kremlin and said, in effect, "Now, *after* the war, we will annex much of the eastern section of Poland. . . ."

I don't know if "appeal to" is too strong a term, but I'll chance it: Bulganin and Khrushchev, who appear to be of about equal rank, can be appealed to—if the right man is entering the appeal. So can Marshal Zhukov. Molotov and Gromyko abide by the Book—Lenin's Book—which emphatically says it is not possible for a communist state to co-exist with a capitalistic state.

But Molotov and Gromyko are not running the show. Bulganin and Khrushchev and, to a lesser degree, Zhukov are the decision-makers. And they just don't seem to be the sadistic type. Bulganin looks a bit like a Russian Foxy Grandpa. Khrushchev likes to get drunk. At Geneva, Zhukov looked like a man trying to get Eisenhower's autograph, or an old chorus boy from the last road company of "The Student Prince."

They're not going to *smile* us into relaxing our vigilance, of course. We're not dumb enough to fall for anything as simple as that. What our side did at Geneva was to sound out these fellows like a doctor applying a stethoscope, or an attorney in a pre-trial interrogation. And they stood still for the examination.

Which brings me to the man who did the principal sounding, the man who tonight lies in his hospital bed on the eighth floor of Fitzsimmons Army Hospital.

Your political leanings are none of my business. I don't want to talk now about Eisenhower the politician at this point, anyway. I want to talk now about Eisenhower, the Man of Peace. His performance at Geneva was the most thrilling, inspiring, wonderful job I've seen turned in by a statesman in twenty-five years of reporting. He transcended party affiliations and all other considerations and performed as an American. They called it the "Meeting at the Summit." But only one man truly made it

all the way to the peak, and he was our President. It makes you proud to be an American.

Ike talked to those Russians not in the high-falutin' language of diplomacy. He looked them in the eye and talked to them man to man. And in basic English—Basic Kansas English.

This happened:

One day over a drink at the buffet which followed formal meetings, Eisenhower and Bulganin got into a discussion about the horrifying effects of the H-bomb.

Suddenly Ike looked at him and said, "You know, don't you, that the prevailing winds of the earth blow from west to east. . ."

Bulganin answered, after a bit, "You mean that we would get your radioactive dust?"

"Yes," Ike said, looking at him steadily.

Bulganin nodded and said, "Yes, but you'll also recall that the winds continue to blow from west to east and in time blow from our land to yours. You would get *our* dust, too."

"Right!" Ike agreed. "But these winds flow mainly over the upper portions of the world, where our two countries lie. We could destroy you; you could destroy us, perhaps. But if you did, don't you see that you'd be gone, but many free places like South America and Africa and Australia and New Zealand would still exist. . .and free?"

Bulganin was plainly moved by what he heard. He mumbled something in Russian, several times over.

It meant: We must do something. . .We must do something.

The Russians were thoroughly unprepared for Eisenhower's proposal that we exchange military blueprints and let observers fly over each other's country. They couldn't comprehend such open-handedness. Their furtive, scheming lives had not conditioned them to understand goodness of heart. Ike couldn't have stunned them more if he had rapped them on the noggin with a baseball bat.

That evening, more than before, the four of them rubbed shoulders as they left the Palais des Nations, as if for mutual support. They had nobody to call home to for advice. Ike knocked them completely off balance.

It is one of the curious contradictions of our time that Eisenhower would emerge as the temporal symbol of peace on earth. For years and years his business was mass destruction. At West

Point he studied Clausewitz, Napoleon, Grant, Lee, Lundendorf. At Leavenworth he graduated Number One in his advanced post-graduate studies on how to conquer and defend. In World War II he had under his command the greatest armed force in history, more than 5,000,000 men on land, sea and in the air. His forces laid waste to cities, armies and to some extent populations from North Africa to the Baltic.

And then, almost like Saul on the road to Damascus, he traded in his sword for an olive branch. But he retained something not always associated with a peace-maker. He retained that fighting jaw. He began to *fight* for peace.

In the course of those battles Eisenhower has achieved a miracle. He has made peace *exciting*. He has become to peace what Churchill was to war. The bugle he sounds calls men to peace, not to arms.

I flew to Korea with him, after he made that campaign promise to go there and try to bring that exhausting war to a close. It was a memorable experience. . . the bitter cold. . . the disgust of the men with the war. . . the suffocating smell of Korea . . . the slim little "token" forces that other United Nations sent to fight UN's first war. . . and tender moments such as when Ike took leave finally of his son John, then serving with a forward element. He told his boy that he could somehow bear it if John was killed in the service of his country but he wondered if he could carry on as president if John was captured. "For God's sake," he said, "don't let them capture you."

Each day, Eisenhower flew from Seoul to a different portion of the front in a tiny single-engined plane. In that terrain an engine failure would almost automatically mean death. A Mig, such as those which came over Seoul the night we left, apparently looking for his transport plane, a MiG could have shot down the little plane with a single burst of fire. A Chinese anti-aircraft gunner could have done the same with hardly much more trouble.

But Eisenhower was spared for the great jobs that lay ahead. He has the gift of *daring* a hesitant world to take a more trustful attitude. That speech before the UN after the Bermuda conference, for instance. That's where he proposed that the nations of the world *pool* their peaceful atomic knowledge, that all join in, contributing what they could, for the benefit of all.

Russia said "Ridiculous!" at the time, and even some of our friends were wary.

But at Geneva this summer, thirty-some nations, including

Russia, met in the atoms-for-peace conference, met in the most cordial and cooperative manner. Russia showed her 100-kilo-watt atomic power plant and spread out her plans for a 100,000 kilowatt job. An Indian outlined the breath-taking potentialities of hydrogen power, power from the H-bomb. A man from Westinghouse sold the Fiat Co. of Italy an atomic reactor. The nations of the world gathered around an operating reactor built by us and owned by the Swiss, and around the walls of the building were exhibits whose captions were written in English, French, Spanish and Russian.

Ike's imaginative dream of December 8, 1953, the date of his speech before UN, had come true in eighteen months.

But where will *he* be, eighteen months after Geneva? That would bring him up to election time in '56.

I don't think he'll run. I have no inside information, and the signs may be deceptive. But right now I'd say he'll slowly, surely regain his health to a point where he can assume much (but not all) of his past responsibility and activity, concentrate on convincing Russia and the rest of the world that the people of the U.S. feel exactly as *he* does about peace—and when he's decided that he has made his point, he'll say, "That's it boys. Come up to Gettysburg and see me sometime."

When he says that, I wouldn't advise any of you to stand in the doorway of either the Republican national convention or the Democratic national convention. You might be trampled to death by would-be candidates, favorite sons and the like.

It's going to be a scramble when Ike bows out, as I think he will. (In further support of the brief that Ike won't run, the Vice President told me in an interview a week before Ike's heart attack that the President considered his health one of three major factors involved in whether he'd seek re-election. The other two concerned the international situation and the continued domestic prosperity. As for health, the President then was pictured as being a man who knew he had to come to peak physical and mental fitness time after time after time. The President estimated that he averaged one fateful decision per hour, each of which made tremendous demands on him. He'd have to see whether he felt he could keep that up for four more years. He'd have to see. In the meantime, you'll recall, he said on several occasions that there were plenty of good Republicans in the woods and that there was no such animal as the "indispensable man.")

To repeat, don't stand in any open doorways.

The woods may indeed be filled with good Republican candidates, but it seems to me the GOP needs more than a good candidate. It needs a good dramatic Republican. It's the minority party in this country and has been for longer than we might suppose. Gallup Poll indicates that if all Americans of voting age were required to register today there would be 54.3 Dem.: 34.3 GOP. It had to go outside of its party ranks to come up with the last two presidents it elected—Herbert Hoover and Eisenhower. Neither had ever run for public office before. Both earned their fame in non-political fields. Both had toyed with the notion of running as Democrats. It seems a bit hard to believe now, but Hoover was asked to head the Democratic ticket and run against Coolidge. He declined (just as Ike declined to run with Truman's support in 1948).

No vice president in our history was ever given a truer power of attorney than Dick Nixon. The young Californian has been an assistant president from the start. He has conducted the weekly meetings of the cabinet, the National Security Council and the legislative leaders, in addition to presiding over the Senate. He has visited 35 countries as Ike's personal representative and has the President's complete confidence.

But Eisenhower admires him more wholeheartedly than do some of the factions and splinter groups within the GOP hierarchy. It is plain by now that Governor Knight, rather than the second highest office-holder in the land, will control the powerful California delegation to the convention in San Francisco next August. Governor Knight would like the nomination himself, as perhaps would Senator Knowland.

Which brings us to a fourth Californian, who now says he wants no part of it—Chief Justice Earl Warren. He's Ike's age and plainly would prefer to stay on the high bench. But there is precedent for leaving it—Charles Evans Hughes did—and there's no doubt that if Eisenhower feels he can't carry on, tremendous (and very possibly successful) pressure will be put on Warren to pick up the torch. With Eisenhower's endorsement I think he'd be tough to beat.

Now the Democrats. Stevenson, it seems to me, faces two problems: 1) He has been a man without a platform for nearly three years of prosperity and wide employment and 2) he's got that 1952 loss going against him. On the other side of the ledger, some Democratic leaders will figure that the voters considered

him the second best man in the country three years ago, and now if the best man isn't playing ball any more, they'll take the next best. They gave him a tremendous number of votes the last time.

Averell Harriman has the most important platform in the country as governor of New York. He says he's for Stevenson. But Carmine Di Sapio, the Tammany leader who handles Harriman's political business, say *he's* for Harriman—not Stevenson. Harriman is 64.

I saw Estes Kefauver's picture in the *World-Herald* today, wearing an Indian turban and a garland of flowers. He should carry the Calcutta vote hands down, but he can't get the leaders of the Democratic party to go for him. As for the most respected Democrat on Capitol Hill, Dick Russell of Georgia, he'll be passed up, I suspect, because the Democrats must depend to some extent on the Negro vote in the North.

There will be a sprinkling of other names—John Foster Dulles, Harold Stassen, Christian Herter, even Tom Dewey—for the Republicans, Soapy Williams and Gov. Lausche for the Democrats. It'll be a scramble all right. Had a card yesterday from Bernarr McFadden. He's thrown his parachute in the ring. And Tommy Manville.

And everybody expected that it would be one of the quietest of them all, with Ike running and winning without trouble.

The people will know what to do. They'll know because they are the best-informed people in the world today—with free courts, newspapers, radio and TV.

This, incidentally is National Newspaper Week. The slogan this time is "The People's Right to Know." There is certainly nothing to complain about the coverage of the Eisenhower illness. Probably never before in history has the exact condition of a chief of state been so completely communicated to the people. This is infinitely better than leaving us in the dark—where the American people were left in the matter of the condition of President Cleveland, Wilson and F.D.R.

Cleveland was operated on for cancer of the upper right jaw on July 1, 1893. But the only people who knew about it were a handful of doctors, a few personal friends and perhaps the crew of the private yacht "Oneida," on which the operation was performed. The story was broken several months later by a Philadelphia newspaper but vigorously denied by a White House

spokesman. The public considered it a hoax. The full account was not published and believed until 1931, years after Cleveland's death.

Woodrow Wilson, by an astonishing coincidence, was taken ill in Denver within a few hours of the very hour Eisenhower was stricken thirty-six years later. He insisted on going on by train to Wichita where he suffered what several of his biographers agree was the first of two strokes. The public never knew. Just who ran the country until the end of his term is still a matter of debate—though some say it was Admiral Grayson and Mrs. Wilson.

Roosevelt's physical condition was extremely bad before he went to Yalta and worse when he returned. But the public wasn't told.

Churchill suffered a slight stroke in 1949, while out of office. It briefly affected his speech, but he recovered sufficiently to campaign in 1950 and return to office. On June 24 at 10 Downing Street, at the end of a statedinner, Churchill suffered a second stroke which deprived him of his speech for twelve hours. His meeting with Ike at Bermuda was postponed indefinitely. Yet to the amazement of his doctors he recovered and carried on until this April, at which time he first told the world that nearly two years before he had had what he called "a very serious illness which paralyzed me completely physically."

SECTION PROCEEDINGS

FRIDAY, OCTOBER 7, 1955

SECTION ON REAL ESTATE, PROBATE AND TRUST LAW

David R. Warner, Esq.
Chairman

"Some Real Property Aspects of Avigation"
Hon. Perry W. Morton, Esq.
Assistant Attorney General of the United States

Report of Title Standardization Committee
Walter R. Raecke, Esq.
Chairman
Central City

Report of Executive Committee by the Chairman

"The Proposed Model Probate Code"Barton H. Kuhns, Esq.
President National Conference of Commissioners
on Uniform State Laws

"Real Property, Probate and Trust Legislation
of 1955"Herman Ginsburg, Esq.
Lincoln

"SOME REAL PROPERTY ASPECTS OF AVIGATION"

By

Perry W. Morton
Assistant Attorney General of the United States

It is always good to meet with fellow lawyers, but I am especially grateful for the invitation which has brought me back home to Nebraska today to be with old friends of the Nebraska Bar and particularly to participate again in a program sponsored by the Real Estate, Probate and Trust Law Section, in the work of which I have been vitally interested ever since its organization in 1936.

Before reaching the announced subject, you may be interested in a few more general words about the operations of the Lands Division in the Department of Justice. Before going to Washington, I would never have supposed that the work of the Lands Division could possibly offer such a variety of experience and involve such a diversification of problems. For example, it was beyond my most fantastic imagination that I should be engaged in

the defense of the Government against the assertions of the claims of tribal Indians involving potential liabilities in the estimated aggregate of as much as ten billion dollars. Little did I anticipate that I would be trying to help figure out the responsibility of the United States to pay, if at all, for the northerly half of an international bridge across the Rio Grande now collapsed under the waters of the reservoir behind Falcon Dam.¹ I could not conceive that I would be working upon a case involving an old dispute between secretaries of two of the executive departments of the same Federal Government at the suit of a county in Oregon, involving the administration of 1/2 million acres of valuable timber land.² I could not have guessed that a real-estate lawyer would have much to do with the question whether the Government is liable for the killing of Indian ponies and allegedly driving certain individual Indians from some desert grazing lands in a well-nigh undiscovered portion of the State of Utah.³ Little did I know that I would be involved in a vast program of slum clearance in the District of Columbia and in testing the constitutionality of the Act under which it is being done.⁴

But these are just a few samples of the problems within the scope of the work and responsibility of the Lands Division.

I consider it a privilege almost without parallel to be in charge of the title work and real estate litigation of the biggest landowner, the biggest land buyer, the biggest landlord, the biggest land seller, and at the same time the biggest land tenant in America. A recent survey by the General Services Administration shows that the Federal Government now owns 21% of all the land in the United States.⁵

The staff of the Lands Division is divided among eight sections, each with a particular field of responsibility. I would not impose on your time to describe the function or work load of each of these sections. One may suffice for illustration. In the Land Acquisition Section alone we have cases now pending for the condemnation of more than 30,000 separate tracts of land. Under the Declaration of Taking Act, permitting the advance deposit of estimated just compensation, we have on deposit in the Court

¹ United States vs. 85237 Acres in Zapata County, Civil 529, Laredo Division, Southern District of Texas. Pending.

² Clackamas County, Ore. vs. McKay, 219 F.2d 479, vacated as moot, 349 U.S. 909.

³ Bill Hatahley vs. United States, 220 F.2d 666.

⁴ Berman vs. Parker, 348 U.S. 26.

⁵ *Inventory Report on Federal Real Property*, Senate Document No. 32, 84th Cong., 1st Session, p. 9.

Registries a fairly constant balance of somewhere around \$40,000,000, with the monthly new deposits and withdrawals averaging roughly \$3,000,000. Aside from condemnations, this section also handles the title work on so-called "direct purchase" matters where the acquiring agencies have successfully negotiated voluntary purchases, and there is an average volume of around 4,000 of such transactions pending in the office most of the time. In the 26 months I have been in office more than 23,000 title opinions of the attorney general have been prepared in this one section, and in many cases a single opinion will cover several tracts.

Out of all the mass of interesting questions which are constantly confronting the Lands Division it has been rather difficult to decide on one for this discussion. The subject which has been announced has at least the virtue of being ultra-modern. It has to do with some of the consequences of the collision between the flight of modern aircraft and some very durable old common law concepts about the ownership of air-space. The rapid advances in aviation, particularly the recent developments of jet planes for the military services, have brought into sharp focus many questions regarding the nature and extent of the rights of landowners whose property is in the immediate vicinity of an airfield. There is such a widespread misunderstanding of some aspects of the problems created that a discussion of them here may be both timely and helpful.

Sir Edward Coke, who died in 1634, in his *Institutes of the Law of England*, expressed the ancient common-law rule in a way which at least had the advantage of simplicity:⁶

And lastly, the earth hath in law a great extent upwards, not only of water, as hath been said, but of ayre and all things even up to heaven; for *cujus est solum, ejus est usque ad coelum*, as is holden in 14 H. 8. fo. 12. 22 Hen. 6. 59. 10 E. 4. 14.

Blackstone⁷ and Kent,⁸ in their *Commentaries*, restate the rule given by Coke. Blackstone can be forgiven since he died in the year 1780 and the balloon was not invented until 1783. But Kent, who lived until 1847, does not have this excuse. As early as 1815, Lord Ellenborough considered a case in trespass for cutting a tree, the branches of which overspread the defendant's land. He is reported to have said:⁹

⁶ First American Ed., 1853, Ch. 1, § 1 (4a). The three cases relied on by Coke in support of the maxim all had to do with the ownership of young birds in their nests in trees.

⁷ Lewis ed., 1902, p. 18.

⁸ Gould ed., 1896, p. 621.

⁹ Pickering vs. Rudd, June 20, 1815, 1 Stark. 56, 58.

I recollect a case where I held that firing a gun loaded with shot into a field was a breaking of the close. Would trespass lie for passing through the air in a balloon over the land of another?

Lord Ellenborough did not answer his own question, probably because of the fine English sensibility about not disposing of questions which are unnecessary to a decision.

The prophetic question of Lord Ellenborough was one of the earliest expressions of doubt about the inflexibility of the common-law maxim that the ownership of land extends from the center of the earth to the periphery of the universe. But even so, the courts have struggled with the philosophy of airspace problems from very early times, while trying generally, nonetheless, to keep their decisions within the framework of the common-law maxim. The reported cases dealing with so-called ownership of airspace are so numerous that their collection here would be impractical. These include actions of various kinds relating to the overhanging of natural growths,¹⁰ such as the branches of trees; the protrusion of man-made structures such as cornices,¹¹ eaves,¹² crossarms,¹³ elevated railways,¹⁴ power and telephone lines;¹⁵ and the firing of projectiles across land without touching the surface.¹⁶ The variety of the cases is almost unlimited. One curious case in 1874 arose because the defendant's horse had kicked and bitten the plaintiff's mare which was standing on the other side of the boundary fence. No part of the horse touched plaintiff's ground. This was held to be actionable trespass because the horse's nose and leg protruded in the airspace over plaintiff's land.¹⁷

I cannot resist the temptation to include passing reference to another unusual airspace case. The trespass consisted of the defendant reaching her arm across the boundary fence during a bitter quarrel between neighboring landowners. The Iowa court amusingly observed that ownership extends not only downward, but upward to the heavens, "although it is, perhaps, doubtful

¹⁰ E.g., *Lemmon vs. Webb*, 1894, 3 Ch.D. 1; same, 1895, A.C. 1.

¹¹ E.g., *Fay vs. Prentice*, 1 C.B. 828 (1845); *Harrington vs. McCarthy*, 169 Mass. 492, 48 N.E. 278.

¹² E.g., *Smith vs. Smith*, 110 Mass. 302.

¹³ E.g., discussion in *Harris vs. Central Power Co.*, 109 Neb. 500, 191 N.W. 711.

¹⁴ E.g., *Metropolitan West Side Elevated Ry. Co. vs. Springer*, 171 Ill. 170, 49 N.E. 416.

¹⁵ E.g., *Butler vs. Frontier Telephone Co.*, 186 N.Y. 486, 79 N.E. 716.

¹⁶ *Infra*, notes 33 and 34.

¹⁷ *Ellis vs. Loftus Iron Co.*, L.R. 1874, 10 C.P. 19.

whether owners as quarrelsome as the parties in this case will ever enjoy the usufruct of their property in the latter direction."¹⁸

Until the arrival on the judicial scene of some of the special problems created by aviation, there could be detected in the reported cases some disagreement in basic theory. Some courts inclined to the view that the airspace is not capable of ownership and that invasions of it are only actionable when they are breaches of duties otherwise owed to the subjacent landowner. Generally speaking, the argument has been much hotter among theoretical commentators than it has ever been deducible from reported decisions. By far the greater number of cases adhered to the common-law concept that the superjacent airspace belongs to the owner of the surface. When confusing language is sometimes found in the courts' opinions, it is often quite obviously due to the opinion writers' attempt to justify a particular result on the merits either by means of or in spite of some very rigid distinctions made at the common law between particular forms of action, as, for example, the differences between ejectment, trespass *quare clausum fregit*, and trespass on the case—differences which have in various degrees disappeared with the progress of modern concepts of pleading and remedy. If the maxim is limited to the extent to which it has been applied in adjudicated cases, practically all of which have dealt with trees or buildings or other man-made structures having ground support somewhere, there should be nothing amazing about refusing to apply it to aviation, or modifying it to suit the practical requirements of the new problem.

In this perspective, the 1946 decision of the United States Supreme Court in *United States vs. Causby*¹⁹ is fairly understandable. In that case the majority opinion, after referring to the common-law doctrine, sweeps it away by saying:

But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.

In an effort to confine this discussion as much as possible to aspects of real estate law, any extended reference to regulatory powers and functions of federal, state or local authorities will be

¹⁸ Hannibalson vs. Sessions, 116 Ia. 457, 90 N.W. 93.

¹⁹ 328 U.S. 256.

purposely avoided. It is, however, helpful to note at this point that Congress, by the Air Commerce Act of 1926²⁰ and the Civil Aeronautics Act of 1938,²¹ exercising its power under the commerce clause, has recognized "a public right of freedom of interstate and foreign air navigation"²² through the navigable airspace of the United States, and has defined navigable airspace as meaning "airspace above the minimum safe altitude of flight prescribed by the Civil Aeronautics Authority."²³ The regulations adopted²⁴ pursuant to these Acts prescribe the minimum safe altitudes of flight as 1,000 feet over congested areas and 500 feet elsewhere, except for take-offs and landings which are required to conform to a given flight pattern and "path of glide." Military aircraft are subject to the rules of the Civil Aeronautics Board in the absence of military regulations to the contrary.²⁵ Exercising their police powers, several of the states have enacted laws dealing with sovereignty in the airspace, lawfulness of flight within certain limits, and ownership of airspace by the subjacent landowners subject to the right of flight.

However, the effect upon the "ownership" aspects of aviation of a federal or state "commerce power," comparable to that exercised by Congress over rivers and harbors, has never been decided with regard to the landing and take-off areas near airports,²⁶ and hence is a completely virgin territory which I shall not explore today.

While seeming to repudiate what it calls the "ancient doctrine" as to the ownership of airspace, the *Causby* case goes on to hold the Government liable for frequent, low-level flights by military planes over private land. It may be said more accurately, therefore, that what the *Causby* case really does is to trim the doctrine down to the size required by modern life in the air age.

The *Causby* case was brought in the Court of Claims to recover for the alleged taking of an interest in Causby's home and

²⁰ 44 Stat. 568, 49 U.S.C. 171, *et seq.*

²¹ 52 Stat. 977, 49 U.S.C. 401, *et seq.*

²² 49 U.S.C. 180.

²³ 49 U.S.C. 180, 401 (24).

²⁴ 14 Code of Federal Reg., Sec. 60.17 (1952). To the effect that these regulations supersede local ordinances, see *Allegheny Airlines vs. Village of Cedarhurst*, 132 F.Supp. 871 (E.D. N.Y. 1955).

²⁵ *Cameron vs. Civil Aeronautics Board*, 140 F.2d 482.

²⁶ In the *Causby* case, *supra*, the court found it unnecessary to decide "the question of the validity of the regulation" since the "path of glide" for landing and taking off was not within the regulation's definition of "navigable air space."

chicken farm located about 2,200 feet from the end of the main runway of an airport leased by the Government. Frequent and regular flights of Army planes, in taking off and landing, passed over Causby's land at about 83 feet, which was only 18 feet above the highest trees. It was claimed that there was great noise, vibration and glare of light which deprived respondents of sleep, made them nervous and frightened, and killed so many of their chickens that they were driven out of business. The Supreme Court agreed with the Court of Claims²⁷ in this respect that the actions of the Government in the particular case constituted a taking of an easement of flight over the Causbys' land for which they were entitled to receive just compensation as provided by the fifth amendment.

Neither the *Causby* case nor any other provides any precise yardstick for judging whether in any other given state of facts there is or is not a taking of an easement for which compensation must be paid. The result must invariably depend upon the facts of each case. Yet there can be summarized from the decisions several general rules against which any particular facts must be measured.²⁸

It is firmly established that a landowner has no such exclusive proprietary right to the superjacent airspace as would permit any recovery for occasional flights of aircraft over his land on a theory of trespass or taking. In that respect the "*ad coelum*" part of the common-law maxim is as dead as Lord Coke. The airplane is part of the modern environment of life, and the fact that it may sometimes cause certain inconveniences or annoyances must be accepted. On the other hand, frequent low-level flights of Government aircraft over private land, resulting in direct interference with the use and enjoyment of the land substantially diminishing its value, may constitute the imposition of an easement upon the land requiring payment of just compensation. Thus the landowner clearly has some rather definite rights in the airspace immediately above his land. And those rights are real property rights. The word "taking" and the word "ease-

²⁷ Opinion of Court of Claims: 60 F. Supp. 751.

²⁸ A few illustrative cases are: *Causby, supra*; *Hinman vs. Pacific Air Transport*, 84 F.2d 755, cert. den. 300 U.S. 654; *Smith vs. New England Aircraft Co., Inc.*, 270 Mass. 511, 170 N.E. 385; *Northwest Airlines vs. Minnesota*, 322 U.S. 292 (3rd paragraph of concurring opinion by Jackson); *Hyde vs. Sommerset Air Service*, 61 A.2d 645; *Antonik vs. Chamberlain*, 78 N.E.2d 752; *Swetland vs. Curtiss Airports Corp.*, 55 F.2d 201; *Vanderslice vs. Shawn*, 27 A.2d 87; *Thrasher vs. Atlanta*, 178 Ga. 514, 173 S.E. 817, 99 A.L.R. 158, and note, 173.

ment" are very much at home in the field of real-estate law, as distinguished from tort law. It may be noted parenthetically that the *Causby* case was decided May 27, 1946, whereas the Federal Tort Claims Act was not passed until August 2, 1946. In the Government's brief in the *Causby* case there was a short argument that the claim, if actionable at all against a private operator, was beyond the jurisdiction of the Court of Claims because it sounded in tort as for nuisance. There has been some speculation whether the *Causby* decision, applying the taking-of-an-easement theory, may have been influenced by the then-existing sovereign immunity from tort claims. But that is a little like arguing which came first, the chicken or the egg. The fact is that the *Causby* opinion is in the record, and that is that.

While the surface owner has some rights in the superincumbent airspace, these rights are definitely limited. He has exclusive control of the immediate reaches of the atmosphere only to the extent necessary for his full enjoyment of his property and his exploitation and development of it according to its present or immediately foreseeable highest and best use. His protection extends at least as far as the airspace is, or economically can be, physically occupied or used in the conventional sense. But that is just a part of it. It also means that the intrusions in the airspace must not, without compensation, be so low and so frequent as to cause substantial impairment in the use of the surface. It is the character of the invasion as related to the character of the property—not the amount of damage, so long as substantial—which determines whether there is a taking.²⁹ Any diminution in the value of property not directly invaded or peculiarly affected, but sharing in the common burden of incidental damages arising from lawful governmental activities, is not a taking of property.³⁰ Only damages not experienced by the public at large may be the basis for recovery of compensation.³¹ In other words, the liability of the Government for payment of just compensation arises only when the damages differ *in kind* and not merely *in degree* from those suffered by the public at large.³²

Another factor in considering whether there has been a taking and if so the extent of it, is the probability of the intention of the Government to continue the particular operation. This

²⁹ United States vs. Cress, 243 U.S. 316, 328.

³⁰ Richards vs. Washington Terminal Co., 233 U. S. 546, 554.

³¹ Baltimore and Potomac R. R. Co. vs. Fifth Baptist Church, 108 U.S. 317, 332.

³² Thompson vs. Kimball, 165 F.2d 677, 681; United States vs. 357.25 Acres of Land, etc., 55 F.Supp. 461 (W.D. La.).

element is well illustrated by the history of two airspace cases which did not involve airplanes but did involve the firing of a coastal artillery battery. In the first case, decided in 1913, the Supreme Court held that the mere erection of a coastal battery with a field of fire extending over the plaintiff's land and the subsequent discharge of only three shells did not evidence an intention on the part of the Government to impose a servitude on the land.³³ Yet nine years later when the same parties plaintiff again brought suit alleging repetitions of acts of this nature by the Government, the court said, "While a single act may not be enough, a continuance of them in sufficient number and over a sufficient time may prove it. Every successive trespass adds to the force of the evidence."³⁴ Thus we see that there is no single factor which may be the basis of judgment, and great importance is attached to the cumulative result of several factors.

It should be noted that the fifth amendment to the Federal Constitution, as distinguished from its counterpart in many state constitutions, including Nebraska's,³⁵ provides just compensation only for *takings* of, not *damages* to, private property. The borderline between takings and damages may sometimes be a little fuzzy, but it is nonetheless very important. If the impairment of property caused by an authorized federal activity is sufficiently substantial, it may be a taking of an interest in that property, even though the interest taken is in the nature of an easement or use, either permanent or temporary, requiring the payment of just compensation for that particular interest less than the fee. But the Federal Government, under the fifth amendment, is not required to pay for consequential damages.³⁶

Although it is implicit in what I have already said, it may be well to observe specifically that there are at least three principal ways in which the United States may acquire real property or some interest in it. First, of course, the Government may purchase the property or interest in an ordinary free negotiation. Secondly, it may acquire by condemnation proceedings which it institutes in exercise of its power of eminent domain. The third

³³ Peabody vs. United States, 231 U.S. 530.

³⁴ Portsmouth Harbor Land and Hotel Co. vs. United States, 260 U.S. 327.

After remand, the claimants were unable to prove a case, the petition was dismissed, 64 C.Cls. 572, and certiorari was denied, 277 U.S. 603.

³⁵ Article I, Sec. 21: "The property of no person shall be taken or damaged for public use without just compensation therefor."

³⁶ United States vs. Petty Motors Co., 327 U.S. 372, 377-8; Mitchell vs. United States, 267 U.S. 341, 344; United States ex rel. T.V.A. vs. Powelson, 319 U.S. 266, 281.

method of acquisition, which is not familiar to the laws of some states, is called inverse condemnation. This is likewise an exercise of the power of eminent domain, but it is done without affirmative legal proceedings. It is outside the scope of this paper to examine the ramifications of that form of acquisition in detail. It happens to be exactly the kind of acquisition which was involved in the *Causby* case. Inverse condemnation occurs when the Government intentionally and physically appropriates private property to its own use for an authorized federal purpose. This appropriation is a taking in the constitutional sense just as much as the taking which results from a condemnation proceeding. The time of the taking by inverse condemnation, generally, is the time of the first substantial invasion of the private property.³⁷ The remedy of the landowner is by an action for compensation under the Tucker Act.³⁸ In a negotiated transaction the interest which the Government acquires is, of course, the precise interest described in the contract of the parties. In a condemnation proceeding the just compensation must be limited to the exact estate condemned, for the Government acquires and must pay only for what is expressly taken.³⁹ The same concept is also present in the cases of inverse condemnation.⁴⁰ This is illustrated by the fact that in the *Causby* case the Supreme Court considered the findings of fact of the Court of Claims insufficient as to the accurate description of the easement taken by the Government and remanded the case to the Court of Claims to make such necessary findings.

Another essential point to remember is that a suit against the Government under the Tucker Act may be commenced only within six years after the cause of action accrues.⁴¹ If someone has purchased land after the easement has already been imposed by the process of inverse condemnation, the title which the purchaser acquires is, of course, just as much subject to the easement⁴² as it would be subject to any prescriptive easement, the extent of which could be ascertained by reasonable examination

³⁷ *United States vs. Dickinson*, 331 U.S. 745, 748.

³⁸ 28 U.S.C.A. Sec. 1346(a)(2), as to United States District Courts; and Sec. 1491, as to Court of Claims.

³⁹ *Karlson vs. United States*, 82 F.2d 330, 335-6 (C.A. 8, 1936) (affirmed on other points, *Olsen vs. United States*, 292 U.S. 246); *United States vs. 2,648.31 Ac. of Land, etc.*, 218 F.2d 518 (C.A. 4, 1955).

⁴⁰ *United States vs. Cress*, 243 U.S. 316, 328-9.

⁴¹ 28 U.S.C.A. Sec. 2501. Cause of action accrues when "situation becomes stabilized," *United States vs. Dickinson*, 331 U.S. 745, 749.

⁴² Cf. *Smithdeal vs. American Air Lines*, 80 F.Supp. 233 (N.D. Tex., 1948).

of the premises at the time of the purchase even though there may be no evidence of it in the abstract or the record.

Finally, we should give some consideration to the basis for and elements of evaluation of the easement, which is now commonly known as an avigation easement. The general rule is exactly the same as applies to the valuation of any kind of easement. The measure of just compensation is the amount by which the fair market value of the property is diminished as a direct result of the imposition of the easement.⁴³ It is simply an application of the familiar "before and after" principle. An extreme case could be imagined in which the value of land might be totally destroyed, and in such case the value of the easement would be the same as the fee.⁴⁴ At the other extreme it is easily possible that the value of the easement may be little more than nominal. In cases of inverse condemnation the same facts which would result in a conclusion that there was only nominal value to a so-called easement would probably require the conclusion that there had, in fact, been no taking at all. While it is important to keep separate the legal principles of *taking* on the one hand and the rules for *valuation* on the other hand, it is nevertheless true that both determinations will be governed by the cumulative result of most of the same factors.

There are well documented studies⁴⁵ showing that generally the establishment of an airport enhances rather than decreases the land value in its vicinity, even in the approach zones. The pattern for the development of areas in the vicinity of numerous airports has been historically similar. Airport sites are generally selected in relatively undeveloped areas where land is rather cheap, at least until people know that Uncle Sam wants it, and there are few obstructions to the natural approaches to the runways. Access roads and other public utilities are made available primarily for the airport. The airport and its activities attract people—the general public and the workers who require homes close to their jobs. Land developers see an opportunity to develop at a profit the surrounding land where utilities are already available. All of this generally results in an enhancement of land values in the airport vicinity. The historical pattern indicates

⁴³ United States vs. Causby, *supra*; United States vs. 2648.31 Acres etc., *supra*; United States vs. 26.07 Ac. of Land, etc., 126 F.Supp. 374 (E.D. N.Y., 1954).

⁴⁴ The Causby opinion proceeds from exactly this premise.

⁴⁵ Walther, "The Impact of Municipal Airports on the Market Value of Real Estate in the Adjacent Areas," XXII *The Appraisal Journal*, 15 to 25 (January 1954).

that people adjust very readily to the seeming nuisances of airplane operations. Mere proximity of property to an airport, without more, does not justify a conclusion that there has been a taking, since damage due solely to proximity is common to the public at large and any difference in the amount of damage is one of degree only.⁴⁶ In valuing the easement, if it is determined that one has been taken, there must be excluded from consideration all matters which are conjectural, speculative, remote, fanciful or imaginary.

The highest and best use to which the land and superjacent airspace may be adapted may be considered, but only when the prospective use is reasonably probable, as distinguished from being merely possible.⁴⁷ This will depend primarily upon the character and location of the land, the existing development of the neighborhood, the market for comparable land, the existence of zoning regulations or building restrictions limiting the use of the land or the height of structures on it. From data readily available to appraisers, the elevation of the path of glide over each property should be definitely ascertained. The glide-angle plane does not represent the actual line of flight but is the minimum elevation of the approach zones including the allowance of a safety factor. Generally, in military operations this minimum glide-angle plane commences at ground zero at least 1000 feet from the end of the runway and rises one foot vertically to every fifty feet horizontally.

The easements, no matter how acquired or imposed, include the right to clear physical obstacles and to prohibit the erection of structures which would extend above the glide-angle plane at any given point. When it is necessary to remove or reduce the height of an obstruction as, for example, a smokestack, the necessary cost of the alteration may be the measure of compensation to the extent that the alteration will diminish the amount of damages.⁴⁸

Some journal writers have asserted,⁴⁹ incorrectly, I think,

⁴⁶ Richards vs. Washington Terminal Co., 233 U.S. 546, 554; Thompson vs. Kimball, 165 F.2d 677, 681; United States vs. 357.25 Ac. etc., 55 F.Supp. 461 (W.D. La.).

⁴⁷ Olson vs. United States, 292 U.S. 246, 255-6 (1934).

⁴⁸ Cf. Porrata vs. United States, 158 F.2d 788 (C.A. 1, 1947), that willing buyer would consider availability of substitute loading station. And see, Gohman vs. City of St. Bernard, 146 N.E. 291, 299 (Ohio, 1924); Hartshorn vs. County of Worcester, 113 Mass. 111, 114; Baltimore Steam Packet Co. vs. United States, 81 F.Supp. 707, 710.

⁴⁹ E.g., Howard, "Valuation of an Aviation Easement," XXII *The Appraisal Journal*, 336 (July 1954).

that avigation easements have nothing to do with noise, vibration or glare of light. How such an assertion could be reconciled with the precise facts of the *Causby* case, I am at a loss to understand. I think it is unquestionably clear that these factors do, in appropriate cases, enter into the valuation problem in precisely the same way that they are factors in determining whether there has been a taking, no more and no less. It is essential to repeat, however, that in the modern age a landowner has no vested right to freedom from annoyance, inconvenience, or even discomfort. For such factors to be considered in valuation, their effect must be such as would be harmful or dangerous to the health and comfort of reasonable people of ordinary sensibilities who can usually adjust themselves to the conditions of the locality.⁵⁰

Such intangible factors as fear of danger or interference with television are, I think, beyond the limits of reasonable consideration. Statistically, aerial navigation is demonstrably safe, and danger to persons on the ground is so remote that an assertion of fear is fanciful.⁵¹ Even bicycles kill more innocent bystanders than do airplanes.

These, then, are a few of the real property aspects of avigation. The entire subject is new enough that its rapid development is certain to command the increasing attention of both the bar and the bench as the line between the rights of landowners and the rights of airspace navigation becomes more clearly defined. None of such cases may be on your desk today; but do not be too sure that you may not have to grapple with one of them tomorrow. Many of the general principles which we have examined today are already sufficiently clear that there is little excuse for some of the professional misunderstanding about them. But even if the books already contained a thousand decisions on the subject the individual case would necessarily depend on its own facts. I am reminded of a recent news item to the effect that the General Services Administration had granted the attorney general authority to buy a bull for one of the federal prison farms without asking for competitive bids. An official of the Prison Bureau explained that "it is awfully hard to write up specifications for a bull."

⁵⁰ *Smith vs. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 385; *Hyde vs. Somerset Air Service*, 61 Atl.2d 645 (N.J.); *Antonik vs. Chamberlain*, 78 N.E.2d 752 (Ohio); *Thrasher vs. Atlanta*, 178 Ga. 514, 173 S.E. 817, 99 A.L.R. 158, 162.

⁵¹ "The Airport and Its Neighbors," Report of the President's Airport Commission, 1952; "Accident Facts," National Safety Council, 1954.

THE PROPOSED MODEL PROBATE CODE

By

Barton H. Kuhns

The Model Probate Code had its origin in a series of articles published in 1939 and 1940 by Professor Thomas E. Atkinson, who then taught wills at the University of Missouri. The final article by Professor Atkinson, which was published in the February, 1940, issue of the *Journal of the American Judicature Society*, was entitled "Wanted—A Model Probate Code." This suggestion was taken up by the Probate Division of the section on Real Property, Probate and Trust Law of the American Bar Association, the chairman of which division, incidentally, at that time, was our fellow lawyer, Fred Hanson, of McCook.

Professor Atkinson wrote his article in a background of a movement for reform of our probate law. During the 1930's a number of jurisdictions had adopted new probate codes, among them being Minnesota in 1935 and Michigan in 1939. Other jurisdictions were studying reforms in their probate laws, and it is fair to say that in quite a number of states there was general dissatisfaction with much of the statutory law pertaining to probate matters.

A special committee of the Probate Law Division of the Real Property section of the American Bar Association was appointed at the 1940 annual meeting of the Association for the purpose of making further study of the suggestion for a model probate code.

Considerable progress was made by the committee between the 1940 and 1941 annual meetings of the American Bar Association, and at the 1941 annual meeting held in Indianapolis the desirability and the feasibility of a model probate code had become apparent. The general topics to be covered by such a code and the general plan or arrangement of the code had been developed. Many of the section titles of the Model Probate Code in its final form came directly from topics suggested by that committee.

It had also become apparent by 1941 that the task of actually drafting such a model probate code was one which was too tremendous for a committee of a section of the American Bar Association composed of busy lawyers serving on a voluntary basis. Fortunately about that time the University of Michigan Law School came to the rescue, and in 1942 the actual drafting of the code became a research project of the Research Department of the University of Michigan Law School.

The preparation of the code was in charge of Professor Lewis M. Symes, who was relieved of part of his teaching duties for this purpose and who was ably assisted by Professor Atkinson, who has since become a professor of wills at the New York University Law School, and Mr. Paul Bayse, then a research assistant and now of San Francisco. Their work not only included the drafting of the proposed model probate code, but the actual drafting work was preceded by extensive research into the many problems suggested by the variety of statutory provisions in the probate laws of the different states. Not only the statutory law but the case law and the practical workings of the probate law in the various jurisdictions were included in the research project. It required approximately five years to complete the work on the Model Probate Code, and the result is a code in five parts which are divided into these subject matters:

- I. General Provisions.
- II. Intestate Succession and Wills.
- III. Administration of Decedents' Estates.
- IV. Guardianship.
- V. Ancillary Administration.

The suggestion of a model probate code was not just an academic idea. There has been a continuing movement for probate reform in many of our states. Some jurisdictions have adopted entirely new probate codes. Others have been making piecemeal changes in their probate laws. The last session of the Texas legislature adopted an entirely new probate code. Even in Nebraska, where I suspect that many lawyers are of the impression that we have not substantially changed our probate law for many decades, there have been since 1943 more than twenty amendments made to sections of our Chapter 30 dealing with decedents' estates up to the time of our 1955 legislative session. And this figure, of course, does not take into account the many bills introduced but not enacted by our legislature. The extent of the movement varies in different states, but I believe it is safe to say that there are only a limited number of states where it can be said that there is complete satisfaction by the profession with all the provisions of the existing probate law.

I want to emphasize that the Model Probate Code is what it is described to be; namely, a model act as distinguished from a uniform act. This distinction is of considerable importance, in that in using the code as a guide it should be clearly understood that it was never intended that all states should adopt it without change. It is strictly a model and was so intended. Uniform

acts are promulgated on subject matters where it is felt that uniformity of the law is necessary or desirable. Uniform laws fail in their complete accomplishment of purpose to the extent to which an entire uniform act is not adopted in any given state. A model act, being more in the nature of a guide, may tend in some degree to promote uniformity of legislation, but the principal purpose of a model act is to set forth an example of a potential code or act without the necessary thought that uniformity of its adoption is essential or desirable. It is rather the thought that a model act in whole or in part may serve as a useful suggestive guide to the enactment of legislation on the subject matter.

Contrary to a general impression, the Model Probate Code as such is not a product of the National Conference of Commissioners on Uniform State Laws; however, there is embodied in the code a number of uniform acts, some very short and some very more lengthy. These include uniform acts on the subject matter of Execution of Wills, Secured Creditors' Dividends in Liquidation Proceedings, and also the Uniform Veteran's Guardianship Act. In addition, the part of the code dealing with ancillary administration is composed primarily of uniform acts in this field, including the Uniform Powers of Foreign Representatives Act and the Uniform Ancillary Administration of Estates Act.

These uniform acts, of course, should be adopted without change, and, as a matter of fact, they can be lifted out of the Model Probate Code and enacted in any jurisdiction as a separate item of legislation on the particular subject matter involved.

I think it is rather important to understand that to take advantage of the Model Probate Code it is not necessary that all of the probate laws of the state should be repealed and supplanted by the Model Probate Code. It is one of the objectives of the code that the more desirable provisions may be removed from it and enacted in states which wish to adopt those provisions, without necessarily abandoning all existing law on the subject matter where that law has proved satisfactory. In only a very few states, of which Arkansas is an example, has the legislature seen fit to supplant all existing probate law with the Model Probate Code. I think it is likely, for example, that in Nebraska there would be a reluctance to change the established and accepted plan of intestate succession as far as concerns closely related heirs. To illustrate, under the Model Probate Code the surviving spouse is entitled to one-half of the estate regardless of the number of issue. It seems to me that it would be a very substantial, and perhaps unwarranted, change in our probate law to attempt to

alter our accepted plan of intestate succession, so that the surviving spouse would receive one-half where there is more than one child. Likewise, in procedure for the probate of wills and the appointment of personal representatives, the practice of the various states is well established. In some states the will is offered for probate and there is a publication, usually of three or four weeks, before a hearing is had on the probate of the will, after which the executor or administrator is appointed and notice to creditors is then given. In other states, and this is the plan of the Model Probate Code, the will is proved as the initial step in the probate proceedings, and the personal representative then gives notice of his appointment combined with a notice to creditors. Under this procedure the period of administration can be shortened. Of course under this procedure the period within which a contest can be made is usually longer than in jurisdictions where the objections must be filed prior to a decree admitting the will to probate. Unless there is substantial objection to the length of time required for the administration of estates in those jurisdictions which follow the plan of giving notice before the probate, the probabilities are that the practice is so well established that if reasonably acceptable there is no particular point in recommending change.

Then, too, in some states there are constitutional provisions with respect to the establishment of the probate court, the qualifications of its judges, and even its jurisdiction, which might render unconstitutional some of the provisions of Part I of the Model Probate Code under the heading of General Provisions.

Unless the dissatisfaction with existing probate laws is so substantial that the Bar is clamoring for a complete reform of the probate laws, the Model Probate Code should be used as a reference and a guide whenever reform is felt desirable in any particular area of probate law. It would be desirable if there could be prepared a section-by-section comparison of our existing probate laws and the recommendations of the Model Probate Code. The very making of this section-by-section comparison might reveal undesirable features of existing law, but whether that should be the case or not, the comparison would then be available in the event that any suggestions are made to change any particular section or sections of our existing statutes. Occasionally some isolated section of our probate statutes is amended simply because one lawyer or a very small group of lawyers may have encountered a particular problem involving that section, and the proposed amendment comes before the legislature without a full study of all the ramifications which the amendment may involve. A more

intelligent appraisal of the desirability of a proposed amendment could be made if such a comparison were available. Many sections of the Model Probate Code can be isolated from other sections and taken over as an improvement of one particular phase of the probate laws. Certainly it is not an indictment of the Model Probate Code to say that it should not be approached with an attitude of take it all or leave it all alone.

Let me cite some instances where helpful suggestions might be obtained from the study of the Model Probate Code.

As you know, our Statute, Section 30-111, provides that "Kindred of the half blood shall inherit equally with those of the whole blood, in the same degree, unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance." Thus the way in which the intestate acquires the property makes a difference in the manner of its descent. This presents extremely difficult problems in cases where there has been commingling of inherited and non-inherited property, and involves the necessity of having to trace the source of particular property. The Model Probate Code simply provides that "Kindred of the half blood shall inherit the same share which they would have inherited if they had been of the whole blood."

In Nebraska illegitimate children are not allowed to claim, by right of representation of either their father or mother, any part of the estate of the father's or mother's kindred unless the parents have married and had other children and unless the father, after such marriage, shall have acknowledged the child in writing before a witness, or adopted the child. See Section 30-109. The Model Probate Code simply provides that the illegitimate child will be treated as the legitimate child of the mother for purposes of inheritance to, through and from such child, and that if the parents marry the child is treated as the legitimate child of both.

With reference to questions of inheritance in connection with adopted children, our Statute, Section 43-110, provides that "After a decree of adoption is entered, the usual relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between such adopted child and the person or persons adopting such child and his, her, or their kindred." Our statute is silent on the effect of the adoption upon the rights of inheritance between the adopted child and his natural parents. The Model Probate

Code provides that "An adopted child is treated as though he were the natural child of his adopting parents for purposes of inheritance to, through and from such child, and for purposes of intestate succession, an adopted child ceases to be treated as a child of his natural parents."

The law with respect to advancements illustrates another area wherein the Model Probate Code might profitably be studied. Our law with respect to advancements seems to be confined to an advancement "to any child or other lineal descendant." (See Section 30-112.) Under the Model Probate Code an advancement "to any person who would be entitled to inherit if the intestate had died at the time of making the advancement" is counted toward the advancee's intestate share. The code contains a further provision whereby if the advancee dies before the intestate, the advancement is taken into account in determining the share of a lineal descendant of the advancee, with a carefully phrased provision as to the proportioning of the advancement if the lineal descendant's intestate share is less than that of the deceased advancee.

There is an interesting provision in the code whereby a surviving spouse has an alternative election to receive life income.

In the field of execution of wills, the Model Probate Code offers valuable suggestions. It is, I believe, common practice to have the testator sign in the presence of attesting witnesses who sign in the presence of each other. Our statute (Section 30-204) does not specifically provide that the witnesses must sign in the presence of each other. The Model Probate Code does specifically require that the witnesses and the testator all sign in each other's presence.

Our statute (Section 30-201) makes "full age" one of the requirements of testamentary capacity. The question of the age at which a testator may be considered as sufficiently mature to make a will received extensive study by the draftsmen of the Model Probate Code. There is statutory authority in other jurisdictions for permitting minors to execute wills. Sometimes the exception is founded on the minor being a member of the military or naval forces of the United States. The possibility of persons under twenty-one years of age making an appointment under a general power of appointment is recognized in Section 2503 (c) of the Internal Revenue Code of 1954, in connection with the circumstances under which gifts to minors will not be considered as gifts of a future interest. The draftsmen of the Model Pro-

bate Code have provided that any person of sound mind, eighteen years of age or over, should be able to make a will.

On the question of revocation of a will by burning, tearing, canceling or obliterating, with the intention of revoking it, our statute (Section 30-209) provides that this shall be done by the testator or by some person in the presence and by the direction of the testator. Our statute does not provide that there must be any other witness to the destruction of a will. Some states specifically require that a destruction at the direction of the testator must be proved by at least two witnesses, and the Model Probate Code likewise provides that there must be two witnesses to the destruction.

In the field of administration of estates, there is a provision of the Model Probate Code which specifically allocates those powers which can be exercised only by two or more personal representatives when there are two or more such personal representatives, as distinguished from those powers which can be exercised by any one of two or more personal representatives. The powers the exercise of which requires joint action are as follows: (1) instituting a suit, (2) employing an attorney, (3) carrying on the business of the deceased, (4) voting corporate stock, and (5) powers which a will specifically provides shall only be exercised by all the personal representatives. Any other powers may, under the provisions of the Model Probate Code, be exercised by any one of two or more personal representatives.

There is a provision in the Model Probate Code for the appointment of a special administrator, without notice, even after the appointment of an executor or a regular general administrator, without removing him, under which such a special administrator may perform duties with respect to specific property, or perform other particular acts.

There are specific provisions in the Model Probate Code to meet the situation where a will is discovered after administration proceedings have been commenced. The code provides a five-year statute of limitations on the probate of a will.

In the area of guardianship law, helpful suggestions may be found in provisions of the Model Probate Code for the appointment of a temporary guardian for an incompetent, pending completion of the formalities of the appointment of a regular guardian. Provision is made for the filing of claims against a guardianship. And there are specific provisions governing the procedure for the termination of guardianships.

The foregoing comments upon the provisions of the Model Probate Code could be expanded many fold. Other features which I believe would be found especially interesting are those dealing with the right of a surviving spouse to elect, the election procedure, and the provisions for waiver of the right to elect. There is, for example, a provision of the code whereby the clerk of the Probate Court gives notice to the surviving spouse of the right to elect, a feature which does not exist in many states.

There are interesting provisions pertaining to the bonds of fiduciaries. There is, for example, a section which states that in the case of a corporate fiduciary a deposit of cash or collateral with the state treasurer may be in lieu of any other bond. There is also a provision that where one bond is signed and filed by two or more personal representatives, no personal representative shall be deemed a surety for another personal representative unless the bond so provides.

Other subject matters such as pretermitted heirs, qualifications of witnesses to wills, the effect of a witness to a will being interested, and just what makes an attesting witness interested, all present considerations which might well be studied.

I trust that the foregoing discussion conveys the message that there is at hand, completed within the last ten years, a probate code which in whole or in part can be used as a model for purposes of studying probate reform, as well as for studying the drafting language with respect to almost any particular detailed item of proposed probate legislation. The code was authentically and carefully prepared with extensive research. Many of its provisions have been well seasoned by virtue of adoption in different jurisdictions. The code should, I believe, be more widely known by lawyers generally than is the case. If my remarks will at least tend to prompt consideration of the provisions of the Model Probate Code whenever general reform or even minor tinkering with our probate statutes is contemplated, they will have served some useful purpose.

**REVIEW OF LEGISLATION AFFECTING REAL ESTATE,
PROBATE AND TRUSTS PASSED BY THE 1955 NEBRASKA
LEGISLATURE**

By

Herman Ginsburg

The purpose of this review is to challenge the practitioners' attention to legislation affecting the branches of law in which the

members of this section are interested, which may be novel or important. This review will not attempt to cover all of the details of the legislation affecting such subjects where it is felt that such new legislation makes no material change in the existing law. Neither will this review attempt to cover in minute detail the provisions of each bill discussed, but will only touch upon the major provisions of such legislation, leaving it to the individual practitioner to check carefully all of the details of such legislation.

With reference to decedents' estates, L.B. 171, it is of interest and represents a further demonstration of the activities of the bar in its service to the public in attempting to decrease the expense in connection with small estates. Many of you may recall that in the 1953 legislature L.B. 143 was adopted, which is now Sections 60-111.01, .02 and .03 of the 1953 supplement. This bill when first proposed was intended to cover all estates where the value of the property of the decedent was less than \$700.00; however, as passed the bill was limited wholly to the matter of the vesting of the title to motor vehicles. L. B. 171 of the 1955 legislature extends this Act to all of the personal estate of the decedent. It provides that the surviving spouse or the distributees of the estate shall have a defeasible right to the personal property thereof without the necessity for the appointment of an administrator or the probate of a will, if the value of the entire estate of the decedent, less liens and encumbrances, does not exceed the sum of \$700.00. The 1953 Act provided that it was applicable if the value of the entire estate did not exceed \$700.00, and therefore it soon became evident that in cases where the estate exceeded \$700.00 in value in gross but there were liens and encumbrances against the same so that the actual equity was less than \$700.00, the distributees or surviving spouse still could not take advantage of the provisions of the Act. The 1955 Act eliminates this difficulty because the value of the estate is now determined after liens and encumbrances. Any person having possession of such personal property is required to make delivery thereof upon presentation of an affidavit setting forth the facts establishing the defeasible right of a surviving spouse or distributees in accordance with the provisions prescribed by the Act. The Act purports to relieve any such persons from liability for making distribution of personal property in reliance upon such an affidavit.

It will be noted that there are a number of questions remaining unsettled by the provisions of this Act. Thus, the Act states that the personal property is to be turned over to the surviving

spouse or the distributees; it leaves unanswered the question of what is to happen when both the surviving spouse and the distributees, as defined in the Act, may make adverse demands. Likewise, what is to happen when demand is made by one set of distributees claiming under a will, and by another set of distributees who claim that the will is invalid? There is no provision in the Act for the person having possession of the personal property to relieve himself of liability in case of such duplication or uncertainty of claimants. Under the Act he can be sued by any claimant, and thus be put to the expense and trouble of defending himself against such suit and perhaps setting up at his own expense and cost the claims made by the adverse or conflicting claimants. In the ordinary case the Act will serve a useful and beneficial purpose in permitting prompt distribution of personal property of small estates to persons entitled thereto without the cost and expense of legal proceedings. However, the holder of such property is not protected in the instances which I have mentioned, nor is there any protection for creditors where the distributees obtain possession under an affidavit which eventually is demonstrated to be false.

L. B. 174 provides that in proceedings in the district court for the sale of decedent's property to pay debts, etc., that the court may determine whether or not the property was a homestead. This Act serves a most worthwhile purpose. Undoubtedly all Nebraska practitioners are familiar with the fact that the homestead cannot be sold by the administrator or executor under the statutory provisions for sale for payment of debts and expenses, and matters of that kind. If an administrator's sale were held and it was later established that the property constituted the homestead of the deceased, the administrator's sale would be wholly void. Yet there was no statutory provision for the determination of the question as to whether or not the property was a homestead. L. B. 174 will now eliminate all questions and will facilitate the examination and approval of titles, in that it provides that the petition for sale shall assert that the property is not a homestead and that the court shall hold a hearing on that issue and shall make a determination which will then be binding upon everyone.

L. B. 269 provides procedure for dispensing with the administration in the event of the death of a person under guardianship or who has a conservator appointed over him. In such cases, where the assets in the hands of the guardian or conservator do not exceed a sum sufficient for the payment of the expenses of the last illness and burial expenses not in excess of

\$350.00, and the costs, administration shall be dispensed with; and the court, in the order closing the guardianship or conservator proceedings, shall make final distribution of the property in the hands of the guardian or conservator. This Act is an elaboration and amplification of L. B. 12 of the 1951 legislature.

L. B. 93 repeals Sections 30-228.01 and 30-228.02 of the Revised Statutes, Supplement, 1953, and in effect re-enacts 30-228 as it existed in the 1943 Revised Statutes. It does provide, however, that the Act shall apply to devisees or legatees named as a member of a class and who may have predeceased the testator, leaving issue; and provides that when any devise or legacy shall be made to any child or other relation to the testator, either by name or by designation of such relationship, singly or as one of a class, and the devisee or legatee shall die before the testator, having issue who shall survive the testator, such issue shall take the estate so given by the will in the same manner as the devisee or legatee would have done if he had survived the testator, unless a different disposition should be made or directed by the will. It will be noted that this is almost identical with the language of Section 30-228 of the 1943 Statutes, with the addition that it applies to the designation of a devisee or legatee as a member of a class. The history of this Act is interesting. L. B. 331 of the 1951 legislative session repeals Section 30-228 of the Revised Statutes of 1943 and provided in Section 1 that any devise of real or personal property which shall be void or lapse shall become a part of the residue and shall pass to the residuary devisees, unless the will makes a contrary disposition. Section 2 provides that unless the will made a contrary disposition, when any adopted child of the testator or blood relative within the fourth degree is designated as a devisee and such person dies after the making of the testamentary instrument and before the testator, leaving issue surviving, or is dead at the time of the execution of the will, leaving issue surviving and the fact of the death is unknown to the testator, then such issue as represents a deceased devisee shall be deemed substituted for him. In the 1955 legislature attention was called to the fact that Section 2 of the 1951 Act referred only to a devise. It was asserted that since a devise applied only to real estate, the Act might not apply to bequests or legacies of personal property. This argument was made even though Section 1 of the 1951 Act specifically referred to a devise of real or personal property. It was suggested to the 1955 legislature that Section 1 was already the law of the State of Nebraska, and that Section 2 was uncertain and indefinite because of the use of the term devise only, and therefore it was felt that the 1943 statutes

amended to take care of class gifts would be sufficient. Accordingly, L. B. 93 repealed L. B. 331. It is submitted that the language of L. B. 93 is also indefinite and will raise a question as to whether it is applicable to cases where the testator may have made a devise or bequest to a person who was already dead at the time of the execution of the will, but the death of such person was unknown to the testator. A strict grammatical reading of L. B. 93 would lead to the interpretation that it does not apply to such cases. On the other hand, L. B. 331 of the 1951 legislature did provide for such cases. It is submitted that it would have been preferable to simply have amended Section 2 of the 1951 Act to use the word "devise or legacy" if there was any question about the meaning of said section.

In the field of trust law, L. B. 315 specifies the forms and kinds of investments lawful for trust funds. The provisions of this Act are so detailed and comprehensive that it is impossible in a review of this kind to give a full, detailed analysis thereof. It suffices to say that every lawyer who advises trustees, guardians, executors, administrators, and other fiduciaries must thoroughly familiarize himself with the provisions of this Act. A significant change made in L. B. 315 is the specific provision that it shall not apply to any incorporated religious, charitable or eleemosynary institution or corporation except to the extent that any such institution or corporation may be named as specific trustee under a will or other trust instruments.

By a series of bills dealing with the subject of oil and gas, the legislature made provision for the authority and power of trustees in such matters. These are L. B. 36, L. B. 61, L. B. 62 and L. B. 59. I shall not attempt to review all of these bills but simply call attention to the fact that they all deal with the power and authority of trustees relative to contracts with pipeline companies and the granting of easements therefor, and trustees for oil and gas leases and provisions for obtaining the authority to enter into such leases. L. B. 62 provides for the appointment of trustees to represent and take care of the interests of contingent remainder men for the purpose of leasing land or entering into oil and gas developments. The bills deal not only with trustees but also with similar powers and authorities for administrators, executors, guardians and other fiduciaries.

In the field of real property law, the 1955 legislature has adopted novel and significant changes. Particularly interesting in the light of the presentation made at this meeting by the Honorable Perry W. Norton relating to air rights and navigation, we

find that the 1955 legislature by L. B. 541 made specific provisions limiting the rights of the owner of the soil insofar as the rights of aerial navigation are concerned. Section 1 of this Act declares that there exists in behalf of the citizens of the United States a public right of freedom of transit in air commerce through the airspace of the State of Nebraska, and that any obstruction to air navigation interfering therewith is dangerous to life and property, and that the public health, safety and welfare require that the erection and maintenance of obstructions to air navigation be regulated and controlled. By this Act the legislature has placed and recognized limits to the old common-law right of the owner of the soil to control the airspace above his land. Section 3 of the Act limits the height of any structure within the State of Nebraska to not exceed 400 feet above the surface of the ground unless a permit in writing shall have first been obtained from the Department of Aeronautics; and no such permit will be granted which will constitute a hazard to air navigation or will interfere unduly with public right of freedom of transit in commerce through the airspace affected thereby. Section 7 also makes provision for a requirement for the owner of the soil to mark and light all structures which are located outside corporate limits and which exceed 150 feet in height and all structures within corporate limits which exceed a height of 500 feet. Any structure erected in violation of the Act is declared to be a nuisance and may be removed on 5 days' notice.

It may be of interest to note that as first proposed the Act contained a provision for graduated heights and structures depending upon the distance of the location thereof from the existing airports. Thus ground immediately adjacent to an airport might be prohibited from having any structure thereon whatever. While the Act as passed was not this drastic, it is interesting to note that now the legislature has recognized that the right of ownership of the grounds is subject to the right of air transportation, and the legislature may from time to time hereafter further limit and prescribe the rights of the owner of the fee above ground. It will be interesting to observe in the future which will be given preference, the right of aerial navigation or the right of the owner of the soil to use it as he may desire. Eventually some reconciliation is going to have to be made between these two interests, since it is quite apparent that they can, and in many instances will, conflict. It may very well be that the owner of land immediately adjacent to an airport, if he erects any structures thereon, may create a hazard to air navigation; and yet, on the other hand, the owner of such land may have to erect struc-

tures therein in order to make full use of his investments or his ownership. At some point these two interests will clash, and one or the other will have to give way. As of 1955, the legislature has determined that the rights of the owner of the soil do not interfere with freedom of aerial navigation where the structure does not exceed 400 feet in height in a municipality or 150 feet in height outside of corporate limits. Only the future can foretell what the ultimate resolution will be.

L. B. 127 grants to foreign corporations, incorporated under the laws of the United States or the laws of any state of the United States, the right to acquire and own oil and gas leases and to acquire and own the fee or to lease for any period such real estate as may be necessary for producing gas, oil or other hydrocarbon substances and of treating, processing, storage and disposal thereof. This Act further provides that no corporation doing business in the state which owns or holds any real estate shall elect aliens as members of its board of directors in a number sufficient to constitute a majority of the board or elect aliens as its executive officers or managers, or have a majority of its capital stock owned by aliens. This Act is an extension of the rights of foreign corporations to own real estate in the State of Nebraska.

While not particularly in point so far as real estate law itself is concerned, L.B. 230, I am sure, will be of interest to the members of this section. This bill provides for the allowances of fees in partition proceedings. Heretofore it has been the law that only the plaintiff's attorneys could be awarded any fee, and then only in cases where the proceedings were amicable. This was a highly technical rule laid down by the Supreme Court as to when proceedings could be said to be amicable. While the court held that where the proceedings were adversary no fee could be allowed, yet there were few if any instances where the court ever held such proceedings to be adversary. The case of *Lorenz vs. Lorenz*, 150 Neb. 20, is interesting on that point. In that case, even though there was an argument over the respective interests of the parties and the liens which existed thereon, the court nevertheless held that the proceedings were not adversary. It is also true, on the other hand, that many practitioners have had the experience of being required to appear in a partition proceeding in behalf of certain parties named as defendants in order to set up the defendants' rights and interests where the plaintiff's counsel failed to set forth properly the respective interests of the parties. Thus it was in many instances necessary for the defendant in a partition action to procure his own counsel to protect his own interests and naturally to pay his own counsel. At the

same time such defendant, who was compelled to employ an attorney to protect his interests because of the neglect or failure of the plaintiff to properly plead the same, still had to pay his portion and share of the attorney's fees. L.B. 230 takes care of this situation. It provides that in all cases reasonable attorney fees shall be taxed as costs, and that if the shares of the parties have been properly pleaded and properly set forth such fees shall be awarded entirely to plaintiff's counsel. However in the event that the plaintiff's pleadings do not properly set forth the shares of the parties and expenditures thereon, then the court may order such fees to be divided among all of the attorneys of record. This bill should be of considerable value both to the public and the bar and eliminate a troublesome situation in many partition cases.

The title to L. B. 263 states that it is a bill for an act relating to decedents' estates. However, the bill really has nothing whatever to do with estates, but attempts to establish a procedure to determine title in certain cases. Normally all questions as to title to real estate are to be determined by the district courts. This Act purports to enable certain of such questions to be determined by the county court. The Act is intended to take care of cases where the title is vested in a certain person subject to a limitation over to the children or heirs of another person. Its use can be illustrated by the following example: Assume a conveyance to A with remainder on the death of A to the children or issue of A. A dies leaving no estate to be administered. How are the persons who are to take the remainder to be determined? L. B. 263 provides that in such case any person having an interest in the property may file a petition in the county court in which the property is situated or in the county court of the county in which the deceased resided at the time of his death, seeking a determination of the time of death, who are the heirs at law, devisees, legatees, or surviving issue, and their degree of kinship. The statute then prescribes the procedure whereupon the county court shall make such determination. Such decree of the county court shall then be binding and conclusive upon all persons interested, including heirs at law, devisees, legatees or surviving issue.

This statute must be considered in the light of the famous *Fisher vs. Sklenar* case in 101 Neb. 553 wherein the Supreme Court made it evident that the county court can act only in connection with the settlement of estates and said:

The object of a decree of distribution [in the county court] is to determine to whom the estate of the deceased should be de-

livered. Neither adverse claims nor title to the property can be litigated in the proceedings. The title itself may not be drawn in question. No title passes by the decree to the persons named as heirs.

Under the rule of this case, if there is no estate to be administered, it is, to say the least, highly questionable whether the county court can enter any sort of decree which will be of any utility. Since the county court is precluded from acting where title to real estate may be drawn in question and is only permitted to act where a distribution of an estate is to be made, it is difficult to see how the county court may be permitted to make a finding of heirship where there is no estate to be distributed.

Also, it must be borne in mind that our Supreme Court has said:

The district court has original jurisdiction to make a finding of heirship where the question becomes material in a proceedings of which such court has original jurisdiction.

Dennis vs. Omaha National Bank, 153 Neb. 865.

Since the district court is the court which has original jurisdiction over the questions of title to real estate, it would seem that L. B. 263 is an attempt to deprive the district court of its original jurisdiction to make a finding of heirship where the question is material in a proceedings where the title to real estate may be drawn in question.

Also, we are confronted with the situation that in many instances the heirs are to be determined not as of the date of the death of the decedent but as of a much later date. (See *In re Estate of Mooney*, 131 Neb. 52, and the Dennis case hereinbefore cited.) The act does not make it clear as to what date the county court may make its determination. Section 1 provides that it is to determine the time of death of the decedent and who the heirs are. Is this determination to be made as of the date of the death of the decedent or is it to be determined as of the date of the filing of the petition? If as of the date of the filing of the petition, there is all the more question as to the jurisdiction of the county court, since it would be clearly evident that the finding was being made in connection with the title to real estate and not for any determination as of the date of the death of the testator. It must be further remembered that our Supreme Court has said:

A county court in Nebraska . . . has no power to construe wills. . . . The construction of the will by the probate court was not incident to distribution of the estate, but solely for the benefit of the executor in advance of any distribution. Such a decree bound

no one, but could only be for the guidance of the executor. . . . This jurisdiction was long committed to the doctrine that the construction of the will in such a case in probate court is for the benefit and information of the executor or administrator only. . . . It adjudicates nothing beyond his rights and liabilities in the execution of his office; controversies between adverse claimants under the devise, or between the executor or administrator and persons claiming adversely to the estate will not be affected thereby.

In *Jones vs. Shrigley* 150 Neb. 137, the Supreme Court said:

The county court has jurisdiction to construe wills when necessary for the benefit of the executor in carrying out the terms of the will, but it has no jurisdiction to construe wills to determine rights of devisees or legatees as between themselves and has no authority to bind the heirs, devisees or legatees by any construction.

Section 1 of L. B. 263 provides that if any person shall die testate or intestate without leaving an estate to administer the county court is vested with jurisdiction to determine who are the heirs, devisees and legatees or issue of the decedent. Section 3 provides that the court shall make a decree determining who are the devisees and legatees of the decedent and such further matters as may be necessary for proper determination. Section 4 provides that the decree of the county court shall be a final order and shall be binding and conclusive upon all persons interested, including devisees and legatees.

It would seem that this act is directly contrary to the holdings of our Supreme Court. Thus, supposing, in a case which we have heretofore posed, there is a dispute between parties as to who are the legatees or devisees entitled to take. By our constitution and the cases announced by our Supreme Court the county court has no jurisdiction to make any determination. As a matter of fact the decree of the county court in such case is a nullity, and the district court does not apply any jurisdiction in case of an appeal from the county court. (See *Hahn vs. Verret*, 143 Neb. 826.) Since the county court cannot make any determination as between adverse claimants, how can it make a determination under this statute which would settle any problems as to the rightful takers under a will? Even in a case where there is no dispute, an attorney could not pass a title based upon a decree of the county court because such decree would not be binding upon any person who wanted to dispute the finding of the county court.

Furthermore, the proceedings as to notice specified in this Act would seem to be questionable. In case proceedings are in-

stituted in the district court, service of summons must be had on all available persons, and only when summons cannot be personally served can service be had by publication. Even where service is permitted by publication, there are certain safeguards which protect the rights of the defendant to notice. L. B. 263 simply provides for the publication of a notice in the county where the petition is filed, which may or may not be the county where the interested parties live, or where the property is situated, and even though the interested parties may be known to the petitioner, the petitioner is under no requirement to serve notice upon them. I personally cannot believe that the rights of any persons interested in real estate can be shut off by procedure of this kind.

It is quite evident that this legislation demonstrates again the hazards of piecemeal legislation designed to take care of a particular problem, but is adopted in haste without considering the implication and application of all the other rules of law which may be affected. This bill demonstrates the need for study of the effect of any particular legislation in the entire field of the law before adopting such a bill to meet a particular problem. For myself I cannot recognize the validity of any proceedings instituted under this act until such time as the Supreme Court shall pass thereon.

Another departure in the law with which all the members of this section should be familiar is L. B. 197. This also purports to be, by its title, an act relating to decedents' estates. However, it does not affect decedents' estates but affects the law of joint tenancy. Simply stated, L. B. 197 provides that upon the death of a joint owner of any real or personal property the surviving joint owner shall be liable for the debts and obligations of the deceased joint owner under the following conditions: (1) a creditor or personal representative of the deceased joint owner shall institute an action in a court of competent jurisdiction within three months after the death of the deceased joint owner against the surviving joint owner, setting forth the claim; (2) the surviving joint owner shall be liable to the creditors or personal representatives of the deceased to an amount equal to the value of the amount contributed to the jointly owned property by the deceased joint owner, for the payment of lawful debts and obligations of the deceased, but subject to all homestead and legal exemptions in the decedent's jointly owned property.

Apparently if a deceased joint owner contributed nothing to the acquisition of the property, the creditors get nothing; on the other hand, if the deceased joint owner contributed half of the cost of the jointly owned property by advancing x dollars, the

fact that such half^d interest may now be worth 2x dollars is immaterial, and all that the creditors can require is payment of the original advancement of x dollars. Even this is subject to exemptions to which the decedent would have been entitled. It must be emphasized that the obligation is personal against the survivor, and there is no obligation as against the property itself. The Act does not create a lien upon the title but imposes a personal obligation wholly upon the surviving joint tenant to the extent of the amount advanced by the decedent for the acquisition of the joint property.

L. B. 197 further provides that in any action instituted thereunder it shall be necessary for the persons interested to allege and prove that there is not sufficient other property standing in the name of the deceased joint owner at the time of his death, subject to the payment of his debts, provided that if no petition to probate the estate of the deceased is filed within thirty days from the date of his death, there shall be a presumption of lack of such property.

The genesis of this bill is very interesting. The bill was sponsored by parties who felt that joint tenancies were being made use of to avoid the payment of debts. While there was no desire to eliminate joint tenancies entirely as their legal estate in the State of Nebraska, it apparently was felt by the proponents of this bill that property in joint tenancy should, upon the death of a joint tenant, be liable for the payment of his debts. The bill as first introduced provided that:

all jointly held property . . . shall be liable for all the debts and obligations of the joint owners, both their joint debts and obligations and their separate and individual debts and obligations. That on the death of either or any of the joint owners, any and all property that was held jointly at the time of his or her death shall be liable for all the debts and obligations of the deceased.

There were a great number of objections to this bill as it originally read, not only because of defects in draftsmanship and the failure to coordinate with other rules of law also applicable to these situations, but because of the fact that this bill would tie up the title to joint properties so as to make the same wholly unmerchantable. If the bill as originally drawn were adopted, it would be manifestly impossible ever to pass title to jointly owned property. This was recognized by the proponents, and consequently various amendments thereto were proposed, including a proposal that only the share of the deceased joint owner would be liable for the payment of debts. When it was pointed out that upon the death of a joint owner there was no share, the

bill was finally amended on the floor of the legislature to read in its present form.

Since this bill does not directly affect the passage of title to real estate but only lays down a rule as to personal liability, it is not our position as lawyers to question the public policy which may lie behind the legislative adoption of this statute. Whether public policy requires the imposition of personal liability in such case is a matter for the legislature as a solid spokesman for the people to decide.

Certainly this bill requires interpretation by the court before the full extent of its meaning and use can be determined. There are many problems created by this bill which may possibly exceed any good to be accomplished thereby. It is, however, a bill with which every member of this section should be familiar.

In conclusion I cannot refrain from making several observations as the result of my study of the new legislative enactments above referred to and the process of their enactment. Apparently the Bar Association has been quite active in proposing new legislation deemed to be beneficial and in the public interest. The Bar has not, however, been as active in watching proposed legislation to see whether such legislation is well thought out and will best serve the public interest. It is submitted that in the case of both L. B. 263 and L. B. 197, a study by a responsible committee of the Bar Association would have been very helpful in enlightening the members of the legislature as to what was being considered by them. Both of these bills involve technical problems in fields of law where the layman is not competent to judge. Yet the legislature could receive no assistance in the consideration of these bills from any authorized spokesman of the Bar Association or of the section of the Bar interested therein. Only individual lawyers who were willing to take the time and trouble to appear could be heard, but such lawyers had no authority to speak on behalf of the Bar. It is submitted that it would be very helpful and a great public service in the future if at least this section would appoint a legislative committee charged with the duty of examining all proposed legislation affecting the fields of law in which the members of this section are interested and, speaking on behalf of this section, to enlighten the members of the legislature and help guide it in these technical fields. The Bar should not only inspire legislation, but should also act to endeavor to prevent undesirable legislation.

JUNIOR BAR SECTION

Albert G. Schatz, Esq.
Chairman

“Executive Records in Congressional Investigations—Duty to Disclose—Duty to withhold”.....Hon. Roman L. Hruska
Omaha
United States Senator from Nebraska

EXECUTIVE RECORDS IN CONGRESSIONAL INVESTIGATIONS—DUTY TO DISCLOSE—DUTY TO WITHHOLD

By

Roman L. Hruska
United States Senator from Nebraska

Powers of investigation by Congress are well established since early years of the Republic. They include the right of subpoena to secure presence of witnesses for examination, the right to demand and enforce production of papers and records, and the right to punish for contempt. Such powers are extensive. They are indispensable to proper discharge of legislative duties.

But precedents are neither clear nor certain when attempts were made to project those powers into the area of the Executive Department.

Frequent conflict has arisen when Congress or one of its committees insisted upon the Executive Department's duty to disclose in order to subserve the legislative function. In resistance to such demands, the Executive on occasion has cited its “duty to withhold” information because of its confidential nature or because its disclosure would be incompatible with the public interest or jeopardize the safety of the nation.

The purpose of this paper is to cite some of the instances of such conflict and to consider some underlying principles.

The present administration first asserted its duty to withhold testimony papers and records in May, 1954. The sub-committee of the Senate Committee on Government Operations had called on the Department of Defense to produce certain records of conversations and communications and of correspondence pertaining to the controversy between Senator McCarthy and the Department of Army. President Eisenhower, in a letter dated May 17, 1954, instructed Secretary of Defense Wilson to instruct department employees in all appearances before the sub-committee regarding the subject inquiry that “they are not to testify to any

such conversation, communications or to produce any such documents or reproductions. This principle must be maintained regardless of who would be benefited by such disclosure."

The President's reasons for giving such instructions will be set out later in my remarks.

Immediately upon publication of the President's letter, a loud chorus of anguished criticism was loosed. It was quite apparent, however, that the controversial and emotional nature of the issue at hand had much to do with many of the denunciations made. The effort to make partisan political capital was also quite evident. It was a Congressional election year. Criticism leveled on this latter basis was not very persuasive. President Eisenhower's predecessor had invoked "the duty to withhold" in about a dozen major instances during his tenor as president.

Of course there are some who would not consider actions of President Eisenhower's predecessor as valuable or even as very pertinent precedent. Aside from this, however, as lawyers we would do well to explore the historical origin and development of this subject. In doing so, we find that it is based on impressive, time-honored practice and on sound principle.

The very first instance dates back to 1792 under President George Washington. A House resolution created a committee to inquire into the "failure of the late expedition (against Indian uprising) under Major General St. Clair; . . . and that said Committee be empowered to call for such persons, papers, and records as may be necessary to assist their inquiries." (*President and Congress*, Wilfred E. Binkley (1947) pp. 40, 44; Richardson's *Messages & Papers of the Presidents*, Vol. I, pp. 194-6).

The House based its right to investigate on the control of Congress over public money expenditures. This being the first example of a demand on the Executive for papers, President Washington called his entire cabinet together to consider it. He stated his wish that so far as it should become a precedent, this matter should be rightly conducted.

Thomas Jefferson, then Secretary of State, reported the event. The unanimous conclusion of Washington and his very notable and distinguished cabinet members was:

First that the House was an inquest, and therefore might institute inquiries. Second that it might call for papers generally. Third. that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public; consequently were to exercise a discretion. . . .

Washington applied the same rule in 1796 regarding certain papers regarding treaty negotiations with Great Britain.

In 1807, President Thomas Jefferson asserted the same denial to Congress in its demand for "any information in possession of the Executive . . ." in regard to the Aaron Burr conspiracy against the United States. In that instance for the first time the "raw file" nature of information at hand and means of gathering it entered the picture. Jefferson's reply to Congress brought up to date the news he had received regarding the illegal combination of private individuals against the peace and safety of the Union. He then pointed out that he had recently received a mass of data, most of which had been obtained without the sanction of an oath so as to constitute formal and legal evidence. He went on to say:

It is chiefly in the form of letters, often containing such a mixture of rumors, conjectures, and suspicions as renders it difficult to sift out the real facts and inadvisable to hazard more than general outlines, strengthened by concurrent information or the particular credibility of the relator. In this state of the evidence, delivered sometimes too, under the restriction of private confidence, neither safety nor justice will permit exposing of names, except that of the principal actor, whose guilt is placed beyond question.

(Richardson's *Messages and Papers of the Presidents* Vol. I p. 412.)

In 1835, President Jackson received a Senate resolution requesting him to communicate copies of charges which had been made to the President against the official conduct of one Gideon Fitz, late surveyor-general, which caused his removal from office. The President declined to furnish the information, stating that in his judgment the information related to subjects exclusively belonging to the Executive Department. The request, therefore, encroached on the Constitutional powers of the Executive. In his message, President Jackson referred to many previous similar requests which he deemed unconstitutional demands by the Senate. He went on to say:

Their continued repetition imposes on me, as representative and trustee of the American people, the painful but imperious duty of resisting to the utmost any further encroachment on the rights of the Executive.

The President noted the fact that the Senate resolution had been passed in executive session. From this he presumed that if the requested information were communicated, it would be applied in secret session to the investigation of fraud in sale of public lands. Thus, he stated, the citizen whose conduct the Sen-

ate sought to impeach would lose one of his basic rights, namely, that of a public investigation in the presence of his accusers and of the witnesses against him. In addition, compliance with the resolution would subject the motives of the President, in the case of Mr. Fitz, to the review of the Senate when not setting as judges on an impeachment; and even if such a consequence did not follow in the present case, the President feared that compliance by the Executive might thereafter be quoted as a precedent to similar and repeated applications.

Such a result, if acquiesced in, would ultimately subject the independent constitutional action of the Executive in a matter of great National concernment to the domination and control of the Senate. . . .

In 1843, President Tyler issued what is considered one of the best reasoned precedents of a President's refusal to permit the head of a department to disclose confidential information to the House of Representatives. The House had demanded reports relative to the affairs of the Cherokee Indians and to the frauds which were alleged to have been practiced upon them.

The Secretary of War informed the House that negotiations were then pending with the Indians for settlements of their claims; therefore publication of the report at that time would be inconsistent with public interest. It was further reported, however that Lt. Col. Hitchcock, who had been charged to investigate this matter, rendered a report containing information which had been obtained by *ex parte* inquiries of persons whose statements were without the sanction of an oath and which the persons implicated had had no opportunity to contradict or to explain. Promulgation of those statements at that time would be grossly unjust to those persons and would defeat the object of inquiry.

The answer of the Secretary of War was not satisfactory to the House committee, which claimed the right to demand from the Executive and the heads of departments such information as might be in their possession relating to subjects of the deliberations of the House.

President Tyler in his message to Congress vigorously asserted that the House of Representatives could not exercise a right to call upon the Executive for information, even though it related to a subject of the deliberation of the House, if by so doing it attempted to interfere with the discretion of the Executive.

One of the most famous of Congressional investigations occurred during the Civil War. In 1861, by joint resolution of both

Houses, a joint committee was appointed "to inquire into the conduct of the present war; that they have power to send for persons and papers. . ." This was the first instance of a joint Congressional committee. Apparently Congress did not trouble itself with the reflection that inasmuch as the president is commander-in-chief of the Army, such interference constituted a serious infringement of the Executive prerogative. The vote of the Senate on the resolution was 33 to 3. In the House there was not even debate or division. The committee went about its duties vigilantly during the entire course of the war. Its reports comprise four large volumes. It has been said that this committee virtually took over a partial control of Union operations. Practically no phase of the conflict escaped the inquisitorial eye. Battles, disloyal employees, naval stations, surrenders at sea, military and naval supplies were investigated. War contracts were inspected with great zeal. It has been further said that if legislative meddling could be shown to have been damaging from a strategic standpoint, at least Congress was able to legislate with adequate knowledge and to hold officials in Washington and upon the line of battle to strict accountability.

President Theodore Roosevelt, in 1909, was confronted with a Senate resolution directing the attorney general to inform it whether certain legal proceedings had been instituted against the United States Steel Corporation, and if not, the reason for non-action. The President replied, refusing to honor this request upon the grounds that:

Heads of the Executive Department are subject to the Constitution, and to the laws passed by the Congress in pursuance of the Constitution, and to the directions of the President of the United States, *but to no other direction whatever.*

Thereupon the Senate summoned Herbert K. Smith, the head of the Bureau of Corporations, and requested the papers and documents in question on penalty of imprisonment for contempt. President Theodore Roosevelt then took personal possession of all the papers, informed the Senate Judiciary Committee of what he had done, and stated that the only way the Senate could get them was through his impeachment. He also explained that some of the facts were given to the Government under the seal of secrecy and cannot be divulged, "And I will see to it that the word of this Government to the individual is kept sacred."

While the foregoing are some of the outstanding instances in this field, almost every President encountered the same problem. There are well documented instances under Presidents Mon-

roe, Polk, Fillmore, Buchanan, Grant, Hayes, Cleveland, Coolidge, Hoover and Franklin D. Roosevelt, in addition to the presidents already mentioned in this paper.

It has been demonstrated that in every case where a president has supported the refusal of a department head to testify, the result was that the subject information was not furnished. "Public interest" was invariably given as one of the reasons.

One of the underlying principles evidencing itself throughout seems to be this: The president can withhold information or direct its withholding whenever he finds that it is confidential or that its disclosure would be incompatible with the public interest or endanger the safety of the nation.

Bases for this principle include the following: That officials and employees of the Government must be candid in advising with each other on official matters; that channels of information sources must be kept open—confidences cannot be breached. Further, that the doctrine of separation of powers in our constitutional form of government precludes the exercise of arbitrary power by any one branch. This is necessary if we are to be saved from autocracy, whether it be executive or legislative in character. The president is head of the Executive Department. He is given certain powers. He may use discretion in exercising those powers. His accountability is not to the Congress but to the country in his political character, and to his own conscience.

This does not necessarily mean that the president is all-powerful and that the Congress is impotent. The Congress still has power over legislation and over appropriations. Its investigations around the periphery of any given situation can be so searching and so relentless as to raise suspicions and pressures in public opinion which would make silence on the part of the Executive Department impossible.

For over 150 years this basis of conduct has served well in the relationship between Legislative and the Executive. It contains the elasticity of give and take. Very often the powerful personalities on either side may have much to do in determining its exact course. The procedures and results under them have been such as to withstand all attempts to clarifying legislation or Constitutional amendment.

What about court action or proceedings? It seems that whenever the aid of a court was sought to obtain information or papers from a president or the head of departments, it has universally been held that the president and his department have an uncon-

trolled discretion to withhold the sought information and papers in the public interest, that the courts will not interfere with the exercise of that discretion, and that Congress has not the power as one of the three great branches of the Government to subject the Executive Branch to its will any more than the Executive Branch may impose its unrestrained will upon the Congress.

SECTION ON TAXATION

Robert R. Moodie

Chairman

Hale McCown

Vice Chairman

Presiding

Panel Discussion of Developments Under the 1954 Revenue Code
Moderator

Hale McCown, Esq.

Beatrice

Members of the Panel

Robert V. Denney, Esq.

Fairbury

Leo Eisenstatt, Esq.

Omaha

John C. Mason, Esq.

Lincoln

John E. North, Esq.

Omaha

HALE MCCOWN: The first section of our program this afternoon is on social security provisions with particular reference to the one affecting farmers. I have asked Tom Davies if he will introduce our speaker.

THOMAS DAVIES: Our speaker today is district manager of the Lincoln office of the Social Security Administration, and we had him last year for the Institute of the Lincoln Bar Association and he did a swell job for us.

I want to tell you a little bit about him. He was graduated from the University of Minnesota in 1932 and received his degree in electrical engineering. He was a Lieutenant Commander, USNR, and was in the Pacific for approximately three years on the cruiser "Denver." He was a radar technician and an assistant gunnery officer.

I hope that he had a better reception in the Navy than I did. When I went aboard my ship, the skipper said, "What are you?"

And I said, "I am a lawyer."

He said, "My God, we need engineers and they send us lawyers!"

So I assume that Joe Sewell had a better reception in the Navy than I did. He was assistant manager of the social security office in Des Moines from 1940 to 1948, except for his Navy duty.

And it is a pleasure to present Joseph Sewell.

JOSEPH SEWELL: Thank you, Tom.

Well, gentlemen, what I would like to do is just very briefly review the Social Security Act, bringing it up to date, and then spend most of my time talking about these new amendments with particular reference to coverage of farmers.

The original Act went into effect on January 1, 1937. At that time the only people who were covered were persons working as employees in commerce or industry. Self-employed were not covered, no sort of agricultural work was covered, no government employees or anything, just people working as employees in commerce or industry.

So far as coverage is concerned, that Act remained in effect substantially without change until January 1, 1951. As of that date the Act was broadened to take in some of the previously excluded groups.

At that time the big group that was brought in was the self-employed businessman in town. The self-employed farm operator was still excluded. There were certain professional groups, professional self-employed groups, still excluded, among them, of course, lawyers, doctors, dentists, and so forth.

In 1951 farm hands, not the farmer, but the farm hand, was covered to a limited extent. Coverage was made available then to state and local employees, and the State of Nebraska passed the necessary enabling legislation bringing all state employees under in 1951, and in turn making it optional with each political subdivision.

And in the intervening four years since then, ninety-two out of the ninety-three counties in the state have brought their employees under, and I would estimate that somewhere between eighty and ninety percent of the larger municipalities and other political subdivisions—well, I shouldn't say "other"—very few townships, but eighty to ninety percent of the larger municipalities have brought their employees under.

Coverage was also made available in 1951 to employees of

non-profit organizations such as churches, schools, and so forth on a basis that was optional with the employing entity, and at least two-thirds of the employees.

As of January 1, 1955, there was another broadening of coverage. As of that date the self-employed farm operator came under social security, and our office and every social security office in the country that had anything to do with farmers has been swamped with questions about this farm coverage.

I will just touch on a few of those questions, and perhaps you will raise others in the question and answer period afterwards.

By far the commonest question that we have received is, "Is it compulsory? Can I take it or leave it?" It is compulsory on exactly the same basis as the program has been compulsory to all other covered employees ever since it went into effect. Farmers are treated no differently than anybody else in that respect. If the farmer is still operating his farm he is covered by social security. If he is not operating a farm or if he is not in any other kind of work covered by social security, he is not covered even though he might want to be. It is compulsory in both directions.

Another question of course that most of you know the answer to is, "When do I pay my social security tax? What steps do I need to take?"

Of course the first one is that the farmer should get a social security account number if he does not already have one. If he already has one he should get a duplicate if he has lost it, as most of them probably have. We are very much concerned about the farmers getting social security numbers and you can be a help to us and to the farmer.

In the spring of 1952 when the first self-employment tax returns became due, I think on the afternoon of March 14, 1952, we got about five thousand letters saying, "Please rush me a social security number. I need it tomorrow morning." Of course you cannot open that many letters in half a day, let alone issue the numbers. So we are very anxious that those people, self-employed farmers, who are going to need numbers get their numbers now and not wait until that last minute.

For those of you who will be helping farmers prepare returns, be sure that that number gets on the return. We have had untold numbers of self-employment tax returns where the fellow had a number but they just failed to put the number on the re-

turn. When a return comes in from John Smith without a social security number, we have no way in the world of knowing what John Smith that is. The only way we can keep track is by the numbers.

So if you do help anyone prepare a return, be sure that his number gets on that return. Another question is, "What type of income is covered? What type is not covered?" Well, just roughly, the Act says that operating income, that is, the net profit from the operation of the farm, is covered. The big exclusion in the farm area is rental income. Rental income is not covered, regardless of whether it is received in the form of cash rental or crop shares. By far the largest rental income or most common type of rental income here in Nebraska is crop-share rental, not very much cash.

For a long time we had a great deal of difficulty just determining what income was rental income and what was not. There is a twilight zone in there where it is extremely difficult to make a determination.

Regulations were recently approved, and thus they have the status of administrative law more clearly defining what constitutes rental income.

There are four elements that we consider in deciding whether or not the income is rental income.

First, where the landowner and the share farmer, sometimes called the tenant and sometimes called a partner, regardless of what he is called, the fellow who is doing the work, the landowner and the share farmer, agree that the share farmer will produce a crop or livestock.

Second, on the landowner's farm, for which, third, the landowner will receive a share of the crop or livestock, or a share of the proceeds of the crop or livestock.

And, fourth, where that share, the amount of the share, depends on the amount of crop or livestock produced.

If those four elements are all present, then the regulations provide that the income is considered to be rental income regardless of what the farmer may choose to call the relationship. He can call it a partnership or an employer-employee relationship or whatever he wants. If those four elements are met, the share farmer agreeing to produce a crop on land owned by the farmer, and they share that crop and the amount of the shares depend on the amount of the crop, then it is considered to be rental income and will not be covered.

And another question that has been asked very often is, "Does the farmer have to deduct all his operating expenses? Can he, in order to boost up his net profit for social security purposes, not consider his operating expenses but simply get credit for his total receipts?"

And there again he must deduct all his operating expenses. The Social Security Act defines net income as being the same as it is so defined in the Internal Revenue Code, and of course the Internal Revenue Code defines net income as total receipts or gross income minus operating expenses. The Social Security Act has exactly that same definition.

Another question that has been asked is, "Does the farm wife need a social security number? They file joint income tax returns as a general rule. Does that mean that she also needs a social security number?" No, she does not. The mere fact that a husband and wife file joint returns does not in itself create a partnership, and the only situation in which the wife would need a social security number is if she is actually a valid legal partner in the operation of the farm. And for our purposes we will consider that the farmer himself is the primary operator of the farm. The wife will qualify for social security benefits based on his wage record without needing a social security number herself.

Whenever we get a pair of applications in the same envelope from the same address and it appears that one of them is from the farm wife, we will go ahead and issue the number to the farmer and return her application along with a little note that she will not need a number. However if she is actually working in town or someplace where she needs a number, or if she is in fact a legal partner, we just tell her to send it back to us, if she will, for a number, but normally the wife will not need one.

As a matter of fact there has been a lot of misunderstanding as to computation of benefits. People have gotten the impression, I do not know where, that by splitting the income between the two of them and each one qualifying on his own record they can get larger social security benefits. Well, that is true only providing the entire net profit from the farm is somewhere in the area of fifty-four hundred dollars a year. And if the income is less than that and they split it between the husband and the wife, each one will qualify for benefits only based on half of the income, and the combined benefits in that situation will not be as large as if the farmer had shown the whole income and she qualified on his wage record. So in most cases they are going to injure themselves by splitting the earnings. And I say whether

they are going to injure themselves or not, they should not split the earnings unless the wife is actually a recognized legal partner in the operation of the farm.

I am going to pass on here to some of the other changes. Back in 1951 farm employees were covered only to a very limited extent. For all practical purposes the only farm hands that were covered were those working on a full-time, year-around basis for one employer. Starting this year, 1955, a farm hand is covered if he works long enough so that he is paid cash wages of one hundred dollars or more during the year by one employer. So that is going to cover a lot more farm employees than were covered though 1954. If he goes out and maybe helps with the planting in the spring and earns fifty dollars, goes back and helps with the harvesting in the fall from the employer and earns another fifty dollars, then that employer is required to deduct the two percent social security tax, match it with two percent of his own, and send it in at the end of the year just like the employer in town. The only difference is that the employer in town sends in the tax quarterly while the farmer only sends it in annually.

There has been only one large extension of coverage, and that was the possibility of extension to teachers in the state. Under the 1951 amendments they were barred from coverage because they had their own existing retirement system. In the fall of 1954 the Act was amended to permit them to come under social security co-existent with their existing retirement system, providing a referendum is held in which the majority of the members of the existing system voted for coverage.

The legislature has passed the necessary enabling legislation for them to hold that referendum, and it is presently planned that the referendum will be held sometime in December. If the vote is in favor of social security coverage, the coverage will be effective January 1, 1955.

There were some changes in the computation of benefits, but I am going to pass over those very rapidly. Essentially the method of computation is the same. It is based on the average earnings over the entire period from January 1, 1957, or from January 1, 1951, up to the date the computation is made, with one change.

Under the new amendments we drop out the low four or five years. We simply drop those out of the picture and base it on the remaining high years. The primary reason for dropping or putting in that four or five year drop-out was simply for

the benefit of those new groups who are coming under now for the first time who have not had any coverage during the years '51, '52, '53 and '54. Those drop-outs will permit them to get rid of those zero years in there and thus their average will not be hurt.

So for all practical purposes for these new groups who are coming in now, 1955, for the first time, their benefit will be based on their average earnings from January 1, 1955, up to the date the computation is being made.

Benefits are substantially the same as they were before—benefits to the survivors of a qualified wage-earner who dies, that is, mostly the widow, children under eighteen, or to the widow past sixty-five, or in the case of a single wage-earner benefits to his dependent parents.

The retirement benefits, that is, the benefits to the living retired wage-earner past age sixty-five, benefits to the wage-earner himself, or to herself as the case may be, and to his wife, to his children under eighteen. I did not mention in the survivors' side of it a minute ago that in addition to the monthly survivors benefit there is also a lump sum benefit payment made in every case, either to the surviving spouse or, in the case of a single wage-earner, to the person who has paid his burial expenses.

The retirement test has been changed. I mentioned a moment ago that the benefits were paid to the living and retired wage-earner past sixty-five. The newer benefits define retirement as being earnings of twelve hundred dollars a year or less, or, putting it a little differently, a person can earn up to and including twelve hundred dollars a year and still get the full amount of his social security benefit for all twelve months of the year. If he earns more than twelve hundred dollars, then he is considered only partially retired and his benefits are suspended for some of the months of the year, depending on how much more than twelve hundred dollars he earns.

Well, I might as well get a little technical here, I guess. For each additional eighty dollars of earnings above twelve hundred dollars, he loses one month's benefit, because up to twelve hundred dollars there's no benefits lost; he receives twelve payments. Up to twelve hundred and eighty dollars he'd lose one month's benefit and receive eleven. Up to thirteen sixty he'd lose two and receive ten, and so forth, until he gets up to two thousand eighty dollars a year, and by that time all twelve payments have been suspended.

After age seventy-two there is no retirement test. A person age seventy-two or over can draw the full amount of his benefits for all twelve months of the year, regardless of the amount of his earnings. The only type of earnings that applies to that twelve hundred dollars income or retirement test is earned income. There again, rental income, investment income, income from another retirement system, life insurance proceeds, and so forth have no application to that twelve-hundred-dollar test. It is only if the person keeps on working and earning twelve hundred dollars or more a year that the retirement test is applied.

I might also mention the disability freeze. That's something that was new in 1955. The disability freeze does not provide for the payment of any disability benefits to the person who is under sixty-five. It does provide that if a person is totally and permanently disabled that he can freeze his status as of the date his disability commenced. So that when he does reach sixty-five at some date in the future he will get just as much benefits as though he kept on working, as though he had not become disabled and kept on working at the same average earnings rate that he had up to the time of his disability. It simply protects his status at age sixty-five, but does not provide for any immediate cash benefits.

Now you folks are probably, in connection with that disability freeze, in a position to be of great service to disabled persons, particularly to persons who may have become disabled at some time in the past. We have no way of knowing about them unless somebody contacts and calls them to our attention. Many of them are not aware of this disability freeze. They are not sixty-five yet so they haven't made any application for benefits, or if they did make inquiry at the time they became disabled we simply had to tell them that there was no provision whatever for disability in the Act. That was true probably at the time we talked to them, maybe three or four or five years ago. We had no way of anticipating this change in the law.

Anyhow, they may not know about it and may have failed to file an application for disability freeze. Those applications are fully retroactive from the time they became disabled, providing they get their application on file before July 1, 1957. If they file their application after July 1, 1957, then it is retroactive for not more than one year. So any person you know of who has worked under social security for at least five years, and that is a requirement, worked under social security for at least five years and has become disabled sometime in the past, that person

should be encouraged to contact his nearest social security office to find out whether or not he might be eligible for a disability freeze, and before July 1, 1957.

Most of you are probably aware of the fact that the veterans of World War II or the post-World War II period received social security credit for the period of their military service. The Act just recently extended that: I think that under the old Act that credit expires as of July 1, 1955. It has been extended to April 1, 1956. Why they selected that particular date, I will guess with you. But anyhow, up until April 1, 1956, as the Act is now in effect, veterans still receive credit for social security purposes from the military service.

Well, that's been a pretty fast go-over of what is actually a pretty technical and complicated piece of legislation, and no one knows it better than we do in those social security offices.

Now if you have a few question, I will be glad to answer them as long as time will permit.

VOICE: With a farmer, that man owning the land, the tenant's feeding stock for him, both the landowner and the tenant own the stock, is that an income or is that rent?

JOSEPH SEWELL: I will repeat the question for the benefit of those of you who may not have heard it so you will know what question I am answering here.

Landlord-tenant relationship in which the landlord and tenant own stock jointly, equal share. The tenant is feeding the stock. What is the landlord's income, rental income or profit?

Going back to that regulation that I read a while ago, if the tenant performs substantially all of the services in connection with feeding and caring for that stock and the landlord performs substantially none of the services as we interpret it, that would constitute rental income.

Now if the landlord himself, owning fifty percent of the stock, has fifty percent of the investment, he has fifty percent of the risk of loss. If he actually performs a reasonable amount of services, it would not have to be fifty percent of the services, but if he actually performs a reasonable amount of physical services and participates in the management aspect of it, that is, the determination of when to buy the stock, when to sell it, and who to sell it to and so forth, the kind of stock to buy, I would interpret him as being self-employed, and he would be covered with respect to his share of the net profits from feeding the stock, not from the rest of the farm, just the stock-feeding.

VOICE: Are you able to tell me why it is that the Social Security Administration seems reluctant to deal with lawyers?

JOSEPH SEWELL: Well, I did not know they were reluctant to deal with lawyers.

VOICE: I have had several cases, and invariably I would begin by writing the Social Security Administration, asking them for blanks for a client of mine, usually a widow, whose husband's estate I am probating. They will send the blanks directly to the widow. The widow would then have to come down to my office to have them made out. She does not know how to make them out.

I will make them out and send them to your office with a letter from my office, and if something is needed they will turn around again and write the widow directly. They will never correspond with me.

On one occasion that I can remember I sent a widow down to the Grand Island office and told her to make application for social security benefits. She went down there, and for some reason, though I was thoroughly convinced in my own mind that she had some benefits coming, they questioned her down there and told her, "No, you do not have any benefits down there because your husband was not covered." I knew at the time that her husband failed to file a tax report because he was convinced that he did not make enough money. I checked into her income and was in the process of sending in an amended return to Lincoln, but they told the lady that because her husband was not covered there was no sense in her signing an application.

Now I did not know that until approximately a year later when I went down there, and then the question came up as to when her benefits would start; were they to start the day I sent her down there to sign the application or the date she actually signed the application, a year later?

Now if the social security office had seen fit to talk to me, we could have alleviated a lot of that.

JOSEPH SEWELL: Of course in the territory served by the Lincoln office, and I think in most service offices, we have no reluctance whatever to deal with attorneys.

Of course we are in a rather difficult position there. For instance, if some widow comes in and she does not say she has been sent in by an attorney, we will question her: "Did your hus-

band work in the kind of employment covered by social security, or the kind of self-employment?"

"Yes, but he never earned enough to file a tax return. His income was always less than four hundred dollars a year, and he never filed any tax returns." And we will probably do the same thing as the Grand Island office, and we will say if he was not covered, there is no sense in filing an application. And unless she tells us her whole story, that she has already gone to her attorney and he is in the process of preparing that return, and if she does not tell us that, we would have no way of knowing that.

And as I say, it depends on the information that is given to the field office at the time the application is made. We are not in the business of making meaningless claims. If the person comes in and says, "My husband never worked under social security," why, it seems futile to make application for benefits that are not going to be paid.

And if she makes an application and says he worked under social security benefits, we would certainly try to get the additional information.

Now when you write a letter to the social security office and they answer directly to the claimant without going back through your office, I will say I do not think it should be done. In my own office, I hope it is never done that way. Any time we get an inquiry from any attorney, we will answer the claimant through the attorney.

VOICE: Well, it is very habitual at the Grand Island office.

VOICE: Omaha office too.

JOSEPH SEWELL: I say, if we are doing it, it is something that we should straighten out.

VOICE: Well, I received the impression that the social security office thinks that lawyers are preying on these widows and charging them huge amounts to get social security benefits. Actually I do not think I have ever charged a client of mine, and I do a lot of work for them in obtaining social security reports. If I could get a little cooperation out of them, I could get it done a lot quicker and a lot sooner.

JOSEPH SEWELL: Where are you from?

VOICE: I am from Burwell, in the Grand Island area.

JOSEPH SEWELL: Sometime when you are down there in the Grand Island area, why don't you stop in and visit with the manager in the Grand Island office about that problem.

VOICE: It does not make any difference.

JOSEPH SEWELL: Of course I have no control. We serve our territory and they serve theirs. We should all be doing it on the same basis, but apparently we are not, and, I say, we should be, and I hope we are not doing that in our territory. At least we will do something about it if it is called to my attention. Thank you.

HALE MCCOWN: I am sorry to shut off your questions here so rapidly, but we are forced by the schedule this afternoon to vacate for the House of Delegates later on.

There will be a five-minute recess right now, and I would like to have you all back promptly after five minutes so that we can go ahead.

Mr. Sewell, I'm sure, will be glad to answer any individual questions that you may have during this five minutes.

(Short recess at 2:15 o'clock p. m.)

HALE MCCOWN: Gentlemen, if you will come to order we will go ahead with the program for the afternoon, and which is as you note from your program notes the panel discussion of developments under the 1954 Revenue Code.

First, may I call your attention to the fact that the regular 13th annual Tax Institute will be held again in December commencing the week of December 12th, starting Monday of that week. It will be held as previously in two-day sessions, commencing at Scottsbluff the first two days, Kearney the second two, and Omaha the last two. Laurens Williams and Bob Moodie will both be with us again on that clinic. I am sure that all of you will want to be here again for the regular December clinic.

The panel today, as I think probably most of you know from the program, Mr. Mason on my left, Bob Denney to my right, Jack North, the next gentleman over, and on the far right, Leo Eisenstatt.

Now we have simply selected certain individual things and individual topics which we thought might be of interest to all of you. We are not going to attempt to follow any set routine or any proposal or any specific set of subjects. It will be moving from one to the other of the fellows on this panel.

At the close there will be time for questions. However if something is not clear as we go along, please feel perfectly free to ask for a clarification at that time. We have to be out by

not later than 4:15, if possible, and we will try and leave possibly fifteen or twenty minutes at the close for a question and answer period.

First, I think that there has been considerable discussion about provisions with respect to dependents on the new '54 code. There have been some additional matters come out on that.

Bob Denney, would you comment on the specific provisions with respect to dependents under the '54 code?

ROBERT DENNEY: Yes, I will, Hale. I want to say this, that there have been very few regulations issued with reference to dependency, and this paper will primarily be concerned with a review of the changes in the law with reference to dependents from the '54 code and the '39 code. I would like to call to your attention that effective for tax years beginning after 1953 and after, and ending after August 16, 1954, the internal revenue code of 1954 created several special classes of dependents for whom under certain conditions a taxpayer was entitled to a six hundred dollar dependency deduction.

These included children, stepchildren and adopted children under nineteen year of age or attending school. That seemed to be one of the most important.

And then, secondly, other individuals, including non-relatives whose principal place of abode was the taxpayer's home. And, third, mentally or physically disabled cousins receiving institutional care.

Now with reference to that first class of dependents, children under nineteen and students, the income test, that is, the dependent's income must be less than six hundred dollars, is no longer a prerequisite to qualifying for a dependent in these two situations, where the child is under nineteen or is attending school five months or more according to the taxpayer's calendar year, is a full-time student at a regular school or college, or is pursuing full-time or on-the-farm training under the supervision of an educational institution or state agency.

But we must keep in mind that the taxpayer must have contributed over one-half of the child's support. An example of this: The total cost of supporting a son who is under nineteen years of age or is attending school is twenty-four hundred dollars. The son earns eleven hundred dollars by his own efforts, which he applies to his own support. The father contributes thirteen hundred dollars, and of course the father's entitled to the exemption.

And in determining with reference to the child in school, if he earns a scholarship of five or six hundred dollars, Section 152 (d) of the new code provides that a scholarship does not count in figuring whether a parent contributed more than half the child's support. A warning that some writers have given on these tax matters: Attendance at night school while holding a job is not considered full-time attendance.

Another observation. Enrollment for part of a month constitutes enrollment for the full month. February through part of June will qualify.

Now take the second one, other individuals including non-relatives. You must assume the support and earnings tests are met and that the taxpayer is entitled to exemption for any individual making the taxpayer's home his principal place of abode for the entire taxable year.

Temporary absence due to special circumstances will not disqualify, such as attendance at a boarding school or college or hospitalization. This removes the inequities of the prior law, because now you can claim the dependency of a foster child or a child awaiting adoption. And of course the cousins. That would not happen often, but, assuming that the support and earnings tests are met, a cousin of taxpayer can qualify as a dependent if he receives institutional care by reason of mental or physical disability, and before receiving such care he or she was a member of taxpayer's household.

Another important point under this dependency which I know comes to all of you is the multiple support of dependents, sometimes called the multiple-support problem.

It often happens that two or more taxpayers contribute jointly to the support of a close relative or other person who could be a dependent of any one of them. Who can claim the exemption? If one contributes more than half the support, he and he alone can claim the exemption. If no one contributes more than half the support and they can all cooperate and agree, then one of them can claim the exemption if he has contributed more than ten percent of the dependent's support, and each other person who has contributed to that support more than ten percent files a written declaration as prescribed by the commissioner that he will not claim the support.

For example, two sons contribute to their mother's support, each son five hundred dollars. The mother spends seven hundred dollars of her capital. Her income is less than six hundred dol-

lars. Either son may claim, provided the other son files a written waiver. Or A, B, C and D contribute thirty, twenty, twenty-nine and twenty-one percent respectively to support of their mother. Each contributes over ten percent. Any one could claim dependency if all others execute a Form 2120 or a comparable instrument. But it would not be enough, for example, for either A or D to claim the credit and the other execute the waiver, even though between them they contribute over fifty percent of their mother's support.

Now about the only other regulation that I'm aware of right now with reference to individuals is this rounding-off regulation with reference to the figuring of the tax. After you have added up the gross income and subtracted your deductions, it's my understanding that under the new regulation you can take the nearest dollar—if it's below fifty cents drop down to the next dollar, if above fifty cents to the higher dollar—and when you actually arrive at the tax you can drop the cents off the tax itself, and of course when the government pays a refund they can ignore the cents when they make the refund.

HALE MCCOWN: As I recall too that election is made by putting on your return. You should probably check that regulation.

I would like to have Jack North, if he will, cover the changes of the '54 code as made in the taxation of corporate acquisition and disposition of property.

JOHN NORTH: Well, Hale, the general problem in connection with corporations, with corporation sale or corporate acquisitions of property, is simply this: A corporation may hold some property that it wants to sell, and the shareholders want to know whether or not the corporation will recognize income upon sale and whether that income when it is distributed to them will be taxable to them.

Under the 1939 code the best way to make savings was to have the corporation distribute the assets in liquidation and then let the shareholders sell. That way they would incur a tax only at the shareholder level and not a double tax, which would occur when the corporation would sell, since we have a tax on the corporate income and then when a distribution is made to the shareholder he pays a second tax.

Naturally corporate shareholders decided that when they would sell property they would use the first method, and this presented a problem which was decided in Court Holding, and that is, where a corporation solicits the sale and then prior to

consummation of the sale distributes the corporate assets to the shareholders, that the commissioner will be allowed to look through the transaction and treat it as if the corporation made the sale, tax the corporation on the income from the sale, and turn around and tax the shareholders when the distribution is made.

So the shareholders then decided that the smart thing to do would be to have the acquiring corporation just purchase their stock, and in that way they would only recognize a capital gain upon the sale of their stock and they'd get the same percentage of the selling price that they would have had by reason of the distribution and liquidation.

Now this presents the problem on the other side of the table; that is, whether or not the corporation that is going to acquire the property wants to purchase personally all of the shares of stock of the owning corporation, or whether that corporation wants to purchase merely the asset.

Now a simple illustration would be a corporation that owns an apartment building and wants to acquire another apartment building. Should they buy all the stock of another corporation owning the building, or should they buy outright from that corporation the apartment building?

If the corporation apartment building is worth seventy-five thousand dollars, that will be the purchase price whether they buy the building outright or whether they buy the stock. Now the transfer of the corporation that owns the apartment building may have a base of fifty thousand dollars, so the acquiring corporation will have this problem: If they invest seventy-five thousand dollars in the stock they acquire the apartment building, but they'll acquire the apartment building at the basis that it has in the hands of the transferor corporation, that is, at the lower basis of fifty thousand dollars.

Now the commissioner, when the basis would be stepped up, the commissioner would assert you should look through the transaction and treat the acquiring corporation as merely purchasing the building, just actually reverse of the situation in *Commission vs. Court Holding*.

And in the Kimball-Diamond case, the Supreme Court, the Circuit Court of Appeals, went along with the commissioner, that is, said that you could look through the step transaction and where the acquiring corporation pays fifty thousand dollars for the asset and seventy-five thousand dollars for the stock, you could look through the transaction and say that that's the purchasing

price of the asset rather than the purchasing price of the stock, and they'll take that as a basis of the asset.

Now the 1954 code makes some rather significant changes in application of *Commission vs. Court Holding* and the Kimball-Diamond case. The effects of the Court Holding case are eliminated; that is, if a corporation decides to sell property and makes that sale as a part of liquidation, it doesn't make any difference whether the corporation itself or the shareholders consume the sale. There will only be a tax levy at the corporate level.

Now it is important to remember that, because when you're on one side of the transaction or the other you can remember that the buyer should be the one to determine the mode of the transfer because the buyer is the only one that will be adversely affected tax-wise by the manner which the sale is made, because under the 1954 Act, whether the shareholders make the sale or the corporation makes the sale, the tax consequences will be the same—that is, if it is consummated within the year period.

Now as to the Kimball-Diamond case, the 1954 code presents this legislative clarification. If at least fifty percent of the acquired corporation's stock is purchased within a twelve-month period and if the corporation is liquidated within two years thereafter, the basis of the assets received should not be the transferor's basis but the price paid for the stock. In other words, saying that the purchasing corporation will take as its basis the amount that it pays for the stock and not the basis that the transferor had.

Now many of you may have this problem in mind. Why is it that the transferee corporation just could not liquidate the transferor corporation and then take the increased basis upon the recognition of its being in liquidation?

The reason for this is that when a corporation liquidated a subsidiary that under the old Act and under the new with slight modifications, there was no gain or loss, and the corporation that did the liquidating merely took the transferor's basis, that is, the first corporation's basis.

The enactment as this automatic Kimball-Diamond rule posed this problem. The Kimball-Diamond decision was favorable to the government; that is, the taxpayer's basis, the acquiring corporation's basis was stepped down because he had paid less for the stock than the transferor's basis. The commissioner after the Kimball-Diamond rule tried to assert that it only applied where the taxpayer's basis was stepped down; that it, where he paid less for the stock than an amount equal to the transferor's basis.

But the problem that arises under the 1954 Act is whether that is exclusive; that is, supposing the taxpayer decides not to comply with the provision, that is, not to complete the liquidation within a two-year period as required. Then naturally if the amount paid for the stock is less than the transferor's basis, the acquiring corporation would not want to require liquidation, and the question is, can the commissioner come back then and say that he will look at it as a stepped-down transaction and treat it as a legal transaction?

Now I have covered that hurriedly, but I have given you some idea of both aspects under the elimination of the Court Holding rule and the legislative adoption of the Kimball-Diamond rule.

HALE MCCOWN: Thank you, Jack.

There have been a number of changes, of course, in the state gift-tax field. So far the regulations are not yet out.

John, would you cover briefly what we ought to be looking for in those regulations when they come out.

JOHN C. MASON: There are a few areas in the gift and estate tax sections of the new code in which there may be some room for difference of interpretation of the Act. I will attempt to go through just a few of those situations to call your attention to what the Act might say and so that we may, when the regulations are issued, examine them and see just what position the Treasury Department has taken.

The most important change in the estate tax law under the 1954 code was the elimination of the premium payment test in determining whether proceeds of a life insurance policy are taxable to the estate of the insured at his death.

Section 204.2 provides specifically that the value of the gross estate shall include the value of all the property to the extent of the amount receivable by the executor—for example, as insurance under policies on the life of the decedent—and also to the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidence of ownership, exercised alone or in conjunction with any other person.

The Section then goes on to define incident of ownership, and including a reversionary interest, whether arising by the express terms of the policy or other instrument or by operation of the law. Only if the value of the reversionary interest, however, exceeded five percent of the value of the policy immediately before the death of the decedent.

Now the term "reversionary interest" is further specifically defined to include the possibility that the policy or its proceeds may return to the decedent or estate or may be subject to a power of disposition by him.

The situation which usually comes to mind is the method of taking advantage of this section of the code, is to have the insured make gifts of his insurance policies to his wife or children or to have new policies taken out on the life of the insured by the wife or children. By reason of the elimination of this premium payment test, the fact alone that the insured paid the premiums would not seem to make the policies taxable in his estate if he did not possess any of the incidence of ownership of the policy at the time of his death.

However, court questions arise at the interpretation of this section with respect to what is an incident of ownership, and that is the area in which you will be interested in seeing the position which may be adopted by the Treasury Department. For example, if a reversionary interest includes the possibility that the policy or its proceeds may return to the decedent or his estate or be subject to a power of disposition by him, does the possibility that the insured may inherit from his wife who has been made the owner of the policy, amount to a reversionary interest?

Tax lawyers generally, I have found by reading articles on the subject, are quite interested in seeing what the regulations may provide in connection with that particular problem.

There is also a question, a very incidental question perhaps, as to whether it is possible that insurance policy in which a fractional interest may be owned by the decedent at his death would be taxable entirely to his estate or only fractionally to the extent that he had the fractional interest which might occur in some situations.

There has been a change in the gift tax part of the law with respect to gifts to minors. As you recall, if a gift is not a future interest, then the gift is subject to the annual three thousand dollar exclusion in the donor's determination of gift taxes for the year.

However there was a question under the old law as to whether gifts in trust, for example, were future interests or not future interests when the gifts were for children or the beneficiaries were children.

Specific provisions have been made in the new code defining

what interests will qualify and what interests will not qualify for, as future interests, in that respect; and generally, if the gift gives a present interest so that the principal and income can be used by the child before the child becomes twenty-one, and if the child should die before reaching twenty-one, if the proceeds would be available to the child's estate or subject to a power of appointment by the child, then (I'm speaking generally now) the policy would qualify for the annual exclusion—I don't mean the policy—the gift would qualify and it would not be a future interest.

In interpreting this the statute says that the child must be entitled to have the property go to his estate if he should die before twenty-one, or the property should be subject to a power of appointment. Now there is the question in some people's minds as to whether that's used in the disjunctive sense, that "or" that I mentioned, so that a power of appointment alone would qualify it or giving the property to the child's estate alone would qualify it without the power of appointment, and we'll see what the Treasury rules when the regulations are issued.

In the use of marital deduction under state tax law, there have been a couple of changes. For example, primarily, I understand, for the benefit of this section of the country, or at least agricultural areas of the country, it is now possible to qualify a gift of a life estate for the marital deduction so that a husband can leave a life interest in a property to his widow if he also leaves her the requisite power of appointment to appoint the property.

Formerly, under the old 1948 amendments life estate did not qualify for the marital deduction. If you are contemplating using a life estate in this manner you may be interested in a caution which might be in order, and that is to be sure that you do not restrict her use of the income.

For example, if she, by reason of the language you use, will be required to use some of the income in a way which would be interpreted as an investment in the principal—for example, some type of a replacement of a portion of the property, or something of that sort—it may be a restriction on income which would disqualify the gift for the marital deduction because in order to qualify it, it has to give her the entire right to the income from the property.

And likewise if you want to give her a power of appointment, be sure that the power of appointment is not too restrictive. For example, a power for her to use the property or sell the property if she was in need during her life would not be sufficient to

qualify the gift for the marital deduction. One other point that I might mention is that under the marital deduction provisions now it is possible theoretically to create a trust in which a portion of the interest is granted to the wife, a portion of the income, and the power of appointment over a portion of the principal of the property, with the other portion of the trust being for the benefit of other people, and the portion which is for the benefit of the wife, if it beats the terms of the statute, will qualify for the marital deduction.

In this connection there is some difference of opinion which may or may not be resolved by the regulations, as to whether the portion of the income in which she is given an interest has to be the same portion as the portion of the principal over which she has the power of appointment. And to take a conservative approach to it you would want to make those portions the same.

There is also a question whether in a trust of that type it is necessary to have a portion of the trust segregated or set aside in the administration of the trust for the benefit of the wife, or whether undivided interests are adequate, and again to play it safe until it may be further clarified by the regulations, it probably would be well to frame such a marital deduction trust in such a way that it would really constitute two separate trusts although all under the terms of one instrument.

Those are a few of the things that we might look out for in the regulations when issued.

HALE McCOWN: Thanks, John.

There have been a number of changes with respect to partnerships. Leo, would you cover the ones with particular reference to the basis of contributed property to the partnership.

LEO EISENSTATT: Yes, Hale.

I think I ought to preface my remarks by an admonition to all lawyers that the field of partnership tax law is in my opinion not so simple, and the new code did a lot to clarify conflicting provisions. But the field itself is not too simple and requires a moderate amount of study. The one basic fact that you should keep in mind with respect to whatever remarks I make is that the new code considers the partnership as an entity, that is, something separate and distinct from the partners, and that thread or idea will run through almost all of my remarks.

Now to get to the subject of contributed property. I think it can be best summarized by the statute itself that says that

property contributed by a partnership to the partnership in exchange for an interest in the partnership takes the same basis as it has in hand. For example, if A and B form a partnership and A contributes one thousand dollars for fifty percent interest and B contributes a piece of property which has a fair market value of one thousand dollars for a partnership interest, the cash, of course, on the books of the partnership takes the basis of one thousand dollars.

The property, machinery or real estate or whatever it might be remains the same so far as the basis is concerned on the books of the partnership. Supposing in this case that the partnership had a basis of two hundred dollars. The partnership would pick up that property at a basis of two hundred dollars, and the depreciation, capital gains treatment and so forth would follow from that fact. And that might lead to some inequitable results between the two partners.

For example, suppose that soon after this partnership was formed the partners sold that asset for one thousand dollars or its fair market value. The partnership would have a capital gain. Assume it is a capital asset of eight hundred dollars. If the partnership agreement is silent on the matter, the division of income and losses in the partnership agreement would control in its division of this particular gain. So partner A would have to pick up in his own individual return four hundred dollars of capital gain and partner B also. And that is in most cases to A in equity, because partner A has contributed a thousand dollars in something that he thought he was getting a fifty percent interest in, and theoretically within fifteen minutes after the partnership is formed, he has a fifty percent interest and a four hundred dollar capital gain that he has to pay tax on.

A similar thing is true, you might say, that in putting in this thousand dollars into the partnership, the partner A bought a fifty percent interest in an asset that he thought was worth a thousand dollars, and it ends up that from the tax standpoint he bought one that was only worth two hundred dollars, and so when it comes to depreciation, instead of his being able to depreciate the asset on the basis of a thousand, it has to be cut down to a fourth of that or a fifth of that, twenty percent.

Now this result can be varied by the partners by specific provision in the partnership agreement. In order to protect the interests of the partner who contributed the thousand dollars and to prevent an inequity to him, the partnership agreement could provide that in the event of the sale of that particular asset the

capital gain attributable thereto would be taxed solely to him, and you can word that so as to try to take into account future developments, because the partnership, fair market value, can change after the partnership is formed, and you could preserve it by language to the effect that the differences between the fair market value and the basis at the time it was contributed, just that portion would be charged to that partner.

Now to some extent you can, with respect to depreciation, protect partner A who is losing, in a sense, some of the depreciation that he ordinarily would have been entitled to if the partnership had gone out and bought that piece of equipment for a thousand dollars. The partnership agreement can provide that all depreciation with respect to the contributed property can be taken on the return of the non-contributing partner, so that if there is a full year life remaining, a partner A who contributed a thousand dollars could pick up fifty dollars depreciation, and partner B nothing.

Now the code specifically provides for this effect. When you are attempting to take into account the difference between the basis and the fair market value, that is specifically covered in the statute by specific wording and also in the regulations, and if you have these provisions in a partnership agreement which attempt to perform other acts than to pick up the difference between the base of the fair market value, you have got to be careful that the commissioner or bureau will not describe the purpose of evading or avoiding tax. If the only purpose is to evade or avoid tax according to the proposed regulation, of course the attempted redistribution will be eliminated and the tax incidence of, say, depreciation or gain, will be affixed according to the partnership gains and losses.

I might conclude this particular subject by saying that my discourse has been rather sketchy in that it has only attempted to hit the high points of this particular problem, and it is something that should be kept in mind when you are drafting new agreements or in renewing existing agreements that your clients may presently have because you can make amendments to take advantage of the benefits that the new code allows.

HALE McCOWN: Thanks, Leo.

There has been a lot of discussion about the new depreciation provisions of the code. I thought it appropriate to repeat those again briefly. Bob, will you cover the depreciation provisions?

ROBERT DENNEY: I suppose many of you ladies and gentle-

men have had the same problem that we have down in my section of the country. The farmer has read in his farm periodicals about new methods of depreciation, and he comes in to talk to you about why have you not done something to take advantage of this tax saving.

That is why we decided to briefly review the new methods set forth in the '54 code. Of course, the '54 code re-enacts the straight line method of depreciation, and then it adds what is known as the declining balance method, the sum of the year's digit method, and any other consistent followed methods which do not during the first full two-thirds of the useful life accumulate a depreciation reserve greater than would be accumulated on the declining balance method at such time.

We can see from those methods that are set forth that the useful life of a certain article has not been changed at all by the '54 code, but the manner in which such apportionment shall be made has been very substantially affected by the new code, and in looking at the declining balance method we can see that there are certain characteristics which I think are interesting and which can be used to describe to the client how it differs from the straight line.

It uses a fifty percent rate of depreciation, not exceeding two hundred percent of the straight line method. It exceeds the straight line rate but it is applied each year to the remaining balance of cost rather than the original capital sum.

The annual allowances decline each year. There will always be some depreciation left if you stick to that method, concentration of cost recovery in early years of the life of the asset; it may be used in group accounting as well as item accounting, and you may change back to the straight line method without the commissioner's approval.

It was interesting to me to compare that with the sum of the year's digit method. It resembles the straight line method in that the rate is applied each year to the original cost. The rate changes each year and produces a lot of depreciation in the early years.

Now just for example I took an item of a life for five years having a cost of one hundred fifty dollars and no estimated salvage value. Under the declining balance method of course your rate of depreciation for the first year would be sixty dollars, straight line thirty, and the sum of the year's digit's method which would be, your numerator is the remaining life, your de-

nominator of course is the addition of the life of the article, such as fifteen, if you have a five year life. You would have fifty dollars the first year. You go on down; when you get through with the declining balance method, you have \$11.66 left over; onto the year's of the digit, of course you depreciate it out, you simply take the straight line method, you depreciate it out completely.

Any other consistent method provides the use of miscellaneous other reducing changed methods, most of which are variations of the declining balance method. The new methods referred to are not available to intangible property, property having a useful life of less than three years, property acquired before January 1, 1954, used property, new or reconstruction completed prior to January 1, 1954.

Section 167 (d) of the new code provides that the taxpayer and the government may make a written agreement specifically dealing with the useful life and rate of depreciation of any property. And also it should be kept in mind the taxpayer can use a different method at the same time for different assets or a group of assets.

HALE MCCOWN: Thanks, Bob.

I think that we might also keep in mind that under the declining balance method you do not have to use any salvage value in making your computation.

Now also a long time ago they finally plugged this one, between husband and wife. A man owned a piece of property and it depreciated in value, so he sold it to his wife and reported a capital gain and his wife started to depreciate it on a new basis.

In the new code there are provisions with respect to distribution of depreciated property so far as corporations are concerned.

Jack, will you cover those, please?

JOHN NORTH: Yes, Hale.

I think that everyone understands that there was no basic change in the taxation of corporate distributions other than the annual exclusion of fifty dollars and four percent credit; that is, corporate distributions are taxed to the extent that the corporation has earnings of profits, just as we have a corporation using a cash dividend, that cash dividend would be a tax to the extent that there are any profits.

But you have a peculiar problem when the corporation distributes depreciated property, because on the one hand we have

a code provision which states that property distribution will be treated as a dividend to the extent of the fair market value.

Suppose we have a corporation which has depreciated property that is worth one hundred fifty dollars, which could be an air-conditioner or anything else. Supposing that the corporation's basis for that property was a hundred dollars. If the corporation sold the property it would recognize the fifty dollar gain. Suppose that the corporation has earnings and profits of one hundred and twenty dollars. The corporation, instead of selling the assets and distributing the fifty dollar profit or the one hundred fifty dollars, distributes the asset.

Now on the one hand the commissioner will contend that the taxpayer has a dividend to the extent of one hundred and fifty dollars, the fair market value of the property distributed. The taxpayer on the other hand will contend, "No, I have a dividend only to the extent of one hundred and twenty dollars, the corporate accumulated earnings and profits."

The Tax Court under the 1939 code agreed with the taxpayer. The Tax Court agreed that only one hundred twenty dollars would be taxable, and that was the Godley case. The House report indicates that the language of the section relating to this particular problem in 1939 code need not be changed because they adequately expressed existing law, and the House was of the opinion that existing law should be continued; that is, when there is a distribution of depreciated property the corporate earnings should not be increased by the amount of depreciation and thereby increasing the dividend, but the dividend should be limited to the corporate earnings and profits at the time of the distribution.

And using the precise example that I have stated, the House report stated that it would be taxable only to the extent of one hundred and twenty dollars.

Now after the House bill had been passed and sent to the Senate, the Godley case was appealed and the Circuit Court of Appeals said, "No, when you distribute depreciated property the taxpayer has a dividend to the extent of the fair market value of the property just as long as there are earnings sufficient to cover the basis."

Now the reasoning is simple, that when they distributed that property having a fair market value of a hundred dollars, they actually have a gain of fifty dollars, and that fifty dollars should be added to their corporate earnings, thereby making the corpo-

rate earnings one hundred and seventy dollars and determining the total amount of the tax to be the one hundred fifty dollars worth of property would be taxable in full.

Now the Godley case in the Third Circuit was followed by the Hirshon case in the Second Circuit. Both of these cases decided that the taxpayer should be taxed on the distribution as a taxable dividend to the full extent of one hundred fifty dollars even though the corporation has only one hundred twenty dollars earnings prior to the distribution.

Now there is a rather interesting point in connection with this problem because the House, or the Senate, rather, did not change the provisions. The Senate Finance Committee made a comment on the House's comment to this effect. The House report—and this is what it contained in the Senate Finance Committee report—the House report indicated that this rule clarified existing law. Subsequent to the date of the House report two court decisions have taken a position to the contrary, and the Finance Committee cited the Hirshon and Godley cases.

“In view of this decision your committee does not intend any implication from the enactment of such 312 (a) with respect to the effects of a distribution of property on earnings and profits and on shareholders under the 1939 Code.”

Now it is interesting that the Senate Finance Committee made a comment in connection with the effect to be given in the 1939 code in passing the 1954 code, because this query immediately comes up: Do they intend any implication in connection with the 1954 code? Do they intend that the House's construction of the bill as indicated in the House committee's comments then to control, or do the Hirshon and Godley cases as determined by the Circuit Court of Appeals control?

The commissioner in his proposed regulations has taken the position that was taken by the Second and Third Circuits; that is, that the entire amount of the one hundred and fifty dollars fair market value in property is taxable even though prior to the distribution there was only one hundred twenty dollars in corporate earnings in profit.

Now just last week a rather interesting development occurred. The same situation arose in the Tax Court of the United States, and the Tax Court openly refused to follow the Hirshon and Godley cases. After Godley had been reversed by the Third Circuit and the theory of reversal followed by the Second Circuit, the Tax Court turns right around now and follows the same rule

that is originally followed; that is, that the distribution of depreciated property would be taxable only to the extent of earnings and profits at the time of the distribution.

So here we are left with this rather interesting problem controlling decision. Now this decision of the Tax Court was an interpretation of the 1939 Act, but we have this problem: In interpreting the 1954 Act, should we follow the comment of the House committee and the theory that's adopted by the Tax Court, or should we follow the commissioner's regulation and the position taken by the Second and Third Circuits? I think there will probably be clarifying litigation.

HALE MCCOWN: Thanks, Jack.

A number of us have had the decision from time to time, where is it best to take the deduction for attorney's fees, and so forth, in an estate? One of the factors to keep in mind in deciding is whether to take them on the income tax return of the estate or to take them on the estate tax return.

John, would you cover that, please?

JOHN C. MASON: I think that it would be well just to point out the tax deductions which are available, either for estate tax or income tax or both, in the administration of an estate, and then point out for you briefly what some of the factors are that are to be taken into consideration.

There are three general sections or groups of sections of the code which pertain to this problem, and of course we have the estate tax sections which impose an estate tax and grant certain deductions in computing the estate tax.

These deductions, as you are all familiar, administration expenses, claims, funeral expenses, mortgages against property which is included at full value in the gross estate. There are two other sections then in the income tax parts of the code which pertain to income taxation and deductions in computing income tax in connection with estates.

Section 641 and the sections immediately following generally provide that executors are to be, and estates are to be taxed in the same manner as individuals are taxed, except where specifically changed by the sections that are grouped there.

One of the limitations imposed by Section 642 is that the income tax deductions cannot be taken if they are being taken as a state tax deduction. Therefore in computing the income and

deductions of an estate for income that is accumulated or accrued or paid during the course of administration, you have your choice of taking either an income tax deduction or an estate tax deduction, but not both.

Then Section 691 and the sections following it deal with income in respect of a decedent. Now that, generally speaking, means income items which if paid prior to the decedent's death would have been taxable to him. They have the character of income, and when they are paid during the course of administration they are still treated as income.

And by the same token deductions which have that general character are also deductible.

Now there is no provision in this part of the code that deductions cannot be taken both for income and estate tax purposes. So when you are dealing in income with respect to decedent, and if it also qualifies as an estate tax deduction, you can have the double deduction.

Just a brief check list to illustrate the point. Items which are deductible for estate tax only, which would include, for example, funeral expenses, of course would not be deductible for any income tax purposes. Payment of unpaid mortgages and other indebtedness, payment of claims which represent personal obligations of the decedent and would not be in the nature of business sense obligations, such as claims for expenses and so forth.

In the field of deductions available only for income tax, there would of course be any normal income tax deductible item which did not qualify as an estate tax deduction. In the field, for example, of administration expenses, if you hold an estate open for an unduly long time so that apparently the purpose of holding it open is to manage and conserve the property and produce income rather than merely to accomplish the usual purpose of turning the property over to the heirs, then you may get into a situation where it is not a normal administration expense and would not be deductible for estate tax purposes.

I am referring to such things, for example, as executor's and attorney's fees, but it would be deductible in computing the estate's income taxes.

Items which would be deductible for both income and estate taxes would include such things as interest accrued at date of death but unpaid until after death, property taxes which were

accrued up to the date of death or prior to the date of death but not paid until during the administration of the estate, and expenses which would have been deductible as trade and business expenses, non-trade or non-business expenses which were accrued up to the date of death.

The general principles which are involved here, and this relates to income in respect of a decedent, are limited in this fashion. It must be a situation where the decedent was liable for the item at the time of his death, the liability having been founded on a promise or agreement which was supported by full and adequate consideration. It must be an item which was not properly allowable after deductions in the final income tax return of the decedent or in any prior year of the decedent, and it must be an item which is actually paid during the course of administration.

Now in the area of deductions which are allowable on an alternative basis either as income tax or as estate tax deductions, we include basically administration expenses which would include such items as the following: court costs, filing fees, certification and notarial fees, appraiser's fees, proper traveling expenses, executor's expenses, attorney's fees, accountant's fees, storage and maintenance expense and selling expense, preparing of income and state inheritance tax returns, tax litigation, cost of operating and maintaining real estate, and the litigation respecting the properties or the tax on the properties.

In addition to these items which would be deductible in the alternative either as income or estate tax deductions, any casualty losses incurred during the course of administration to the extent not compensated by insurance would be deductible, one or the other.

It is interesting to note that the minimum income tax rate on taxable income of the estate is twenty percent. This percentage rate is not in the estate tax brackets until the taxable estate is forty thousand dollars after allowing all deductions, including the marital deduction and specific exemption.

Thus in any estate where there would be no estate tax or where the taxable estate is not over forty thousand dollars for estate tax purposes, it would seem that income tax deductions should be taken at least to the extent that there was taxable income. The estate tax bracket does not exceed thirty-seven percent until the taxable estate reaches one million dollars, which for practical purposes probably limits our discussion here.

Yet the income tax bracket reaches thirty-eight percent when

the taxable income reaches ten thousand dollars, an amount which would not be unusual in many of the estates which are probated in other states.

It is therefore probably indicated that the attorneys should check carefully into the possibility of income tax deductions in either foreign field.

One other point which was satisfactorily answered by Treasury rulings under the '39 code and which will no doubt be the same under the '54 code is that administration expenses, for example, may be split between estate tax and income tax, from a deductibility standpoint, so that part of an item may be claimed for income tax deduction and part for estate tax deduction, and some items may be claimed for income tax deduction while others may be claimed for estate tax deduction. This gives the executor greater flexibility in minimizing taxes.

There's one other way in which the executor has a certain amount of flexibility, and that is, that it was possible, or was possible under the old code and apparently is still, for you to claim it both ways. You can file an estate tax return and claim the deduction or file an income tax return and claim the deduction, and until one or the other of the returns is audited, you may continue reinspecting the situation, so that when the first return is audited you may at that time make your choice. You have no limitation on your right to take the estate tax deduction, but your right to take the income tax deduction is limited in this way: If you have been allowed the estate tax deduction or have claimed it, if you have been allowed the estate tax deduction, then you could not take the income tax deduction, so until the estate tax deduction is actually allowed, you apparently would have the right to avoid making up your mind, which may give a little opportunity for hindsight in some situations.

HARRY B. COHEN: Mr. Chairman, do you not have to file an election along with your income tax return that you are not taking it on your estate taxes?

JOHN C. MASON: The answer to that, I believe, is that under the Section 642, which allows the income tax deduction, but with the limitation, it is provided that the deductions which are allowable under the estate tax, under 2053 and 2054, in computing the taxes of the estate shall not be allowed a deduction in computing the taxable income of the estate unless there is filed within the time and in the manner and form prescribed by Secretary of the Treasury a statement that the amounts have not been allowed

as deductions under those sections, and a waiver of the right to have such amounts allowed as tax deductions under those sections.

Now the filing of that waiver does not have to be made at the same time that the income tax return is filed, but it can be filed, at least prior to the 1954 code sections and rulings it could be filed, at the time the income tax return is being audited, for example, which gives you an opportunity to delay making the decision.

It is possible that regulations could be issued which would require the filing of that at the time the income tax return is filed, but at no later time. If such was the nature of the regulations when they are to be issued then you would not be able to avoid making up your mind, but the same situation existed before, and the Treasury Department did not require the making of the election at the time the income tax return was filed.

Therefore if they follow the same procedure as they did before, I think it will still be possible to avoid making the decision until a later time.

HALE MCCOWN: Thanks, John.

With respect to the old provisions of partnership agreements, and so forth, where one partner had a guaranteed salary and also there was income, there was no deduction for the salary except as a part of the partnership income.

Leo, would you take the proposition of the treatment of a guaranteed salary to a partner?

LEO EISENSTATT: Yes, Hale.

This particular subject is based upon Section 707 (c) of the '54 code, which says that to the extent determined without regard to the income of the partnership, payments to a partner for services or for the use of capital shall be considered as made to one who is not a partner, and it says though that it can only be used for the purpose of Section 61 (a), and that is included as gross income of the partner, and Section 162 (a) would be contributed to the expense of the partnership. I paraphrased the provisions of the code.

Now suppose you have a partnership agreement which provides that partner A who is a one-third partner shall receive ten thousand dollars by way of salary. The partnership return will show that as "any other salary." It will be an expense, and in computing the profit or the loss of the partnership will be shown as "any other salary."

Now the partner must pick that up in his return as "other ordinary income," as "other salary." Now the proposed regulations answered one point with respect to that.

The question was raised, "Would such a salary be subject to withholding and social security?" The regulations very specifically provided that that income so far as the partner is concerned has no application to any other section of the code. In other words you do not eat up social security payments with respect to those guaranteed salaries.

Now keep in mind that a salary, to qualify for this type of treatment, must be payable irrespective of the income situation of the partnership. If it is keyed to profit, then this does not apply. The old treatment, it would be considered just merely as a distribution of the partnership. In other words, the agreement that there is ten thousand to be paid if there is profits would not qualify for this section. Now the same treatment is afforded for those cases where you have an interest payment to a partner for the use of his capital, which is sometimes common. That is treated as any other interest and expense and picked up by the receiving partner as an interest expense.

Now let us take a few more examples to illustrate the proposition. Suppose a partnership has made exactly ten thousand dollars profit over—maybe it's easier to figure. I am not too good with my arithmetic—nine thousand dollars in addition to the ten thousand dollar salary to Mr. A. Now on his return for that year he will show ten thousand salary from the partnership, and then his distributed share of the ordinary income of three thousand dollars, or a gross of thirteen thousand dollars income.

Let us take the converse of the situation. Suppose as a result of the payment of this ten thousand dollar salary the partnership suffers a nine thousand dollar loss. Now he would be required on his individual partnership return to show the ten thousand dollars income and then, to the extent there is such sums credited to his account as the basis of his partnership, he can show a three thousand dollar loss as his share of the partnership loss for that particular year.

The partnership return as filed for the partners would show a nine thousand dollar loss. Each partner would pick up his third on his own return. This partner then would net a seven thousand dollar gain as a result of that transaction.

There is one other situation that is mentioned in the proposed regulations, and it deals with a partner who is entitled to

a salary up to, say, ten thousand dollars if there is partnership income to cover it.

In devising a partnership provision when you are forming a partnership, you want to take into account this particular provision of Section 707 (c), because you may have a situation where a partnership is consistently losing money and the partners' interest in that partnership is continually decreasing because of such losses, and then at the same time he may have to pick up ordinary income by way of the salary provisions.

Another section of the code limits the amount of loss that a partner can take to the amount of his basis in the partnership, and it could very easily happen that after a year or two of bad business he would be having to report income without being able to offset it with corresponding deductions for a partnership loss.

CHARLES PHILLIPS: Now that limitation of loss to their partnership, was that just under the '54 code?

LEO EISENSTATT: That is just with respect to the code.

HALE MCCOWN: I would like to have Bob, if you will, cover soil and water conservation, which I know is of interest to a great many of you.

ROBERT DENNEY: Section 175 of the code provides that the taxpayer engaged in farming shall elect to treat expenditures for soil and water conservation in respect to land used for farming or for prevention of erosion as currently deductible. It defines "land used in farming" as land used by a taxpayer or his tenant for production of fruit, crops or other agricultural products or for grazing.

Deduction is limited to twenty-five percent of gross income from farming, and not from all sources, and not from just one farm should be recognized. Any excess is carried forward and deducted on succeeding years.

For example, Farmer Jones's gross income is twenty thousand dollars from all sources, nineteen thousand from farming. He spent five thousand dollars for conservation work. Deduction is limited to twenty-five percent of nineteen thousand or four thousand seven hundred fifty dollars; the remaining two hundred and fifty dollars is carried over the next year.

The '54 code specifically lists types of expenditures included within this concept of soil and water conservation and prevention of erosion of land, such as fertilization, leveling, grading, terrac-

ing and contour furrowing, construction, control and protection of diversion channels, drainage ditches, earthen dams, watercourses, outlets and ponds, eradication of brush and planting of wind-breaks.

The farmer can elect to deduct currently those expenditures in the first taxable year beginning after December 31, 1953, and ending after August 16, 1954, without permission of the Internal Revenue Service. Once election is made it is binding on him for subsequent years unless permission to make a change is requested and granted from the district director where the return is filed.

The election is made by attaching a statement to the return specifying the amount and type of each expenditure.

There is one warning that should be recognized. The expenditures unused due to the twenty-five percent limitation which normally would be carried over and used to reduce income the following year cannot be used in an addition to basis in the event the farm land is sold before the deduction is used.

VOICE: Bob, what is the situation on metal tube?

ROBERT DENNEY: Well, of course if it was construction and control—well, for one thing, you cannot take any deduction on depreciable items, and I believe that that would be a depreciable item.

HALE MCCOWN: Yes, normally your tube would be a depreciable one.

It used to be you could have a preferred stock issue and then later on after a necessary period you would have the corporation redeem it and get capital gain treatment, and thus get some money out of the corporation.

There are some new provisions with respect to those preferred stock bailouts.

Jack, would you tell us about those.

JOHN NORTH: Yes, Hale.

I think that it should be mentioned that under the 1939 code whenever a corporation made a distribution in its own stock that no taxable dividend resulted in the relative interest of the stockholders in the corporation after the dividend was substantially the same as before.

Now this gave rise to a neat device for a tax saving; that is, ordinary income could be distributed and treated as a capital gain

in this manner. A corporation with earnings and profits, instead of distributing those by way of an ordinary cash dividend, if it had only common stock outstanding, would declare a dividend in preferred stock.

The stockholder could then allocate the basis of his old common stock between the new preferred and the old common. He could turn around and sell the preferred stock with this allocated basis and recognize instead of ordinary income a capital gain, report it as a capital gain.

Now oftentimes in closely held corporations there would be an arrangement with an insurance company whereby the insurance company would agree to buy the preferred stock from the shareholders and the preferred stock might have redemption provisions providing for a sinking fund so that the insurance company would be entirely protected.

Now after the insurance company had acquired all of the preferred stock and the stockholders had recognized the earnings and profits of the capital gains raised by a sale, the corporation would actually take the earnings and profit and redeem the preferred stock and cancel it and start the whole process all over again, and in that way the ordinary income of a corporation will be distributed to its shareholders at capital gains rates.

Now the 1954 code attempted to frustrate this device by establishing what we call Section 306 stock. Now Section 306 stock is defined rather simply. It's defined as any stock other than common stock received by way of a non-taxable stock dividend. Any stock other than common stock.

Now I might say that in talking about the distribution of property, many of you may have wondered whether or not a distribution by a corporation of its own stock would be property and taxed in the same way as the air-conditioner that I mentioned.

Well, the answer is no, because stock of the distributing corporation is not considered property within the definition unless the stock is issued in discharge of an obligation under preferred stock, for example, to pay to preferred dividend or unless the stockholder has an option to take cash instead of the stock dividend.

Well, the second aspect of the definition is any stock other than common stock which is received in a corporate reorganization or separation, to the extent that the effect of such receipt was substantially the same as the receipt of a non-taxable stock

dividend, or the stock was received in exchange for Section 306 stock.

Now you can see if you received 306 stock, you might be able to transfer, if you didn't come under that specific provision. You might also, if you have received some Section 306 stock, give it to your son, and your son could sell it, and then you wouldn't have any Section 306 stock on hand. But the legislature provided for that by saying, "Any other stock, the basis of which is determined by reference to the basis of Section 306 stock."

Well now, if the corporation does not have any earnings or profits at the time the preferred stock dividend is declared, we have no problem, because it cannot possibly come within the definition of the Section 306 stock.

Now once it is determined that it is 306 stock, and that is a typical illustration that I have given, common outstanding, and the distribution of the preferred; then these are the rules that are applied. If the stock is redeemed from the shareholder by the corporation, the amount realized by the shareholder is taxed as a dividend to the extent that they are corporate earnings and profits at the time of the redemption.

So that there are two things you have to remember: If the shareholder sells back to the corporation, the redemption situation, it is taxed as ordinary income, and that is determined by the earnings and profits at the time of redemption, not at the time that the stock is issued.

If disposition of the stock by the shareholder is made by a sale, then the amount realized by the shareholder on the sale is treated as a gain upon the sale of property which is not a chattel asset, that is ordinary income to the extent that the amount realized would have been a dividend if the corporation had distributed cash instead of stock.

So that means that if at the time the stock is distributed the corporation has earnings and profits, and if the stockholder waits three years to sell this Section 306 stock, he is going to recognize a non-capital gain upon sale to the extent that the corporation has earnings and profits at the time of distribution.

It would seem that this effectively frustrates the preferred stock bailout, but there is one possibility for some tax savings. I do not know; I might say that the possibility is really impractical in a sense, but it is this: Supposing that a corporation has earnings and profits, and it is ready to distribute those earnings

and profits and would distribute them in the ordinary way and wants to know whether it should also make stock dividends. Well, the advice would be, first, to distribute the earnings and profits, thereby reducing the earnings and profits that would be considered upon a later distribution of stock. Now after you have reduced the earnings and profits, then preferred stock dividend must be advanced.

The stockholder may hold that preferred stock; that is, it may have no substantial economic value at the time it is distributed, but he may hold that stock while that corporation is earning money. Then after two or three years go by he may sell the stock, and he will recognize a gain only to an extent to the earnings and profit that the corporation had at the time that the stock was distributed, since they distributed all they could at that time.

But the difficulty with the process is that it cannot be continued; that is, you cannot then buy it back and reissue another stock dividend because the difficulty is clear that they have earnings and profits at such time, and the subsequent stock dividends will be taxed.

But the rule of thumb, at least the first time, would be to declare a stock dividend on 306 stock after you have reduced earnings and profits as much as practicable.

HALE MCCOWN: For a number of years we have heard many comments about joint tenancies. The '54 code made a number of changes which had some effect on the validity and the advisability of joint tenancies.

John, will you cover briefly the joint tenancy problem?

JOHN C. MASON: Well, our panel members and speakers at various meetings of our Bar Association have often criticized this, and this criticism has been based largely on certain inadvertent pitfalls which may many times unnecessarily trap the layman.

It seems to me that generally speaking the Bar Association has given the impression that joint tenancies are not desirable.

It is certainly common knowledge among Nebraska lawyers, however, that joint tenancies are widely used. Many of the pitfalls resulting from earlier tax laws have been removed under the 1954 tax code, and it is my own thought that in the future joint tenancies can be an even more valuable estate planning tool than ever before.

The danger in respect to the joint tenancies prior to the 1954

code may be summarized in part at least under the following headings: First, under a joint tenancy the property did not pass by the decedent's will, and does not. And therefore the decedent does not have the power to prescribe by his will who shall benefit from his property, and thus he may inadvertently make it impossible for his children, for example, to take an interest in his real estate if he has previously placed it in joint tenancy with his wife.

Secondly, the basis of the property for income tax purposes under the former law continued the same as at the original creation of the joint tenancy, and the surviving joint tenant (I am assuming a gift without consideration at the creation of the joint tenancy) the surviving joint tenant did not receive a stepped up basis commensurate with the value of the property at the time of the husband's death, in a typical situation.

When the wife went out to sell the property at some later time after her husband's death, she found a considerable capital gain problem.

Thirdly, gift tax liability was often incurred at the inception of the joint tenancy without the realization of the joint tenant and without their reporting the gift and without their paying the tax, which created a certain problem in the question of trying to clear up that problem at a later date, perhaps after the death of the original joint tenant who made the gift but did not realize that he was making the gift.

Another problem was that there was no avoidance of a state tax which would have been the case if the husband had transferred the property as a tenancy in common, for example, in which case he probably would have avoided at least half of the property being taxed in his estate, or if he makes it an outright gift, of course he would theoretically get it all out of his estate.

Another point is that if almost all of the property of the decedent was owned in joint tenancy there may not be enough property left subject to claim to result in a deduction for funeral expenses, claims and administration expenses under the old code.

Now the 1954 code has eliminated many of these objections, and I will enumerate some of the changes which help make joint tenancies a more useful tool in estate planning.

First, with reference to the basis of the property. Under Section 1014 (b) 9 of the '54 code a new cost basis attaches the joint tenancy property to the extent that the property is included in the decedent joint tenant's gross estate, the estate of the first of the joint tenants to die. And in these illustrations we are as-

suming that the first to die is the husband and the husband has made the gift without consideration; that is a rather typical situation.

The new basis in that situation under the new code is the fair market value of the property on the day of death, or on the optional estate tax date, and it is applicable beginning with the date of death. Apparently it is not required that any estate tax be found due on a decedent's estate but only that the property be includable in the definition of the gross estate.

The basis is reduced by any amounts which were allowable as deductions prior to the date of death, such as depreciation, depletion, amortization and other similar type of deductions. The stepped up basis applies only to that portion of the property which is taxable in the estate.

If the husband had furnished all of the consideration for the purchase of the property, then it would be entirely includable in his estate, and the stepped up basis would apply to the entire property.

If he had furnished less than all of it, then there would be a proportionate share rather than a full stepped up basis.

In another field, with reference to deductions for debts and administration expenses, Section 2053 (a) of the estate tax section allows deductions for funeral expenses, administration expenses, claims and mortgages in the amounts allowable by the jurisdiction where the administration of the estate occurs. Subsections (b) and (c) provide now that the expenses of administration of property not subject to claims are also allowable as deductions in computing estate taxes to the same extent they would have been allowable if the property was subject to claims if the payments of the claims are made within the period allowed for filing an estate tax return.

So you would now be able to get estate tax deductions for the normal claim, payment of claims, and administration expenses, even though the property is not subject to probate. Therefore that situation has been corrected.

With reference to gift taxes, this is the field in which the most important change has occurred. Now in the creation of a joint tenancy where one tenant furnishes more than his proportionate share of the consideration, the creation of the joint tenancy which previously was considered a gift to the donee joint tenant no longer need be considered a gift for gift tax purposes. It is still possible to treat the transaction as a gift if the donor

chooses to file a gift tax return and so declare it. If no such declaration is made then it is treated as though no gift was made at the time the joint tenancy was created.

In this case when the joint tenancy is terminated a gift is deemed to be made to the extent that the donee receives no more than his proportional share of his property proportioned in accordance with the original contribution as consideration in the acquisition of the property. For example, if he had furnished all of the consideration in the acquisition of the property, and at the termination of the joint tenancy if he receives back all of the consideration, then there need be no gift deemed to have occurred at either time.

If, however, his wife receives half of the proceeds when the property is sold or when the joint tenancy is terminated, then it would be deemed that a gift were made to the wife of one-half of the value of the property at the time the joint tenancy was terminated.

VOICE: Is that limited to joint tenancy by the entire issue?

JOHN C. MASON: I am not sure. I think it applies to tenancies by the entities, but I was not really conscious of studying that part of it.

VOICE: Could it not apply to father and his sons?

HALE MCCOWN: I was checking that. At the moment my recollection is that it is limited to husband and wife and to real estate. It does not apply to joint tenancies between other than spouses, if my recollection is right, and it only applies with respect to real estate.

JOHN C. MASON: I am sure that's right, and I am sorry I did not make that clear when I was preparing this thing.

Now here are same factors than which should be considered in connection with this joint tenancy between husband and wife, real estate between husband and wife, to be precise.

If the property is held until death there will never be any gift tax if no gift tax is declared at the inception of the joint tenancy. Therefore it is possible to avoid it altogether.

If the property is transferred or the joint tenancy is terminated and the property has increased in value, then treating the transfer as a gift in time of termination will result in a greater gift than if it had been declared a gift at its inception.

Thus if it is likely that the property will depreciate in value

and the joint tenancy will be determined prior to the death of either joint tenant, it may be advisable to declare it a gift at the time of the inception of the joint tenancy.

On the contrary, if it is a home, for example, which is likely to depreciate in value, then it may be better to wait until the termination of the joint tenancy before having any gift declared.

If the property is treated as a gift when the joint tenancy is created and then if upon the sale of the property the donor husband takes back all the proceeds, it will be treated as a second gift from the wife to the husband at the termination of the joint tenancy because she in effect is giving to him half of the proceeds, which otherwise would have been treated as belonging to her. Thus in that situation there would be a double gift tax.

One type of problem will doubtless arise. Possibly its solution will be indicated by the regulations when issued. I refer to a situation where a joint tenancy is created in a resident property and no gift is declared at the time of the creation of the joint tenancy. Then if the property is sold later and a new home purchased, the proceeds of the old home being applied as partial payment on the new home, there may be a question as to whether the wife received any share of the proceeds of the old home.

Probably to avoid there being a gift at the time of the second transaction it would be well to have the proceeds of the old home paid to the husband so that they can be clearly traced and then paid by the husband in the purchase of the new home, so that the wife does not have any interest in those proceeds.

In such case I believe that no gift would have been deemed to have taken place at any time. Unless the lawyer is closely in touch with such a transaction, it is certainly possible that the matter could be innocently handled in such a way that the gift was deemed to have taken place at the time of the second transaction.

It is hoped that the foregoing analysis will help the Nebraska lawyers in guiding their clients in the use properly and effectively in joint tenancies.

LLOYD POSPISHIL: A question. What happens to the marital deduction in a joint tenancy when a joint will is executed? I am thinking of the Autry case; what is the status of that rule now?

HALE MCCOWN: I am not sure. Unless I am mistaken, so far your two circuits are in opposite directions. At the moment they are still taking the position at least that a joint will will

destroy the marital deduction. Now what the effectiveness of it is going to be, I do not know. I think it depends on whether there is a contest. I think Dan Stubbs can probably tell you more about that than I can.

What is the present status of the decisions on it? I have not checked it for a while.

DANIEL STUBBS: We are about to get a mandate from the Tax Court so far as Nebraska is concerned in line with the Austry case. I do not have it yet. They have agreed to it so I don't like to get to the—

HALE MCCOWN: We are getting close to closing time. I have one or two other topics that I wanted to cover.

Leo, would you cover the question of transactions between a partner and the partnership?

LEO EISENSTATT: Yes, Hale.

Going back to the opening remarks, the first topic I covered, the code in specific words says that the partnership is a separate entity to be considered in the same light as any stranger, and the transactions between the partners with the partnership are to be treated as if they were disinterested persons, except in a few cases.

Now in this regard you must keep separate the distinction between transactions with the partnership and contributions to a partnership. If the partner contributes a thousand dollars to a partnership for a ten percent interest, that is not a taxable transaction. However, if he were to sell an automobile to the partnership for five hundred dollars and receive money for it, that is not a contribution but a taxable transaction, and in treating that on his return he would consider it just as if he had sold it to any stranger.

Now there are exceptions to when this type of treatment will be permitted, and that exception deals with controlled partnerships. If a partner owns fifty percent or more of a partnership's capital or profits, then he will not be permitted to take any loss on that transaction.

Now the same rule applies to a partnership having transactions with another partnership; if there is a fifty percent ownership factor in both partnerships and then the losses will not be recognized or allowed.

And there is one other situation where the entity rule so far

as transactions between partner and partnerships are not recognized, and I suppose that the best example to apply to it would be in the case of depreciable business property or a non-capital asset. Any gain recognized in a transaction with a partnership in which the grantor owns eighty percent of the interest in the capital profits of the partnership, why, they tax him as the gain on such a transaction as ordinary income. And there is the specific provision in the code and proposed regulations are declaratory of it and the examples given in the proposed regulations make that clear.

So keep in mind that partners may, by observing the provisions of this controlled partnership, have their own businesses. They can still retain the controlled section and jurisdiction of property so long as they do not involve themselves in the controlled partnership feature, and they can get losses. In other words, you have under your control the ability to, in a sense, hold onto that asset and at the same time take the partnership loss. You can pick it off in a year when your father has a considerable income, for example, take some transaction in which a loss would ordinarily be recognized, he does not really want to get rid of. The exception to the entity rule then applies strictly to recognizing losses in controlled partnerships where the person involved owns fifty percent or more of the capital profits.

HALE McCOWN: Thanks very much. We are now open for questions from the floor.

VOICE: On the question of joint tenancies, assume that a husband buys a piece of real estate for three thousand dollars and puts it in his name and his wife's name, and he dies, and upon the date of death it is worth ten thousand dollars, and that is all of the estate he had; he had no estate; that is all of the property he had.

Does it take the new stepped up basis?

JOHN C. MASON: Assuming that he bought it after the '54 code went into effect. That is assuming that the date of death was after December 31, '53.

VOICE: The point of it is, he does not have to have a sixty thousand dollar estate.

VOICE: I have a question. I would like to question the panel concerning the state tax and income tax deductions.

If you take the attorney's fees, for example, on the income tax deduction, do you have a greater adjusted gross estate in figuring the marital deduction?

HALE McCOWN: John, do you want to answer that one?

VOICE: Do you follow me? Instead of taking the deduction off the estate which you are permitted to do, you take it off the income tax.

JOHN C. MASON: It is a question of whether you have to take the deduction in the state tax for the attorney's fees to adjust the fees for the purpose of computing marital tax deductions.

VOICE: I don't know.

JOHN C. MASON: I would think not. I would think that you would only be entitled to take the deductions which you are claiming for estate tax purposes in order to determine the adjustable gross estate in order to compute the marital deduction, but it is just a guess. I do not know.

VOICE: Then you can hurt the children. You give the wife more—I do not know if that is the law or not, but I will put it up to you.

HALE McCOWN: I should think as an offhand comment that that probably is the situation. You do not use it or claim it; then your net and your marital deduction would be figured on the estate as computed, and it would therefore increase your marital deduction.

VOICE: And injure the people taking the residue.

JOHN C. MASON: I think that you raised a very interesting point which was not really involved in these papers, but it is collateral to what you are talking about when you say it would injure the children, for example. I think that there is an area which could well be examined by all of us and could well be the subject of papers or studies on the duties of an executor or an attorney in administering an estate where there can be that sort of situation.

You have conflicting interests between the widow and the children. We are concerned with it presently in connection with a situation where a formula clause has been used, and you normally would go into an inheritance tax appraisal, for example, and try to get as low a valuation as possible, and in setting up the estate tax return you would try to get as low a valuation as possible on all the property; but when you have conflicting interests, with some properties going into the marital deduction part of the estate and others going into the residuary part of the estate, you can not do that because it would hurt somebody, as you say,

and what the duties of the various people connected in a fiduciary capacity with the administration of the estate are taxed under the situation, I am not entirely sure, but it is an interesting problem to think about and one to be aware of.

VOICE: If I could comment on that, I think something that we can all watch in drafting is to give the executor absolutely discretionary power to determine whether to take those deductions one way or the other, thus avoiding that problem of whether you can or cannot do it.

HALE MCCOWN: You also get into the problem of income. Supposing you have one beneficiary who is entitled to the income, and you take the deductions on the income tax return. The effect then is a great deal more benefit to that income beneficiary than to the residual ones in the estate, no matter who they might be, so I do think that those suggestions are good.

VOICE: It is not conclusive that an asset is worth what it brings at public sale under the present law—is that right?

HALE MCCOWN: Excuse me, I did not get that.

VOICE: If an asset in an estate is sold at public sale, that is not conclusive of its value, is it?

HALE MCCOWN: Well I would say normally it has been treated so. At least the department normally has treated it so. You have the provision that if you have a sale within a year that value is the value, and of course it would depend on your optional valuation date there. Of course that might make a difference, for example.

VOICE: Well I am thinking of unproductive leases, for instance. They get rooked on the appraisalment. Now what I thought was that the Bar Association ought to get behind the proposition and have the Treasury either make a regulation or amend the law, if necessary, that if you have an asset in an estate which has a potential value, I mean, it has a present value if you sell it on the open market, but when you go to appraise it, they appraise it on its potential capacity, and a lot of times your productive stuff wouldn't be sufficient to pay the inheritance tax on an unproductive asset.

Now why would it not be a good rule and why should we not contend for the proposition that if that asset is sold that the heirs or beneficiaries could buy it at public sale and that would establish the value in order to protect it for the heirs? For instances, on all leases. Now would that make sense?

HALE MCCOWN: Well, I do not know. Again it is a question of valuation. There's a factual question, and whenever you have a valuation problem you are likely to have some trouble with the department. Normally, however, if it has been a public sale I do not think they are going to raise too much of a question; if you have it limited to the family or something of that sort you may have some trouble.

VOICE: The only time they question it is when part of the family buys it at public sale, and they say, "Well, of course, then the sale is rigged." If we could get away from that thing, I would be happy and satisfied. That is when the department comes in and says, "He got what he had in it. He paid a small price for it, and we are going to soak him."

Now why would it not be a good idea for the department to make the rules on public sale, make it possible so that you are not paying on an unproductive asset, which you would pay the present market on it now, but you want the family to have that potential?

HARRY B. COHEN: You would still get away from it if you have your public sale and have your family member be the highest bidder.

HALE MCCOWN: I was going to say if I had that situation and I had a public sale and somebody bought it at a public sale, I would go right ahead with it.

HARRY B. COHEN: That might be, but you have a lot of litigation there.

VOICE: Why would it not be a good idea to make the recommendation that if an asset is sold at a public sale it establishes conclusively its value, which it does not do today. It is the best evidence, but it is not conclusive. That is the point I am trying to bring out.

(Thereupon, at 4 o'clock p. m., the meeting was adjourned.)

SECTION ON INSURANCE LAW

Jesse D. Cranny, Esq.
Chairman

"Developments in Standard Automobile Cover-
ages" Floyd O. Terbell, Esq.
Chicago
Lumbermans Mutual Casualty Co.

A discussion of the new 1955 basic automobile liability and physical damage insurance policy form. .

“The Taxation of Life Insurance—Where Do We Stand Now?”Irving G. Brunstrom
Assistant General Counsel American Life Convention, Chicago

“Jury Trial Of Auto Injury Claims Threatened”.....
George L. DeLacy, Omaha, Neb.
Member of Kennedy, Holland, DeLacy & Svoboda

DEVELOPMENTS IN STANDARD AUTOMOBILE LIABILITY COVERAGE

By

F. O. Terbell

The policy which is the subject matter of this paper is officially known as “Standard Provisions for Automobile Liability Policies.” It is the “Fifth Revision” and became effective April 1, 1955. In promulgating this revision to its membership, the Bureau’s interpretive bulletin requires the members for all policies written on the older form on or before April 1st and outstanding as of that date to interpret such older edition policies with respect to accidents occurring on and after April 1st so as to afford any broader grants of protection as to the same coverages. The companies rely upon this bulletin because there was not simultaneously prepared an amendatory endorsement to be used with the old policy until the companies’ supplies of those printings were exhausted. On and after July 6, 1955, the Bureau membership are required to use the Fifth Revision.

To fully comprehend the significance of the standard provisions program, a brief look into its historical origin seems worth while. In the early ’30’s and with the rapid growth of automobile insurance, all companies were faced with filing problems necessary to meet a multiplicity of state regulations. Even at that date approval of policy forms for writing automobile insurance was required in a number of states. Almost simultaneously two voluntary industry associations, the American Mutual Alliance—later replaced by the Mutual Casualty Insurance Rating Bureau—and the National Bureau of Casualty Underwriters, began exploring a program of policy uniformity for their respective members. About the same time the Insurance Section of the American Bar Association became interested in related legal problems. Among other things, this section set about compiling an annotation of

provisions commonly found in automobile policies. Eventually these activities became a united effort from which evolved the first standard automobile policy. As the work of developing the auto policy progressed, the Bureau committees sought and received valuable assistance and advice from representatives of the Insurance Section of the American Bar Association as well as other interested groups. These various endeavors culminated in the first standard provisions automobile policy which became effective January 1, 1936.

Viewed in the light of twenty years' experience, the manner in which this program has developed, the breadth of its acceptance, and the way it functions, particularly in the way of state filings, is worthy of some comment. While the standard provisions policy is not a statutory policy such as the standard fire policy, at the same time many state insurance laws establish standards for writing automobile insurance. It is not uncommon for such insurance laws to lay down requirements for prior approval of policies before they are used by any company.¹ The more modern insurance rating laws which give recognition to rating bureaus acting on behalf of their member companies also recite requirements as to policy filings and approval.² It, therefore, is to be observed before standard language is ever used in a policy form by any company. It is first filed by the two Bureaus with the insurance supervisory authority which in turn approves the standard provisions as appropriate policy terminology. Once so approved, the Bureaus' instructions to the member companies state: "This policy is expressed in standard language which may not be amended and no part of which may be altered except" (The exceptions are noted later.) Therefore under the Standard Program, a member company must strictly adhere to the language in the several parts of the policy.

The mandatory aspect of the program has now been sanctioned by state regulations in thirty-odd states. In the areas where the standard policies are used, the legal rule for interpreting an insurance policy—being the language of the company, is to be strictly construed against it—is not in complete harmony with

¹ Section 44-34A, Nebraska Insurance Code: "No insurance policy or certificate of any kind shall be issued or delivered in this state unless and until a copy of the form thereof has been filed with the Department of Insurance and approved by it."

² Section 44-1412, Nebraska Rating Law 1947: "Beginning ninety days after September 7, 1947, no insurer shall make or issue a contract or policy except in accordance with filings which are in effect for said insurer as provided in Section 44-1401 to 44-1442."

the current practice of policy preparation. Rather it approaches a legal fiction, for Insurance Department approval is not always a simple ministerial function. At numerous points policy language reflects Departmental rulings. This rule of construction was first evolved long before the first standard automobile policy or before there was any such orderly process regulating policy terminology. It is not my thought that this rule of construction is to be disregarded simply because of increased state regulation of insurance generally and policy forms in particular. Is it, nevertheless, not plausible to suggest the very breadth of the acceptance of "standard language," coupled with the stamp of approval placed thereon by insurance directors, is sufficient to bring this rule of strict construction into question? After all, a basic function of insurance directors is protecting the public interest. No longer is it axiomatic that a Bureau insurance company is solely responsible for the words in its policy. Gradually and with increasing prevalence, courts seem to take judicial notice of the standard character of the policy before them.³ While most such comments have been by way of dicta, at least in a few instances the fact that the policy was "standard" appears to have been partially persuasive as to the result.

The modern rating laws, such as Nebraska's, spell out in considerable detail the director's responsibility for approving underwriting rules and rates applicable to the grants of coverage as reflected in the underwriting manuals prepared by the National Bureau. Under these rating laws, coupled with Bureau membership, the companies, broadly speaking, are obligated to adhere not only to the approved rates but to provide the protection expressed by those manual rules. In essence, standard provisions are the expression of such underwriting bases. In one state at least, a court has allowed the introduction of a manual rule by way of explanatory proof of the sense of the words used in the policy.⁴

³ *I. L. Logging Co. vs. Manufacturers and Wholesalers Indemnity Exchange*, (Ore. 1954) 275 P. 2d 226, 229; *Farm Bureau Mutual Auto Insurance Company vs. Marr* (USDC-N.J.-1955) 128 F. Supp. 67, 68; *Continental Casualty Co. vs. Padgett* (USCA-4th Cir.-SC-1955) 219 F. 2d 133, 137; *Seavey vs. Erickson* (Minn., 1955) 69 N. W. 2d 889, 891; *Koehn vs. Union Fire Insurance Co.* (1950) 152 Neb. 254; 40 N. W. 2d 874, 878; *Bazar vs. Great American Indemnity Co.* (N. Y. Ct. App.-1954) 119 N. E. 2d 346, 4 AC 2d 791.

⁴ *Kennedy vs. (Amer.) Lumbermens Mutual Casualty Co.*, 85 NYS 2d 428. "We conclude the defendant (insurer) by adopting the rule (Underwriting Manual) followed by annexing the amendatory endorsement . . . extending the policy . . . fully intended to make that rule applicable to Insuring Agreement V of the policy."

It may be well to emphasize this is a program of "standard provisions" rather than "standard policies." Under the previously noted exception in the general instructions, companies are given options for including or omitting any major insuring agreement and all policy provisions relating solely to that class of insurance. Moreover, the companies are allowed certain latitudes as to the arrangement of the several parts of the policy. In a few instances they have the option of combining provisions. For example, the limits of liability may be stated either as a policy condition or as an integral part of an insuring agreement.

Turning directly to the changes brought about in the Fifth Revision, one of the most significant innovations is in the definition of "insured." If the named insured is an individual, his resident spouse is given approximately an equal status. The resident spouse no longer need prove the actual use of the automobile was with the named insured's permission, express or implied. Furthermore, the resident spouse can now extend permission to another so that such permissive user becomes an "insured." This extension of coverage to the spouse is further reflected in a comparable provision in the basic medical payments. The same intent is reflected in modifications made in the "temporary substitute," the "newly acquired" and the "use of other automobiles" provisions.

The definition of "insured" makes the policy applicable to many persons or interests other than the named insured. The inclusion of such multiple interests in the term "the insured" has created interpretive problems. Questions such as: Are the omnibus insured's rights the equivalent of the named insured's? Conversely, does the inclusion of these additional insureds curtail the rights of the named insured? Does a breach of the policy by one insured affect the coverage afforded another? Does the policy afford coverage to an omnibus insured for a claim made by the named insured? Heretofore a determination of these questions turned on whether the policy was so drawn as to treat all insureds as a class or as individual interests; whether "the insured" should be interpreted severally or joint and several.⁵ On this

⁵ For an able discussion of the principle of severability, see "Who is the Insured in the Automobile Policy?" by Norman E. Risjord, General Counsel, Employers Insurance Corp., and June M. Austin. 5 Fed. of Insurance Counsel 52, 61, 1954. Cited with approval in *Employers Mutual vs. Byers*, 114 A. 2d 888.

point there has been a difference of judicial opinion.⁶

For the Standard Provisions policies, such questions have been resolved by the insertion of a new condition, Severability of Interest. This condition negates the class construction by specifically saying, "The term 'the insured' is used severally and not collectively" This means all policy provisions applicable to liability coverage are to be construed according to the particular insured against whom claim is made or suit is brought. The change which has been effected by this new condition can be best illustrated by the much discussed case, *Standard Surety vs. Maryland Casualty*, 119 NYS 2d 795. Here the holder of a general liability policy and the owner of a steam-shovel sought protection as an omnibus insured under an automobile policy because of an injury to the truck driver, an employee of the named insured in an automobile policy. The truck driver's injury occurred in the process of unloading the steam shovel. The automobile insurer argued the omnibus clause did not apply because, by virtue of the employee exclusion, the named insured would be denied coverage if the same claim were being made against him. In upholding the denial, the court said, "The purpose of the exclusion is to exclude certain risks or probabilities of injury which the insurer considered too great to cover. . . . The risk was not that an injured employee of an insured would sue or otherwise claim against his own employer, but that the employee of any user of the 'insured' vehicle would be injured. The exclusion . . . should be interpreted in terms of injuries to be excluded, not in terms of the persons who are to be indemnified." Subsequent to this decision and before the new automobile policy was promulgated, the two Bureaus issued an interpretive bulletin expressing the underwriting intent on which the severability condition is predicated by stating the exclusion in question is to be interpreted severally so that it will apply only to the interest against whom the claim is made or suit is brought. This bulletin, issued in face of the aforementioned contrary judicial expression, as an implement of the standard provisions program, has legal significance. It makes clear the severability condition is to be considered as replacing the judicial interpretation found in *Standard Surety* and other

⁶ Pullen vs. Employers' Liability Assurance Corp. (La. App.), 72 So. 2d 353; Associated Indemnity Corp. vs. Wachsmith (Wash.) 99 P. 2d 420, 127 ALR 531; Standard Surety and Casualty Co. vs. Maryland Casualty Co., 100 NYS 2d 79; Continental Casualty Co. vs. Pierce (Miss.) 154 So. 279; Purcell vs. Metropolitan Casualty Insurance Co. of N. Y. (Texas) 260 S. W. 2d 134; Kaifer vs. Georgia Casualty Co., 67 F. 2d 309; Shanahan vs. Midland Coach Lines (Wisc.) 67 N. W. 2d 297; Employers' Mutual Liability Insurance Co. vs. Byers (N. H.) 114 A. 2d 888.

similar cases. In fact after the Standard Surety case the Bureaus participated *amicus curiae* in another New York case involving an analogous point arising from a suit by a named insured against an omnibus insured. This decision supported the severability principle.⁷

The proposition that the insurer's duty to defend is only co-extensive with its obligation to pay on behalf of the insured, with a few minor exceptions, has been generally recognized.⁸ A test most commonly applied by the courts in deciding whether the insurer correctly refuses to defend a suit is to look at the allegations in the complaint. If those allegations state a cause of action within the coverage, the insurer is bound to defend even though the facts of its investigation point to an ultimate possibility of no coverage. As a corollary, it was also believed an insurer was not required to defend additional actions if its policy limit had been exhausted.⁹ In fact some companies held to the view that, after exhausting the limits in payment of judgments or settlements of claims, they were entitled to return pending lawsuits to the policyholder if in doing so, his rights were not prejudiced.

In *American Employers vs. Gobel*, 131 NYS 2d 393, the court took exception to these general principles. After characterizing as frivolous and captious arguments that the duty to defend was no broader than the duty to pay, it concluded that, even though the total *ad damnum* on eleven suits already filed far exceeded the policy limit and more suits were anticipated, the insurer was nevertheless obliged to defend at least the pending actions. This decision, among other cases, cites *Michigan Poultry vs. Hawkeye Casualty*, 298 N. W. 114. The court in this suit strongly relied upon the introductory wording of an older defense agreement: "It is *further agreed* that as respects insurance afforded by this policy . . . the company shall. . ." The justice in the Gobel case did not take into account this introductory statement had been changed to "as respects such insurance as is afforded by other

⁷ Aetna Casualty and Surety Co. vs. General Casualty of America, N. Y. Sup. Ct. App. Div. (May 10, 1955) 23 L. W. 2613, 140 NYS 2d 670. In considering the coverage agreement with the definition of insured, the court concluded, "They express an undertaking on the part of the company to indemnify an authorized user . . . regardless of who makes the claim against him. The coverage afforded is full and complete. . ."

⁸ "Insurer's Duty to Defend," J. P. Faude, Assistant General Counsel, Aetna Casualty Company, *Insurance Counsel Journal*, Vol. XV, Oct. 1948, p. 331.

⁹ *Lumbermens Mutual Casualty Company vs. McCarthy*, 8A 2d 750.

terms of this policy . . . the company shall. . .” This change made in 1946, with the expectation of overcoming the Michigan Poultry decision, was an attempt to state more clearly the defense agreement and the undertaking to pay damages are not several and independent. In *American Casualty vs. Howard* (USCA 4th Cir.) 187 Fed. 2d 322, after the policy limit had been exhausted, the court did not agree that the insurer was relieved under its agreement “. . . to defend any suit,” etc., and expressed belief in the proposition that the defense agreement was independent of other related coverage provisions in the policy.

Largely as a result of the Howard and Gobel decisions, another editorial refinement has been made in the introductory statement of the defense agreement. In addition, the subsections have been re-arranged. The subsections relating to the defending of litigation have been separated from the provision for supplementary payment such as bond premiums, court costs, interest, immediate medical and other expenses. The concluding provision which refers to applicable limits of liability now modifies only the supplementary payments subsection. By implication, the defense agreement in subsection (a) is, therefore, subject to the applicable limit of liability.

The definition of “automobile” is a vital insuring agreement of this policy. This edition accomplishes a number of editorial refinements. Only three points of significance will be mentioned. All previous policies required the automobile covered be described by motor or serial number in the declarations. The companies now have the option of preparing a policy either on a described-car basis as in the past or, if they so desire, incorporating additional language in the described auto definition: “. . . or, if none is so described, any private passenger automobile owned on the effective date of this policy by the named insured or by his spouse if a resident of the same household.” For the no-description policy, there are two additional provisions. First, a declaration by the insured of the total number of owned private passenger automobiles on the effective date of the policy. Second, a definition of “private passenger automobile.”

The definition of “automobile” has further been expanded with regard to trailers. This definition has been broadened to include any non-described trailer which is designed for use with a private passenger automobile if it (1) is being used with either a private passenger automobile for either business or non-business purposes or (2) is being used with a commercial or truck-type automobile for non-business purposes only. These qualifications

are stated negatively so the coverage continues while a trailer is not attached to a commercial automobile. The effect of this change is to provide liability insurance without additional premium charge not only for the utility trailer but also for the home trailer which was formerly excepted from this definition.

The newly acquired automobile definition has been changed. "Acquired" still implies ownership must arise subsequent to the effective date of the policy. It still distinguishes between a new automobile replacing the described automobile and the one which is an additional automobile. For the replacement automobile the coverage is fully automatic without any time requirement of notice. For the replacement automobile there is no requirement the company insure all owned automobiles. If it is an additional automobile, automatic insurance will be afforded provided (1) all automobiles owned by both the named insured and spouse on the date of the delivery of the new automobile are covered by the company and (2) thirty days' notice of acquisition is given.

The language of this revised agreement should be distinguished from that in older policies which were the basis of two decisions in your jurisdiction. In *Home Mutual vs. Rose*, 150 Fed. 2d 201, the court concluded the reference to insuring all owned automobiles signified that portion of the agreement was to apply only if the contract had been prepared as a "blanket policy." In an insurance man's vernacular, the term "blanket policy" is unfortunate because it is used to characterize a policy embracing a hazard by a class description and without identifying the units falling within such class. Excepting the no-description option for individually owned private-passenger automobiles, this policy never functions as a blanket policy in that it requires a specific description of all vehicles insured. Fundamentally, the court was right in the *Rose* case, but its language may lead to confusion because at least one standard reference work has adopted the *Rose* opinion without any editorial comment.¹⁰

In *Koehn vs. Union Fire*, 40 N. W. 2d 874, an insured, under a policy describing a pleasure car, acquired an additional commercial automobile. The opinion stresses the policy provision which said coverage applies only ". . . to the extent applicable to all such previously owned automobiles. . . ." Since the purpose of use for the described car was pleasure and business and since the policy draws a distinction between such use and commercial use, the court concludes coverage was not to be extended to the

¹⁰ See annotation 34 A.L.R. 2d 936. The text also quotes the First Edition provision which has long since been replaced.

additional commercial vehicle. This agreement is no longer limited to the extent coverage was initially provided for owned automobiles; therefore we no longer expect to get the result of the Koehn case.

From its inception the automobile liability coverage agreements read ". . . because of injury . . . caused by accident." Various aspects of the meaning of "accident" have been before the courts on innumerable occasions. Time permits consideration of only one aspect which until comparatively recently had seemed to be relatively free from doubt. The auto policy, like the other liability policies, state limits of liability for the bodily injury coverage in terms of "each person" and "each accident" and for property damage liability in the terms of "each accident" only.

In the middle '20's a California court was presented with a question¹¹ of applying the property damage limit to a multiple-claimant case. In this litigation the insured's automobile struck another vehicle, damaging its steering mechanism and causing a collision with a third. The question was, was this one accident or two? The majority answered "one accident," reasoning the term referred to the cause and not the resulting damage or injury. Stressing the cause rather than the resulting injury is entirely in harmony with the use of ". . . because of injury . . . caused by accident" in the standard liability agreements. This phraseology has been purposely used to overcome decisions under the older insuring agreements which read "accidentally sustained" or "accidentally suffered" and which had been interpreted from the viewpoint of the person injured.

Anticipating *St. Paul vs. Rutland*, Fed. 2d (August 24, 1955), the California court observed, "It would no more be correct to say of such a case that there were two accidents than it would be to predicate two or more accidents on a general freight train wreck merely because two or more cars in the train might have been demolished in the same catastrophe."

The case of *Anchor Casualty vs. McCaleb*, 178 Fed. 2d 322, arose under a general liability policy covering oil-well drilling operations. The policy had both an "each accident" and an "aggregate" property damage liability limit. There is some dispute on the facts, but it seems that as the result of a blowout the well spewed sand, mud, oil, etc., on the adjoining property. The well was out of control some fifty hours, during which time the wind shifted, thus bringing about claims by the owners and the ten-

¹¹ See *Hyer vs. Inter-Insurance Exchange* 246 P1055.

ants of several pieces of property. The following is the significant statement on the limits question: "The blowing out of the well was not a single accident but a series of events, a catastrophe. Numerous accidents were the product of this motivating force and the wind as a supervening force. The eruptions continued intermittently for over two days; and during this period the wind changed from time to time blowing mud and sand on different properties. The wording 'each accident' as used in the policy, must be construed from the point of view of the person whose property was injured." One of the statements relied upon is from Couch.¹²

Now in the Rutland case the insured motorist collided with a freight train, causing a wreck. As a result of that wreck, cars owned by sixteen different carriers were damaged and, in addition, there was damage to the operating railroad's right of way. The automobile policy had an "each accident" property damage limit of \$5,000. The court was called upon to determine whether the insurer was liable for only \$5,000 or whether the limit was to be applied repeatedly to the claim of each owner. In its original opinion of December 15, 1954, one panel of judges in the fifth circuit, relying on the same statement from Couch and a similar statement from Corpus Juris, concluded the policy was "strongly indicative of an intention to provide coverage for several or any number of accidents which may happen in a single wreck or other occurrence." The court cites McCaleb with approval.

Upon granting of a petition for rehearing, the original opinion was withdrawn. The case was heard by another panel, and a second opinion reversing the earlier holding was filed August 24, 1955. In the second opinion the court observed, ". . . when ordinary people speak of an 'accident' in the usual sense, they are referring to a single, sudden, unintentional occurrence. They normally use the word 'accident' to describe the event no matter how many persons or things are involved." Judge Dawkins goes on to observe that, in the absence of cited cases, the court would be obliged to conclude it was the intention of the parties to this policy that the word "accident" be given that meaning; that the policy in question had three different coverages, one a bodily injury liability coverage which was on an occurrence basis, another being automobile property damage liability which was on

¹² *Cyclopedia of Insurance Law*, Volume 5, page 4136. "If one cause operates upon several at one time, it cannot be regarded as a single incident, but injury to each individual is a separate accident." Couch cites only an old English case: *South Staffordshire Tramways Co., Ltd., vs. The Sickness and Accident Assurance Association, Ltd.*, (1891) 1 Q. B. 402.

an each-accident basis, and the third being a property damage other than automobile subject to both an each-accident and to an aggregate limit. The difference in the treatment of the limits in the various insuring agreements was commented upon as manifesting an intended difference. Finally, he concluded that the word "accident" as used in the declarations is intended to be interpreted from the standpoint of cause rather than effect.

In disposing of the McCaleb case, the court points out the factual difference by observing the damage resulted from a series of events rather than a single collision. Stress is placed upon the "catastrophe" aspect of the oil-well blowout. This is the rule which is expected to prevail under the new limits condition which states the declared limit comprehends "*all damages arising out of the injury to or destruction of all property of one or more persons or organizations, including the loss of use thereof, as the result of any one accident.*"

While the Rutland case was pending on rehearing, two other cases arose. One is *Truckers Insurance Exchange vs. Rohde*, Superior Court, Yakima County, Washington. Rohde, while driving down the highway, met three motorcycles. The first two motorcycles each had a passenger in addition to the operator. The first motorcycle collided with Rohde's vehicle, caromed into the second motorcycle and collided with the third. Two of the cyclists were killed. At the time of this accident the policy was on an occurrence basis, but subsequently it was amended by endorsement to "each person," "each accident." In his opinion the trial justice discusses the multiple-accident question from the standpoint of the people injured, reaching the conclusion there was an accident or occurrence on each impact. Reference is made to both McCaleb and Rutland.¹³ This litigation is still pending.

There is also pending in a Federal District Court in Pennsylvania the case of *Tri-State Roofing Company vs. New Amsterdam* which was held on the docket for decision on the rehearing in the Rutland case and from last report is still pending.

To summarize, it seems fair to observe that this new limits condition, by its very difference in treatment of multiple claimants, in contrast with the similar condition for bodily injury, creates a clearly discernible distinction. For the bodily injury liability, the limits condition first treats the individual claimant's situation and then makes the proviso for each accident sub-

¹³ The Court also considered: Bruener vs. Twin City Fire, 222 P. 2d 833; Perkins vs. Fireman's Fund, 112 P. 2d 670.

ject to the each-person qualification. The property damage limit says the each-accident limit shall always be applicable irrespective of the number of persons whose property is damaged in a single happening or accident.

In speaking of the financial responsibility (F. R.) condition of the policy, it is necessary to distinguish between the "security" provisions and the "proof" provisions of these statutes. Some of the confused thinking concerning this condition may be attributable to court decisions which are not crystal clear as to which section of the law is being applied. In fact, some cases seem to treat decisions under motor vehicle carrier laws as authority in passing upon the effect of the financial responsibility condition. Such a construction is contrary to the policy drafters' intent. In examining judicial interpretation of this condition, it is necessary to distinguish between the older type F. R. laws and the more modern safety responsibility laws. Most of the older statutes contain only proof provisions applicable to future accidents. By far the greater number of decisions construing the automobile policy arose under the older type law.¹⁴

The "security" provision of an F. R. law comes into play when an accident occurs by calling for evidence of existing insurance. Evidence of such insurance counteracts the penalty feature in the proof section. Many of these F. R. laws specify a standard provisions automobile liability policy with stated limits as adequate evidence of security. Such evidence of insurance under this section is usually designated as an "SR-21." An SR-21 simply means the motorist voluntarily carries automobile liability insurance. The security provisions of an F. R. law do not interfere with the contractual rights and obligations of the parties. The policy exclusions and conditions are controlling as to the insured, the insurer and the injured third person. They are not affected by either the F. R. condition or F. R. statutes.

¹⁴ Specific authorities have not been cited, rather the reader is referred to "Analysis of Policy Defenses under F. R. Laws," Allan P. Gowan, *Insurance Counsel Journal*, Vol. XXI, July, 1954, page 295.

Later decisions: *New Zealand Insurance Co. vs. Holloway (La.)* 123 F. Supp. 642; held unless policy was actually a required policy, the F. R. law was inapplicable.

Tri-State Insurance Co. vs. Ford, 120 F. Supp. 118; held the Texas F. R. law did not abrogate a defense of misrepresentation of prior cancellation as against injured third persons.

Farmers Insurance Exchange vs. Ledesma, 214 F. 2d 495; the court concluded insurer by policy terms had assumed an absolute liability even though the F. R. law did not apply to the first accident but cites no authorities supporting the decision.

The "proof" provisions of the F. R. law pertain to future accidents. They either apply after an accident in which the motorist was uninsured or in some states apply because of a conviction of a motor vehicle violation. To satisfy the proof provisions, most statutes characterize the policy as a "motor vehicle liability policy." Certification of the policy to some state authority is usually required. Such a certificate is commonly known as an "SR-22." In keeping with the concept these statutes are designed for the protection of the accident victim, such a certified policy in a sense becomes a statutory policy because now the insurer's liability is controlled by the terms of the statute relating to motor vehicle liability policies rather than the terms of the policy.¹⁵ The terms of the statute will often result in the abrogation of one or more limitations in the policy. Usually it is expected that at least some, if not all, of the policy defenses are not available to the company in an action brought by the injured person or judgment creditor. When the policy is actually certified to the state authority and only as to accidents occurring thereafter does the financial responsibility condition operate to vary other terms of the policy. To clarify this intention, the Fifth Revision modifies the opening statement in this condition by saying, "When this policy is certified as proof of financial responsibility for the future . . ." To distinguish from the security situation, the word "proof" is used because that is the term employed by most F. R. laws. For the certified policy, the condition in effect reads the proof section of the statute into the policy without the attachment of an endorsement amending it to conform to the wording of the statute.

These remarks, lengthy though they may seem, by no means cover all the Fifth Revision changes or the reasoning behind them. In the allotted time I have sought to highlight those changes believed to have the greatest over-all significance. In selecting the changes discussed, I have tried to demonstrate that some are aimed to clarify the policy on points that have been troublesome in litigation. Others represent the evolutionary process by which the companies try to meet the public's desire for more complete protection.

Any member of the Joint Forms Committee, the drafters of the standard provisions, I am sure, would readily concede that the Fifth Revision is not a complete answer even to all the cur-

¹⁵ For a more comprehensive study, see "The Motor Vehicle Liability Policy under Financial Responsibility Laws" by Edward F. Earle, *Insurance Law Journal*, 1953, 678-684.

rent problems. The standard provisions policy is not a static contract. The work of the committee is a continuous process carried on by correspondence and by periodical meetings in which members pool their experience to meet insurance needs. Believe it or not, theirs is not a narrow company point of view. If some changes appear to make the policy language more complex, consider that no small part of this complexity is attributable to broader coverage.

Intention of the parties is a basic element of contracts. Just as it must be translated clearly and concisely into the covenants of a lease by an attorney anticipating legal and practical problems unforeseen by the parties thereto, in a like manner the Forms Committee seeks to weave the same elements and safeguards into an insurance policy. The difference is only one of degree, for in no other private legal document is the expression of intent subject to such precise and technical scrutiny. All or many parts of standard provisions annually find their way into literally millions of contracts and, as a consequence, unanticipated factual situations are bound to arise. When such situations arise, you gentlemen aid in arriving at the answers. So it is with a degree of pride and perhaps relief that the legal profession, the insurance industry and our committee take note that only a minute percentage of these policies are ever presented to a court of last resort for interpretation.

THE TAXATION OF LIFE INSURANCE— WHERE DO WE STAND NOW?

By

Irving V. Brunstrom

Within the past fifteen years the subject of taxation has become one of ever-increasing importance to both lawyers and laymen. Almost no business deal of any consequence is executed without some consideration of the taxes which may accrue as a result of the transaction. A flood of literature on taxation has been one outgrowth of this change in the American scene. Books, articles and pamphlets pour from the presses, discussing one or another of the technical phases of taxation, and the literature on the taxation of life insurance has been no exception. The importance of life insurance and annuities as the foundation for even the most modest estate is almost universally recognized today, and the impact of taxes on life insurance necessarily is the subject of closer scrutiny than was the case thirty, or even twenty, years ago. Loose-leaf services, books and papers without num-

ber have been published on the subject of making the best use of life insurance and annuities, and the attendant tax consequences.

This being true, what contribution can be made by another paper traversing such a well travelled road? One answer occurred; instead of placing under the microscope some technical minutiae of the Internal Revenue Code of 1954, or discussing the uses of business insurance, for example, it might be worth while to discard the laboratory equipment. Instead of examining the needles on one branch of a pine tree, let us climb a hill and look at the forest for a moment. To vary the metaphor, some of us may have become like some doctors, specialists on the left nostril only. It is difficult to retain a sense of perspective looking at the left nostril, so let us back away and look at the whole animal.

A life insurance company has two sources of funds: premiums, and return on invested moneys. Any tax on a life insurance company or on the funds paid to policyholders and beneficiaries therefore must be imposed on one or both of these sources. There are no other accumulations against which to levy a tax. These facts may seem so patently obvious that they need not be said, but once stated clearly, it also becomes obvious that a legislative body must decide which of the two sources is to be taxed. Also a tax of a certain type might be constitutional if levied against premiums, for example, and unconstitutional if levied against income. A lack of understanding of these fundamentals may, and in the past has, led to confusion and uncertainty.

For example, the United States levies an income tax on life insurance companies. The Congress has struggled with this problem for forty-six years, and at the present time is re-examining the whole theory of a proper basis for the tax. In this instance the difficulty is basic: What is the income of a life insurance company? Assuming, as Congress does, that it is proper to impose an income tax on life insurance companies, then Congress has the power, under the sixteenth amendment, to impose a tax only upon income, and not upon capital. All that need be determined is the net income of the company. How has Congress answered the question?

The Corporation Excise Tax Act of 1909 imposed a tax upon "every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company. . . ."¹ The basis of the tax for insurance companies as well as for other corporations was the ". . . entire net income . . . from all sources." Under the revenue

¹ Tariff Act of August 5, 1909, Sec. 38.

acts of 1913, 1916, 1917 and 1918 this continued to be the basis.² How did the two sources of funds, premiums and investment return, fare under these laws? For the eleven years 1909-1920 the gross income of life insurance companies was considered to be their total revenue from the operation of the business and of their income from all other sources within the taxable year. Premiums were included in gross income, with claims paid on policies being allowed as a deduction. Immediately a controversy arose over the question whether that portion of the premium income returned to policyholders as dividends was to be excluded from gross income. The insurance companies, of course, contended that such dividends were merely the result of a deliberate overcharge and hence were not taxable as income to the company. In 1911 the Commissioner of Internal Revenue declared that these dividends were not merely the return of an overcharge, but were distributions of surplus derived not only from overcharges but from all sources of company income.³ However this theory was abandoned in the succeeding law. The government conceded that there should be full deduction of dividends.

Another phase of the same problem came up in connection with dividends applied to pay renewal premiums, to shorten the premium-paying or endowment period, or to purchase paid-up additions. Here the insurance companies argued that such dividends did not constitute income in the year they were so applied by the company, and should not be included in determining taxable income for the year in which they were so applied. The commissioner ruled adversely to the companies⁴ on the ground that dividends transferred back to the company at the direction of the policyholder constituted new taxable income received in the year of application, even though the possession of the dividends had been received by the company in a previous year and had remained in the company during the year they were applied to pay renewal premiums, shorten the premium-paying or endowment period, or purchase paid-up additions. The courts, however, did not sustain the commissioner.⁵

² Tariff Act of 1913, Sec. IIB (1); Rev. Act of 1916, Sec. 10; Rev. Act of 1917, Sec. 1206 (1); Rev. Act of 1918, Secs. 213 and 233 (a)(1).

³ T.D. 1743, Treas. Dec. under Int. Rev. Law of the U.S., v. 14 (1911), p. 134, at 136, 137.

⁴ *Supra*, note 3.

⁵ *Mut. Ben. Life Ins. Co. vs. Herold*, 198 Fed. 199 (D.C.N.J. 1912), *aff.* 201 Fed. 918, cert. den. 231 U.S. 755; *Conn. Gen. Life Ins. Co. vs. Eaton*, 218 Fed. 188 (D.C. Conn. 1914); *Conn. Mut. Life Ins. Co. vs. Eaton*, 218 Fed. 206 (D.C. Conn. 1914); *Fink vs. Northwestern Mut. Life Ins. Co.*, 267 Fed. 968 (1920).

A second problem which arose under the 1909-1920 type of income tax on insurance companies was the deduction allowed for net additions to reserves required by law. The questions were what was meant by the word "reserve" and what reserves were "required by law." The argument raged for years, and resulted in a series of administrative rulings and court decisions not necessary to detail here.⁶ Mention is made of these two problems only to point up the fact that by 1921 it was considered advisable to abandon the philosophy of taxing life insurance companies under the general corporate tax law. The general corporate approach was criticized at that time on practical grounds:

- (1) There were constant disagreements between the Treasury Department and life insurance companies.
- (2) In a desire to avoid litigation the companies submitted to many demands which they deemed unfair.
- (3) When principles involving large amounts of tax were involved, litigation was undertaken at great expense to policyholders.
- (4) After eleven years of experience during which companies were taxed on supposed net income, there were still many matters in dispute.

There were also theoretical grounds for criticism:

- (1) There was doubt about the constitutionality of the law. Under the sixteenth amendment, Congress is not free to declare that to be income which is not income. Serious question existed about the right of the government to tax premiums to a life insurance company as income, particularly in the case of a mutual company.
- (2) The tax did not bear equally upon different companies.
- (3) It did not provide any certainty of income to the government.
- (4) The amount of tax was not easily determinable, and when determined was not a tax on net income.
- (5) The tax was collectible only after heavy expense by both companies and government.

⁶ *Mut. Ben. Life Ins. Co. vs. Herold*, 198 Fed. 199 (1912); Reg. 33, Art. 147(d); Reg. 33 (revised), Art. 240; Reg. 45, Art. 569; *Maryland Cas. Co. vs. U.S.*, 251 U.S. 342, 40 S. Ct. 155, 64 L. ed. 297 (1920); O.D. 427, C.B. 2, p. 216 (1920) and L.O. 1032, C.B. 2, p. 216 (1920); *Fink vs. Northwestern Mut. Life Ins. Co.*, 267 Fed. 968 (1920); *U.S. vs. Boston Ins. Co.*, 269 U.S. 197, 46 S. Ct. 91, 70 L. ed. 232 (1925); *Minn. Mut. Life Ins. Co. vs. U.S.*, 66 Ct. Cl. 481, cert. den. 279 U.S. 856, 49 S. Ct. 352, 73 L. ed. 998 (1929).

Therefore in 1920 three suggestions were made for a substitute for the general corporate approach. The first was a direct tax on premiums. The second was a tax upon the amount of insurance issued. The third was a tax on so-called free interest income. The only virtue of the first two approaches was simplicity. Speaking of a federal tax on premiums, this comment was made:

A very serious objection is that the burden would be very unevenly distributed, and it would fall with greatest weight upon the younger and smaller companies whose interest income is small compared with their premium income. The older companies with many policies carrying high reserves naturally have a much larger proportionate interest income than the young companies. Furthermore the older companies have upon their books a great many paid-up policies from which a large interest income is derived, but no premium income. The young companies have very few such policies. A premium tax would also bear heavily upon industrial insurance.⁷

With reference to the second proposal, a tax on the amount of insurance issued, objection was made that the entire burden would be placed on new policyholders, and the greatest burden would fall upon those insured under the cheaper plans. The younger and smaller companies would be at a disadvantage compared with older and larger companies, as would companies issuing nonparticipating insurance as against those doing a business on the participating plan. Further, the cost of industrial insurance would be greatly increased.

Both of these proposed taxes would have departed from the income type of tax, and would have been excise or franchise taxes.

The third suggestion, for taxing so-called free investment income, had been made in 1918 by the Senate Finance Committee. The recommendation was adopted by the Senate but was rejected by the Conference Committee. In 1921 the reasoning underlying the free investment income approach was given in the Senate Finance Committee hearing by Dr. T. S. Adams, tax adviser of the Treasury Department. Investment income, by definition, included only interest, dividends and rents, while capital gains and any other type of income generally regarded as investment income were excluded. Deductions included investment expenses and amounts representing investment income needed for policy and

⁷ *Proc. Assn. Life Ins. Pres.* 1920, p. 142. See this paper also for general discussion of 1909-1920 period. See also *Preliminary Report on Federal Taxation of Life Insurance Companies to the Joint Committee on Internal Revenue, 71st Cong.* (1929).

other obligations.⁸ In essence this was the theory adopted in 1921. However, since state laws fixed minimum standards for reserves, and many companies, in the interest of conservatism, set up higher reserves with consequent lower interest requirements, it was deemed fair to grant the same reserve interest deduction to all companies. This was done to avoid obvious discrimination and the penalizing of conservatism. As Dr. Adams said:

It has been suggested—and I think it is obviously sound—that the only true basis of income of a life insurance company is its investment income—interest, dividends and rents it receives. The premium payments it gets are a good deal like a bank deposit. When it takes them over it creates an obligation such as the obligation of a bank to return a deposit when it is called for.⁹

This about-face in the philosophy of life insurance company taxation illustrates strikingly what may occur if sight is lost of the two sources of funds with which this discussion began. As Dr. Adams admitted in 1921, the inclusion of premium receipts in the gross taxable income of life insurance companies was “one of the faultiest parts of the income tax act.”¹⁰ The Supreme Court of the United States some years later recognized this when it said:

It had long been pointed out to Congress that these receipts, except as to a very minor proportion of each premium, were not true income but were analogous to permanent capital investment.¹¹

Since 1921, therefore, “life insurance companies” and “insurance companies other than life or mutual” have been taxed under provisions of revenue acts and the Internal Revenue Codes of 1939 and 1954 which are applicable specifically to such companies.

Some little space has been devoted to this history for purposes of illustration, as the whole concept of life insurance company taxation is again under examination.¹² There is some reason to believe that governmental representatives are inclined to

⁸ Hearings before the Senate Committee on Finance (67th Cong., 1st sess.) on H.R. 8245 (1921), p. 83.

⁹ *Ibid.*, p. 83.

¹⁰ *Supra*, note 9.

¹¹ *Helvering vs. Oregon Mut. Life Ins. Co.*, 311 U.S. 267, at 269, 61 S. Ct. 207, at 208, 85 L. ed. 180 (1940).

¹² See “A Preliminary Statement of the Facts and Issues With Respect to the Federal Taxation of Life Insurance Companies,” Nov. 1954, prepared by the staff of the Subcommittee on the Taxation of Life Insurance Companies, House Ways and Means Committee.

favor taxing "life insurance companies upon their total income from all sources in the same manner as other corporations. Taxable income, in general, would consist of premiums and investment income less (1) expenses and other deductions as provided in the Internal Revenue Code for corporations generally; (2) total amounts paid to policyholders by reason of death, maturity, or otherwise, including policy dividends; and (3) net increases in policy reserves excluding increases in contingent surplus reserves. *An approach similar in principle but different in application governed the taxation of life insurance companies from 1913 through 1920.*"¹³ (Emphasis supplied.) If this proposal should be adopted, we shall then have come the full circle, from a tax conceived in ignorance and buried in collapse, through one radically different in theory, back to the original concept refined as to details but similar in principle. The outcome will be of interest to every life insurance policyholder.

Is this discussion of interest to the practicing lawyer? Perhaps only insofar as he is interested in the theory and philosophy of taxation. This paper assumed such an interest at the outset. But perhaps there are more applications of historical surveys of tax theory than may appear at first.

For example, historically the pre-eminent state tax on life insurance has been a tax on premiums. The tax is paid annually by the company. Then why should this tax be of interest to anyone but the company? For many years it was not. Let us look at a little more history. In 1908 a committee of the National Convention of Insurance Commissioners made a report to the commissioners on life company taxation.¹⁴ One recommendation was that such taxes should be reduced, and that "upon the insurance companies and their policyholders devolve the great burden of responsibility for procuring these desirable changes. It is the duty of the managers representing their policyholders to protect in this legitimate manner their property from depletion by unjust taxation."

What is the character of this tax on premiums and who actually pays it? The answers are obvious: it is a tax upon a capital contribution, and the policyholder pays it. Looking back again at our two sources of funds, we see this to be a direct tax upon one source. It is a tax whose only justification is a desire for revenue. It is imposed only upon the thrifty, upon those trying

¹³ *Supra*, note 12, at p. 25.

¹⁴ *Proc. Nat. Conv. Ins. Commrs.* 1908, pp. 59-61.

to make provision for the future of themselves and their families, provision which will prevent a future burden upon the state.

The objections to a tax on premiums have been noted earlier, from the company standpoint. What are the advantages which cause legislatures to overlook these objections? There appear to be four such merits:

- (1) The tax is relatively simple to compute.
- (2) It is easy to collect.
- (3) A state with no domestic life insurance companies collects taxes in proportion to the premiums paid by its residents.
- (4) The tax increases automatically as insurance in force increases.

The inequities inherent in the tax are outweighed by these facts.

What have been the results of the tax, apart from the raising of premium rates made necessary by this excise? One result has been the abandonment of the idea which originally underlay the tax, that the companies should pay for the support of the state departments which supervise them. Less than five percent of the taxes collected are now used for that purpose. In addition, fees and examination expenses must be paid by the companies. Over ninety-five percent of the revenue now goes either into state general funds or is earmarked for schools or some other special purpose.

Another result has been one which came into being by accident, without design. Prior to World War II the word "annuity" was one known principally to life insurance companies and to wealthy individuals. But the passage of the Social Security Act, the wage stabilization regulations during World War II, and the increasing power of labor unions combined to bring the fringe benefit to the fore. One such benefit, fostered and encouraged by the 1942 Revenue Act, was the employee-pension plan. The tax benefits given qualified pension plans were an invitation to the establishment of such plans, especially during the period of operation of excess profits taxes. Many such plans were underwritten by life insurance companies. Many were not. There are several reasons which may influence an employer establishing an employee-benefit program which will lead to the use of a non-insured as against an insured plan. Flexibility of operation is one. Some employers have used a non-insured plan because they believed lower costs would result.

Non-insured plans are feasible for the large employer. For most smaller employers they are not. And one of the major influences militating toward the use of non-insured plans has been the taxes which are imposed on insured, but not on non-insured plans. For years efforts have been to secure lower state premium taxes on annuities, and the allowance of a deduction for returned annuity considerations, in an effort to place insured pension plans on an equal plane with non-insured plans taxwise. In Nebraska, for example, the Supreme Court held¹⁵ on May 27, 1955, that annuity considerations received for annuity contracts are taxable under the premium tax statute.¹⁶ These efforts to date have met with only a modicum of success. And it is not only in the field of state premium taxes that this discrimination exists. The federal income tax on life insurance companies has amounted to a tax on annuity considerations from which non-insured trustee plans are exempt. This was recognized in "A Preliminary Statement of the Facts and Issues with respect to the Federal Taxation of Life Insurance Companies" referred to previously:

This report is immediately concerned only with the taxation of life insurance companies. However, possible actions in the non-insurance field that may have a bearing on this problem are discussed below.

One possibility would be to impose a tax on noninsured plans corresponding to the insurance-company tax, for example, a tax of $6\frac{1}{2}$ percent of net investment income. A difficulty raised in imposing such a tax on employee trusts is that it would require recalculation of the amounts necessary to provide employee benefits where they are determined by contract. The employer would have set up such a plan on the assumption that certain contributions on his part would be adequate to meet the pension that he agreed to pay. Imposing a tax corresponding to insurance-company tax would require that he increase his contributions.¹⁷

Here we have a lesson in fundamental economics, already familiar to members of the bar, but which is only now seeping down to those not so conversant with taxes, that a tax differential can alter basic decisions and influence investments and the entire course of a business. This lesson is being graphically illustrated on television every Tuesday night, in the difficulty experienced by contestants who have to decide whether to take \$32,000 or try for \$64,000. The lesson is brought home forcibly to millions of watchers that if the contestant is a single person with no other taxable income he can keep about \$18,000. The government takes

¹⁵ Bankers Life of Iowa vs. Laughlin, 70 N.W. 2d 474 (1955).

¹⁶ Secs. 77-907, 77-908, Neb. R.S. Supp. 1951.

¹⁷ *Supra*, note 8, at p. 40.

the other \$14,000 in income taxes. If he tries for the \$64,000, he can keep about \$26,500, the government taking the remaining \$37,500. This is a purely incidental, but certainly a wholesome bit of public education.

It seems reasonable to conclude that the taxes on annuities paid by life insurance companies at the state and federal levels have had the result of inducing many employers, particularly the larger ones, to decide upon non-insured pension plans. This has been recognized in the life insurance company income tax bills introduced at the last session of Congress,¹⁸ in the provisions which would permit the deduction from net investment income of 100% of the investment income allocable to group annuities and pension trust contracts relating to qualified retirement plans. One of these two identical bills passed the House of Representatives July 18, 1955, but action on the bill was deferred in the Senate for consideration at the next session of Congress. Final approval of any tax legislation is always problematical, so that while such theoretical recognition of this situation is pleasing, it has had no practical results as yet. The urgent need of the states for revenue yields a no more pleasing picture, as exemplified by the action of the Minnesota legislature this year in imposing a 2% tax on annuity considerations where no tax had been levied before.¹⁹ There are good reasons for encouraging life insurance companies to underwrite pension plans (the safety of their operations and the actuarial soundness of their rates being among them) instead of discouraging them by discriminatory taxation.

There is another part of the forest we might look at with a critical eye to see whether it is composed mostly of evergreens or of deciduous trees which will shortly shed their leaves. For example, what about the elimination of the premium payment test for including life insurance proceeds in a decedent's estate? Is this provision likely to remain in the code, and if not, why not? And what use should be made of the provision? It may be assumed that all tax practitioners are familiar with this provision and its history. For those who are not, it may be noted that from 1942 to 1954 the Federal Estate Tax Law²⁰ provided that life insurance covering the life of a decedent must be included in his gross estate if (1) the proceeds were payable to his estate, or (2) the insured possessed any incidents of ownership at the time of his death, or (3) the insured paid the premiums on the insurance, directly or indirectly.

¹⁸ H.R. 7201, H.R. 7202, 84th Cong., 1st sess. (1955).

¹⁹ Ch. 2, Minn. Laws, 1st Spec. Sess. 1955.

²⁰ Sec. 811(g), I.R.C. 1939, as amended by Sec. 404, Rev. Act 1942.

Under the 1954 code²¹ the third test was eliminated, but a new provision was inserted, to the effect that life insurance must be included in the decedent's gross estate if the decedent had a reversionary interest in a policy on his life which exceeded 5% of the value of the policy immediately before his death.

There was ample reason for deleting the payment of premiums test, the principal one being that the test made life insurance the only form of property which could not, for estate tax purposes, be given away by the insured while he was alive.

The Senate Finance Committee report on the 1954 code said, "To discriminate against life insurance in this regard is not justified."²² For Congress to permit an insured to give away a life insurance policy on his own life, as he could do with any other form of property, is a distinct gain, of course. But almost immediately after the 1954 code was approved, two fears were expressed. First, that the provision would be amended to reinstate the premium payment test. One comment stated:

Some Treasury officials are annoyed with the life insurance industry because it has been strenuously "selling" the new provision, telling clients that only through life insurance can they almost completely escape estate tax liability. Such tactics are sure to increase the Government's revenue loss, officials claim.²³

On other words, if the purported idea of some officials should be followed, life insurance was placed on an equal plane with other forms of property, but it is improper to make use of this equality.

The second fear was that, intentionally or unintentionally, Congress had not placed life insurance on an equal basis with other property in Sec. 2042, I.R.C. 1954, in that if there should be a possibility that the insured might inherit the property previously given away, and the possibilities of such inheritance were more than one out of twenty, the proceeds would be taxable in his estate.²⁴ Inheritance results from the "operation of law." If

²¹ Sec. 2042, I.R.C. 1954.

²² Sen. Rep. No. 1662, 83d Cong. 2d sess. (1954); H. Rep. No. 1337, 83d Cong. 2d sess. 91 (1954).

²³ *Wall Street Journal*, Nov. 17, 1954, p. 1.

²⁴ The pertinent portion of Sec. 2042 reads: ". . . the term 'incident of ownership' includes a reversionary interest (whether arising by the express terms of the policy or other instrument or by operation of law) only if the value of such reversionary interest exceeded 5 percent of the value of the policy immediately before the death of the decedent. As used in this paragraph, the term 'reversionary interest' includes a possibility that the policy, or the proceeds of the policy, may return to the decedent or his estate, or may be subject to a power of disposition by him."

a decedent gave away all his right, title and interest in a life insurance policy to his wife, who then left the policy to the husband in her will, would he have a "reversionary interest" in the policy? If so, a policy purchased by the wife originally, and never owned by the husband, would seem to lead to a similar conclusion. It may then be asked, upon what constitutional ground could such a tax be based, to include in the decedent's estate property which he did not purchase, never owned, and in which he had no interest?

To date there are no guideposts on this question. No regulations have been issued, and no rulings have been forthcoming from the Internal Revenue Service, in spite of requests for such a ruling made almost a year ago. This may be the result of a decision that the answer is so clear no regulation or ruling on the subject is necessary. However, estate planners could breathe more easily if the answer were definitely known.

Another problem similar to the one just outlined was described in a rather recent law review article²⁵ by Professor Joseph Murphy of Syracuse University Law School. In this article Professor Murphy suggests that Sec. 2039, I.R.C. 1954, may attempt to impose taxes which are unconstitutional. This section deals with the estate tax treatment of survivorship benefits under annuity contracts. It defines the amount of the value of the survivorship benefits includible in the gross estate, in the case of non-qualified plans, to be that part of the value proportionate to that part of the purchase price contributed by the decedent. It then provides that any contribution by the decedent's employer or former employer to the purchase price of the contract or agreement shall be considered to be contributed by the decedent if made by reason of employment.

A proviso then exempts from inclusion in the estate, not only under Sec. 2039, but under "any provision of law," survivorship benefits received by a beneficiary other than the decedent's estate, under a pension, stock bonus or profit-sharing plan, or under an annuity contract purchased pursuant to such a plan, if the plan is qualified under Sec. 401 of the code.

If the qualified plan was contributory, however, the value of the survivorship benefits is includible in the decedent's estate in an amount proportionate to the contributions made by the decedent. Here, though, the contributions of the employer are *not* considered contributions by the decedent. Thus there is a distinct advantage in having survivorship benefits provided under a

²⁵ 1 *Howard Law Journal* 1-39, January, 1955.

qualified plan. This is not feasible, of course, in many instances.

One method suggested of avoiding difficulty would be for the decedent to enter into two contracts, one providing a life annuity for himself, the other providing a survivorship annuity for his wife. He would immediately assign the second contract to his wife. Under these circumstances it is quite probable that the survivorship benefits would not be included in the husband's estate, either under the retained life estate theory of Sec. 2036, or under Sec. 2039. This would seem to follow under the decision in *Bohnen vs. Harrison*,²⁶ where the United States Supreme Court held that an assignment of the life insurance portion of a life insurance-annuity combination made the contracts separable, and prevented the application of the retained life estate theory now found in Sec. 2036 of the 1954 code.

To return to the thread of the argument, however, the estate tax is designed to tax the privilege of transmitting property at death, the basic section being Sec. 2033 of the code. The code then continues with a group of provisions designed to cover transfers which were between living persons in form, but which were testamentary in substance. The idea underlying these sections is to tax some property which had been the subject of a transfer by the decedent, as in the examples of the usual survivorship benefits under qualified and non-qualified annuity plans.

It appears, however, that Sec. 2039, as interpreted in the House and Senate Committee reports,²⁷ apparently does not require that, in order to be taxed, the decedent need ever have owned certain property or have made a transfer of it. He need merely be employed by an employer who had a contract, not necessarily with the employee, which provided benefits for him when employment ceased, and benefits for others after his death.

The conclusion drawn from this study of the network of estate tax provisions is this: To tax this type of survivorship benefit in the decedent's estate, where the decedent contributed nothing, and where there was no contract between the employer and the employee, but rather, for example, between the employer and an insurance company, may be unconstitutional, because the decedent had no property interest in the benefits and he made no transfer of them.

²⁶ *Bohnen vs. Harrison*, 345 U.S. 946. 73 S. Ct. 863, 97 L. ed. 1371 (1953).

²⁷ H. Rep. No. 1337, 83d Cong. 2d Sess. A 316 (1954); Sen. Rep. No. 1662, 83d Cong. 2d Sess. 472 (1954).

CONCLUSION

The statements made thus far may seem to have only a tenuous connecting link. To the writer it seemed worth while to make at least these two points: Let us not become specialized to the degree that we lose our perspective, and, as members of the bar, let us not forget our duty to protect our clients from injustice.

With reference to perspective, this paper has tried to make clear the fact that taxes which seem far removed from the interests of most clients may actually be determinative of business decisions. It is therefore suggested that you should be interested in the form these taxes assume.

With reference to the second point, it is suggested that the word "unconstitutional" may not belong to a dead language. Merely because laymen in general may regard take-home pay as their total remuneration, let us, as guardians of the idea of a government of limited powers, not also become so calloused that we disregard the possibility of unjust impositions, of attempts to tax which lie beyond the enumerated powers of government.

JURY TRIAL OF AUTO INJURY CLAIMS THREATENED

By

George L. DeLacy

Your chairman asked me to present a paper to this section. I was, of course, flattered, but I've been before this section so many times that I rather hesitated to appear again.

Having in mind that whatever I say is to be presented to you in the daytime, and not after an extended cocktail hour and heavy dinner, I have taken the liberty of reducing my thoughts to writing. It is much easier on me to do so, and I hope it will not bore you.

In the past on many occasions I have made the statement that man in the English-speaking countries has reached his highest attainment in the administration of justice. While I still believe this, I am quite conscious of the fact that there is much room for improvement. I am conscious of the fact that there is much uncertainty and inefficiency in the trial of controversies in our courts, especially where juries are involved. Men hesitate to submit their controversies to a court and jury. Payments are made to avoid court procedures and men do not turn to the courts with the complete assurance that justice will be administered and that the right will prevail.

It has been said that the very bulwark of the American system of life is based upon trials by juries and judges, but if the system that we have is not going to seek the truth in an expeditious manner, then litigants of all types, whether they be injured pedestrians seeking damages against the driver of an automobile or businessmen seeking a solution of differences with other businessmen, will force the legislatures of this country to furnish some type of bureau to adjudicate their differences.

Some of you will remember that prior to 1913 the trial docket, especially of Douglas County, was crowded with master and servant cases. There were always pending hundreds of these cases against the various packing houses and other employers.

Negligence was charged in failing to furnish a reasonably safe place to work and failing to furnish proper tools, etc. The defenses were assumption of risk, the fellow-servant rule, and the plea of contributory negligence. One man recovered nothing; another man got much more than he was entitled to.

As you know, steps were taken in England and later on in this country to soften these common-law defenses by passing employer's liability acts. These acts either limited or abolished the defense of assumption of risk or made it a question for the jury. These acts generally abolished the fellow-servant defense. They also made contributory negligence a question for the jury, providing that contributory negligence should not be an absolute bar, but that the recovery should be diminished because of contributory negligence.

The main effort in the trial of these cases was to get to the jury. This effort resulted in an increased amount of false swearing. It was also necessary for the injured workman, who wished to sue his employer, to employ an attorney. These cases were generally handled on a percentage basis. Such litigation was costly and long drawn out and again there was much uncertainty and many instances of injustice.

The great complexity of relationships in modern life brings with it the necessity of coping in a comprehensive and systematic way with problems which owe their existence to that very complexity. In the matter we are discussing, public opinion came to regard the care and rehabilitation of injured workers as a just charge upon the industry in which the accident occurred, and through that industry upon society.

The common-law courts throughout the country had made such a mess out of this class of litigation that the legislatures of

the various states passed workmen's compensation laws. These laws had previously been developed in Germany and in England. In Nebraska the Workmen's Compensation Law was adopted in 1913. Its passage accomplished a change and it was, therefore, opposed at the time. The law was submitted to a referendum of the people, but was adopted.

This Compensation Law eliminated jury trials and provided first for a Compensation Commissioner and later for a Compensation Court. At this time the adjudication of claims of servants against their masters, growing out of accidental injury, arising out of, and in the scope of, their employment is handled in an expeditious manner. The judges become skilled in handling claims under the compensation law; in most cases of accidental injury or death there is no contest and the functioning under the Act is expeditious and is much less expensive than the handling of the same claims by a regular common-law court and jury would be. No one would suggest that we go back to the old system.

It is a matter of common knowledge that the tax courts, established by federal statute to determine the rights of the government and of the taxpayers under the Revenue Codes of the United States, function expeditiously and in an entirely satisfactory manner. In these courts a trial with a jury is not involved.

At this time courts and attorneys are presented with the problem of administering justice growing out of the automobile traffic. We are confronted with the problem of properly handling claims resulting from personal injuries growing out of that traffic.

How long will the public tolerate the continual upward spiral of jury verdicts in personal injury cases? You are familiar with the reports in the press of tremendous verdicts growing out of the operation of railroads and growing out of the automobile traffic. Think of a verdict, tax free, of \$400,000 to a 44-year-old waiter for brain injuries and injuries to his legs; of \$250,000 for a brain injury sustained by a 48-year-old freight agent; of \$100,000 for an eye; of \$240,000 for the loss of a leg. These enormous figures have acted as a stimulus for many spurious claims, and a tremendous amount of litigation that has little or no merit has been instituted. Statistics show that between 1941 and 1951 the cost of living index had increased 73% while jury verdicts had increased 149% and are still increasing.

It is true that the citizen of today has become accustomed to thinking in larger amounts. The high cost of everything, taxes, etc., develops this; but it must be apparent that there is some

other reason for these tremendous verdicts in the metropolitan cities.

The average jury, at least in a metropolitan city, is usually made up of men and women of average education. They are not familiar with court procedures and with their duties as jurymen, but are suddenly called in to act as finders of the fact in a trial. The plaintiff's counsel is, of course, aware of the natural advantages in his favor where he is representing an injured party, especially if that injured party is one who has to make his livelihood with his hands. The association of plaintiffs' attorneys, called N.A.C.C.A., organized in 1946, advises and teaches the use of demonstrative evidence. The surgical instruments used are produced. Colored photographs are presented showing the wounds, blood, etc. Not long ago I tried a case in which the surgeon had taken colored pictures of the injuries, which were the basis of the suit. The pictures were certainly realistic. This doctor took pictures on innumerable occasions, i.e., every time he dressed the wounds; and all of them were exhibited to the jury. This N.A.-C.C.A. organization advises the plaintiff's counsel not to rely on the doctor who actually treated the claimant, but suggests that special doctors be employed; that an attempt be made to develop the possibilities which might result from the accident.

In the modern jury trial the injuries are built up by putting on a number of physicians, by exhibiting x-rays which have been blown up, by showing photographs of the blood, the wounds and the dressings, and by exhibiting the braces and casts, etc., used. Simple injuries are magnified. The natural sympathy which all jurymen have is inflamed, and as a result throughout the country unconscionable and excessive verdicts are prevalent.

If in addition to the use of demonstrative evidence the court permits a prejudicial and inflammatory closing argument by plaintiff's counsel and if the court permits the use of charts whereby plaintiff's counsel not only writes out the various amounts claimed for pain and suffering and loss of wages, etc., but is allowed to leave these charts after the argument is closed, in the presence of the jury, it is apparent that no proper trial of the controversy is had. The trial is controlled by passion and prejudice rather than objective deliberation.

If this trend continues, insurance rates must necessarily be increased and an excessive burden must be borne by those operating railroads, motor vehicles, etc.

It has been said:

"No one has any objection to proper evidence that truly assists a court or jury in determining a controversial question. But when evidence ceases to truly assist and begins to create 'impulsive verdicts' it ceases to be a part of an orderly trial. The question of exhibition of injuries, introduction of surgical instruments, the use of blackboards in closing argument and similar schemes to increase awards are all things that a trial judge may regulate in his discretion. During the last twenty years it has seldom been considered discreet to restrict these practices. Verdicts continue to soar. There is considerable alarm from coast to coast about the trend. There is a contest among plaintiff's lawyers to somehow get a larger verdict than has been before returned. The trial courts are quite conscious of this, yet there seems to be no restriction on new schemes designed to stir the emotions of the jury." In 1925 the Illinois Appellate Court had this to say:

The doctors treating plaintiff for her injuries were permitted to go into considerable detail, describing the instruments and surgical appliances used in the treatment. There was introduced in evidence a surgical clamp which had been applied to plaintiff's broken leg. We strongly disapprove of unnecessary descriptions of such appliances and their exhibition to the jury. Such exhibitions usually serve no purpose except to excite sympathy. To permit this in personal injury cases would open a wide door tending to arouse emotions not conducive to a fair and impartial consideration of the proper issues presented.

It seems apparent to me that if the courts continue to allow such procedures and if the courts continue to allow excessive and unconscionable verdicts to stand, that legislatures will soon be called upon to provide for the handling of such claims in the same manner as compensation claims are handled, and this will be by a bureau or special court and will not be by the ordinary trial court and jury. This is what happened when the ordinary common-law courts did not handle efficiently the claims arising out of the relationship of master and servant. It appears to be the rule in this country that we swing from one extreme to the other. There was a time when the plaintiff could not recover damages even though the defendant was negligent if the plaintiff was guilty of any negligence. There was a time when the plaintiff employee could not recover for the negligence of a fellow servant. There was a time when the doctrine of assumption of risk precluded recovery by a plaintiff employee. Gradually all of these defenses were modified. The pendulum has swung back; the adjudication of the rights of an injured claimant is turned into a dramatic sketch, false testimony is common, and trivial injuries are played up and magnified so that unconscionable sums are in many instances allowed to the claimant.

It should not be forgotten that during the trial there sits upon the bench a judge, learned in the law, and placed in that position to see that justice is done between the parties so far as humanly possible. It is apparent that a fearless and experienced judge can see to it that the trial of a jury case is not turned into a theatrical performance, and can see to it that there is no improper use of demonstrative evidence and charts, etc. I will speak of this later on in this paper.

The Bar has made great progress in improving trial procedure. I refer to the Federal Court Rules and the discovery statutes in force in the State of Nebraska. We have all become convinced that the administration of justice requires a full disclosure of the pertinent facts. If an accident has happened, all parties should know the names of the witnesses. If the plaintiff has sustained an injury and is claiming money damages to compensate him for it, the defendant should know what his doctors report, he should know what the hospital records show and should likewise have the benefit of an examination by his own doctor or at least by a doctor appointed by the court. This has been accomplished. You all know that depositions may be taken of either party. At the taking of these depositions all pertinent facts may be inquired into. If it is not desired to go to the expense of having a deposition taken, interrogatories may be served, which the other party is required to answer. By the use of these interrogatories the names of all of the witnesses can be obtained and all other pertinent facts may be inquired into. Under the statutes, parties may obtain leave to inspect the premises, take pictures of the premises, make maps of the premises, force the other party to produce pictures taken at the time of the accident which are not otherwise available and, in fact, procedures have now been adopted which, if energetically availed of, results in a full disclosure of the facts. In addition to this in both federal and state courts we have the pre-trial procedure, wherein the case may be reviewed before the trial judge. This pre-trial procedure is of great help to both parties if it is really used and if it is held by a judge who will really make an effort to conduct a pre-trial as it should be conducted. If the court's attitude is simply to get through a task, then nothing will be accomplished by it; if properly used, proper settlements in many cases may result.

All our procedures are now evolved to eliminate surprise and to do away with the old sporting theory of conducting a trial (based on surprise).

We believe that our courts should sense that we are living

in an age of distorted values and that the developments in trial techniques unless judicially controlled will unduly magnify these distorted values.

In a Wisconsin case, *Markowitz vs. Miller Electric Railway and Light Co.*, 284 N.W. 31, decided in 1939, the court in commenting on an improper argument said:

Proper administration of justice requires that the court promptly check such improprieties on its own motion. A verdict returned upon a record free from such improprieties or after effective judicial control by prompt and positive rulings checking or counteracting them is not as apt to be impaired by reason of prejudice or passion on the part of the jury. . . .

In the case of *Warren Petroleum Corporation vs. Sterling Pyeatt*, the Court of Civil Appeals of Texas, reported in 275 S.W. 2d 216, there was a judgment in favor of the plaintiff allowing him damages for injuries sustained in an automobile accident. The defendant appealed and the case was reversed. In this case, the defendant complained of the action of the trial court in permitting plaintiff's attorney over defendant's timely objection to place three charts upon a blackboard in full view of the jury immediately prior to commencement of closing argument. In the opinion the charts are set out. In the opinion, the court says:

Defendants objected to the placing of said charts upon the blackboard and to their use in the closing argument for many reasons, the chief objection being that "the use of the charts were highly prejudicial and effectively injected new and unsworn testimony for the jury's consideration." With this contention we agree. We do not believe the use of such charts would be permissible in any case over timely objection. Most of the statements in the first two charts are plain positive factual unsworn statements and were not put there during the argument on each point and not as a reasonable deduction from the evidence. The statements and figures in the third chart were not put there during the argument and as a reasonable deduction from the evidence. Oral argument, with proper references to the testimony and evidence that would reveal such factual statements as contained in the charts to be true might have been permissible. But such bold factual statements made orally in argument without any reference to or inference from the evidence is error. An attorney cannot testify orally in his argument, and what he cannot do orally he certainly cannot do in writing. *Wichita Transit Co. v. Sanders*, Tex. Civ. App., 214 S.W. 2d 810; *Employers' Ins. Ass'n. v. Rowell*, Tex. Civ. App., 104 S.W. 2d 613; *Huey & Philp Hardware Co. v. McNeil*, Tex. Civ. App., 111 S.W. 2d 1205; *Southwestern Bell Telephone Co. v. Hardy*, Tex. Civ. App., 91 S.W. 2d 1075, reversed, 131 Tex. 573, 117 S.W. 2d 418. . . . The charts were not put in evidence prior to the time plaintiff and defendants rested

their case. They were effectively put in evidence in the closing argument.

The bar has for many years sanctioned the practice of allowing attorneys to handle personal injury cases on a contingent basis. This is the only practical way to handle these cases. In the larger metropolitan cities (not in Nebraska), runners are attached to some law offices whose duty it is to bring in personal injury cases which are, of course, handled on a percentage basis. Where this practice exists it is apparent that the temptation to introduce false testimony is great and a racket is apt to develop. It is asserted that these firms have associated with them doctors who are amenable to suggestions and testify for them in court, building up and exaggerating the injuries claimed. There is now added to all this the use of colored pictures, charts, etc., i.e., demonstrative evidence.

I am of the opinion that nearly every member of the Bar will admit that the handling of personal injury cases, where a jury trial is involved, is uncertain, is not efficient; I believe all will agree that many injustices result. I believe all will agree that litigants involved in personal injury cases are apprehensive, are fearful of the results and that many defendants prefer to pay more than they should to avoid such an ordeal. This is the year 1955; men in other walks of life, I think, wonder at the inefficient handling of such litigation by our profession and wonder why we do not improve upon our procedures.

The description of the modern jury trial of a personal injury case, especially in the great metropolitan centers, does not paint an agreeable picture of our adversary system of administering justice. Mr. Harry LaBrum, Philadelphia lawyer, in an address given in Milwaukee in August, 1954, said, and we take the liberty of quoting from his address:

Some time ago in Philadelphia the Court of Appeals for the Third Circuit handed down a decision which made the front page and shocked almost everyone—lawyers and laymen alike.

It was not a political decision; it was not another example of hard cases making bad law; it was an ordinary case under the Federal Employers' Liability Act.

A railroad employee fell from a bridge and was injured. Aside from the question of coverage under the Act—which all the Judges decided in favor of the plaintiff—the only issue in the case was whether or not the railroad was negligent.

Now what could there possibly be in such a case to justify an opinion by the Court of Appeals which immediately became a "best seller." Could it be the amount of the verdict? Certainly

not—the court upset the verdict, and in any event a \$37,000 verdict shocks no one today, except of course the particular defendant and his insurer!

The great public interest and discussion about this case stemmed from the reasons the Court of Appeals gave for upsetting the jury verdict in the case. Here is what the court said, in reversing the judgment:

“. . . Because of the bickering and brawling of both counsel, the jury could not possibly have decided the real issues on their merits, but was sidetracked into passing judgment on the character of the attorneys.”

And—“The conduct of both counsel was of such nature as to vitiate the entire trial.”

And finally—“The jury did not have an opportunity fairly to pass upon the real issues, because of the conduct of the attorneys.”

Now I do not mean to cause any reflection on either of the lawyers involved. As the Court of Appeals said, they were able and experienced men and they are well known at the Philadelphia Bar. Their conduct in this case was probably different only in degree from that which takes place at many trials almost daily.

Professor Joiner of the University of Michigan in the *Michigan Law Review*, November, 1954, calls attention to a review of a textbook on trial technique written in 1936. The review appeared in the *Harvard Law Review*, 1949, page 1389. The reviewer of the book was Mr. E. M. Morgan. Here is what he said about a book written for lawyers on trial technique:

Intended as a lawyer's book, it will in all probability be read only by lawyers and those who would be lawyers. And fervent prayers that the book be read by no others should be raised by those who want to believe, and want others to believe, that a law suit is a proceeding for the discovery of truth by rational processes. If only some lawyer could rise up and honestly denounce Mr. Goldstein as a defamer of his profession! If only Mr. Goldstein himself had written his book as an exposition of the evils inherent in our adversary system of litigation! If only a reviewer could assert that this book is a guide not to the palaces of justice but to the red-light districts of the law! But a decent respect for the truth compels the admission that Mr. Goldstein has told his story truly. He has told it calmly, without pretense of shame, and (God save use!) without the slightest suspicion of its shamefulness. He has shown by his own unperturbed frankness with what complaisance the profession, which would smile the superior smile of derision at the suggestion of a return of trial by battle of bodies, accepts trial by battle of wits. In all innocence, he has produced a document which is a devastating commentary upon an important aspect of our administration of justice.

Personal injury litigation in recent years has become big

business on both sides, and it should be handled with businesslike efficiency across a desk with the opposing counsel seeking a solution and not in the trial courts unless trial is absolutely unavoidable.

There is danger that if the trial courts and trial lawyers do nothing to improve the situation, disaster will result. As said by Mr. LaBrum in the same address mentioned above, "The public will stand just so much, and while I am not one to cry wolf, I can without fear of contradiction, predict that unless the present situation is corrected and soon, we will lose the bulk of personal injury litigation to either arbitration, or some form of compensation."

Again, Mr. LaBrum said:

This is not idle talk. You know that both arbitration and compensation are—right now—receiving serious study in responsible circles; and the only thing that can head them off is a drastic change in the outlook for disposal of personal injury cases in law offices and in courts.

If we do not take this problem seriously, the parties will not only take the cases away from the courts—but from the lawyers too; and the rule of law and the role of lawyers will be weakened that much more.

I have noticed advertisements inserted in national periodicals by casualty insurance companies relating to the subject of excessive jury verdicts. They suggest that such verdicts increase insurance rates. That these verdicts must be paid out of premiums belonging to thousands of policyholders. When premiums collected do not cover claims, everybody's insurance rates have to go up.

Such advertisement occurred in the *Saturday Evening Post* and *Life*.

One of the ads exhorted jurymen "to be fair with the public's—and your money." None of the ads called upon the public to be other than fair and reasonable when on a jury. After such ads appeared we find lawsuits brought to enjoin such publications and even to oust the insurance companies from a certain state for contempt of court, etc.

I ran across the case of *People vs. American Automobile Insurance Company*, (California) 282 P. 2d 559 (decided April 18, 1955). In this case a quo warranto petition was filed against an insurance company based on the advertisements to which I have been referring. A demurrer was filed to the petition and the demurrer was sustained.

It has never been my idea that attorneys had a vested interest in court procedures which illy serve the public as a whole.

The spectre of the enlargement or extension of workman's compensation benefits to the field of all accidents is ever present. Its accomplishment would be a catastrophe to lawyers whether on the plaintiff's or defendant's side of the problem.

This compensation plan which I have been talking about has not been adopted in any of the states in this country. Such a plan was adopted in the province of Saskatchewan, Canada. It has been suggested that the imposition of liability, regardless of fault (a necessary corollary of such a compensation plan) would lead to individual irresponsibility and fraudulent abuses. Workmen's compensation is thought to be a feasible system only because of the existence of the employment relationship which aids investigation of claims and prevention of fraud, collusion or malingering. Under such a relationship there is a fairly uniform class of beneficiaries.

Employers as a class can pass on the cost of compensation to the general public and can aid in preventing accidents through the installment of safety devices, whereas those factors are absent with the largely unoffending class of motorists. Likewise the plan would place a heavy burden on the unoffending motorist and would at the same time provide a scale of benefits so low as to be inadequate for any injured person, not a wage-earner, leaving many flagrant wrongs unredressed.

It likewise can be urged that the plan is socialistic and contrary to our system of free enterprise.

This has been a rather rambling dissertation.

During my rather extensive experience I have noted the trends and have come to certain conclusions, which I throw upon the table for discussion.

I am sure that as practicing lawyers we are vitally concerned in making our legal and judicial processes both adequate and effective. We should therefore do more than all others to make them so.

We must make the courts of law more efficient and attractive to the public for the determining of all kinds of disputes.

The public must believe that justice is really meted out in our trial courts in an expeditious manner and that it is being done without too much cost.

Improvements in the administration of justice have been largely left to the Bar and the various Bar Associations. This is as it should be.

Let us not allow the impression to exist among the people that a jury trial is simply a contest of wits between counsel, that everything goes; that it is an outdated and ineffective procedure for the determination of the truth and for the doing of justice between disputants.

We will all agree, I am sure, that motion picture or television reproductions of a trial are usually a travesty and create a most unfavorable impression.

The proper conduct of the trial of such cases lies with the district judge. The district judge should not simply preside at a battle between plaintiff's and defendant's lawyers; he should not simply keep order in court; he should see to it that the officers of the court try each case in a proper manner. Each case should be a challenge to the judge to see to it that justice results from the trial before him. Each trial should be a special event, not one to be hurried through and disposed of simply for the purpose of clearing up the docket. If we have time for nothing else, we all should take time to see that justice is properly administered in our courts and in a dignified manner, otherwise the balance of the community may move in and take charge in a way which will injure our professions and especially those engaged in trial work.

It follows from what has been said that the obtaining of high class men upon the trial bench is a goal to be sought. The Bar has done much to accomplish this. The salaries of judges have been increased. A pension plan has been evolved, this in the hope that the bench will attract able attorneys to make it a life's work.

I am of the opinion that we could have accomplished much along these lines if we had adopted the Missouri Plan for the selection of judges at least in Douglas and Lancaster Counties. It may be in the agricultural districts that the candidates are known to the voters and that the voters are capable of selecting proper judge. However that may be, it might be advisable to give such districts the right to elect as to whether they would come under the provisions of the statute or not.

I believe we should again vigorously proceed to initiate procedures to have what is know as the Missouri Plan adopted. This should be our task for the forthcoming year.

As has been said before, personal injury litigation has become big business—about 85 percent of our trials involve personal injury or property damage.

Fortunately, in Nebraska there is very little "law's delay." Both our state courts and federal courts are up-to-date, and a fairly speedy trial can be had if the attorney is energetic. However, in the large metropolitan cities elsewhere there are crowded dockets, and a litigant must wait two or three years to get his case for trial. The impatient efforts to cure this condition may result in panaceas which will spread to our state, to our disadvantage.

As the handling of personal injury business is important, it should be handled by counsel with businesslike efficiency. After the facts involved are known and the nature of the injury and property damage has been ascertained, then the counsel (if the case is one for settlement) should consult in a fair and frank manner. This should be done at an early time and should not be left to a time when the case is sent out for trial. Settlements on the eve of trial are very common, but they discommode the court and may cause the jury to be idle for the rest of the day. I am sure that the average juror in Douglas County thinks that there is too much time wasted in the trial of jury cases. He sits around for long periods of time waiting to be called into the box; then the case has been settled and he starts to wait again.

If attorneys for claimants allow their clients to demand unfair and unrealistic amounts in settlements, if they allow the business to develop into a racket and make of trials a means of extorting unconscionable verdicts by appealing to the prejudice and passion of the jury and by other questionable means, or if defendant's counsel arbitrarily refuse to make fair settlements and arbitrarily and stubbornly contest cases which ought to be settled, or if defense attorneys persist in stalling the trials, then, as I have said before, the impatience of the public may cause the adoption of poorly conceived plans and procedures to correct the evils involved.

I have in mind that it is up to us to do the job. Let's keep in mind the importance of the matter to our clients and to the public and even to ourselves.

The House of Delegates convened at 4:15 P.M. to receive reports of the sections, with members of the assembly also present. The following proceedings were had:

HOUSE OF DELEGATES

FRIDAY, OCTOBER 7, 1955

JEAN B. CAIN: Gentlemen, the House of Delegates will now be in order.

The first item of business is the report of the Section on Real Estate, Probate and Trust Law, David R. Warner, chairman.

DAVID R. WARNER: Mr. Chairman and members of the House. I should probably apologize for not having a written report. I will try to make the report brief anyway.

The Section on Real Estate, Probate and Trust Law had its annual meeting this morning and conducted a program in accordance with the printed program. The program was well received. We had some excellent speakers. I believe all of the attendance at the section meeting were well satisfied with the program.

An election was conducted and two members of the Executive Committee were elected; Mr. George Farman of Ainsworth and Mr. Lynn Heth of Valentine.

Following the section meeting a meeting of the Executive Committee was held and officers were selected for the coming year, with Herman Ginsburg as chairman, Bob Simmons as vice-chairman, and Lynn Heth as secretary.

There was one item in connection with the program which was held which I believe should be called to the attention of the House specifically, and that was the report of the Title Standardization Committee of our section.

The chairman of the section gave the report, and at the section meeting asked that any members of the Association who have suggestions with respect to revision of the existing title standards or have suggestions as to new standards communicate the same to him or to the secretary of the Association.

I believe now that a new chairman of the section has been selected, and it would be proper also to communicate any such suggestions to Mr. Ginsburg.

Another item which the Executive Committee of the section asked me to bring to the attention of the House was referred to briefly at the close of his talk by Herman Ginsburg, and that relates to the matter of some committee of the Bar Association taking an interest in and following up legislation which is before the

legislature in addition to bills which are actually sponsored by the Association.

Any of you who heard Herman's talk had brought to your attention rather effectively, in my estimation, at least, a couple of bills that perhaps ought not to have been passed at all by the last session of our legislature, and had the Bar Association taken an active stand in connection with such matters perhaps they would not have passed.

This is being submitted at this time as I stated at the request of the Executive Committee of the Real Estate Section. We are not submitting it as a recommendation but it is a matter which our section does feel should receive further consideration by the Association.

I believe that completes the report of our section.

JEAN B. CAIN: Thank you very much, Mr. Warner.

If there are no objections, the report of the committee on the Section on Real Estate, Probate and Trust Law will be received and made a part of the permanent record of the Association.

ROBERT VAN PELT: Mr. Chairman, may I arise at this moment to inquire about a procedure, because I did hear Mr. Ginsburg's splendid paper, and there was a point raised at a luncheon that I attended.

Is there some procedure that the Bar Association, either by the Executive Council or this House of Delegates, can be expressed in disapproval of a bill, and who does it? Would it be for the Executive Council to take the action or the House of Delegates to take action on bills that should be disapproved by the Association?

JEAN B. CAIN: Do you want to answer that, Mr. Turner?

GEORGE H. TURNER: The Executive Council has all of the power of the Association between meetings of the Association. The Executive Council, I think, without question could authorize the section, for instance, to appear as a representative of the Association.

ROBERT VAN PELT: Yes; and I think then what you have said probably answers it sufficiently, George, except that that procedure should be known so that, for instance on this real estate matter, I think Mr. Ginsburg appeared individually and tried to get some changes made and did get some changes made.

GEORGE H. TURNER: Of course the Executive Council ses-

sions are not held more than three or four times during the year, but if by the time that you know a bill is about to be introduced or has been introduced, inquire if there is going to be a meeting of the Executive Council, and I would anticipate no difficulty on that.

ROBERT VAN PELT: I think it is a matter that will come up in the real property section.

JEAN B. CAIN: The next report, Section on Taxation. Who is to make that—Hale McCown.

HALE MCCOWN: In December, 1954, the Section of Taxation conducted the Association's annual institute on federal taxation in two-day sessions held at Alliance, Grand Island and Omaha. Members of the Association who appeared on the program were Hale McCown of Beatrice, Warren Dalton of Lincoln, Barton Kuhns of Omaha, Robert Moodie of West Point, Laurens Williams of Omaha and Washington, D. C., Robert Adams of Omaha and Flavel Wright of Lincoln.

Registration at the Tax Clinic included 559 lawyers from 154 towns in Nebraska. As evidenced by the registration, interest in the tax clinics is increasing and, in the opinion of the Executive Committee of the Section of Taxation, the annual Tax Institute should be continued as a regular part of the program of the Association.

Arrangements have been made to conduct the 13th annual tax institute to be held December 12 and 13 at Scottsbluff, December 14 and 15 at Kearney and December 16 and 17 at Omaha. Subjects to be covered and the personnel appearing on the program will be announced in the near future.

During the early months of 1955, the Section of Taxation collaborated with the Committee on Legislation in the preparation and presentation to the Nebraska State Legislature of the following bills:

LB 223—which liberalizes the provision for giving a bond in cases where the amount of inheritance tax is uncertain.

LB 275—which keys the Nebraska estate tax to the Internal Revenue Code of 1954.

LB 276—which provides for the taxation of powers of appointment. The portion of LB 276 which repealed the provisions relating to previously taxed property was not passed.

Except as noted each of these bills was enacted by the legislature in substantially the form suggested.

This afternoon the section conducted its section meeting which included an interesting discussion by the Honorable Joseph Sewall of the changes in social security provisions and a panel discussion of developments under the 1954 Internal Revenue Code. Participating on the program were Hale McCown as moderator, Robert B. Denney of Fairbury, Leo Eisenstadt of Omaha, John C. Mason of Lincoln and John E. North of Omaha.

The new members elected to the Executive Committee of the Section of Taxation are Thoms M. Davies and Keith Miller. Barton H. Kuhns was elected chairman; Thomas M. Davies was elected vice-chairman and Keith Miller was elected secretary of the section.

JEAN B. CAIN: The report of the Junior Bar Section, Albert G. Schatz, chairman.

ALBERT G. SCHATZ: Mr. Chairman, members of the House of Delegates. The annual meeting of the Junior Bar Section was held this morning at 9:30 as scheduled on the program, a discussion, as you know, by Senator Hruska.

Our attendance was not as large as it was anticipated because we had a pretty tough section to compete with, listening to the first section report here.

But we had a reasonably good turnout, and we had a good meeting.

We had an election of the Executive Committee, and the election resulted as follows: Edward McEcham of Omaha is to serve on the committee for three years; Ray Simmons is to serve three years; DeWayne Wolf of Kearney, two years; Stu Stewart of Lexington, three years; Donald Boyd, Lincoln, one year; and myself, Albert Schatz, one year.

After the election of the committee members, the committee itself met and the following officers were elected for the coming year: Ray Simmons of Fremont, chairman; DeWayne Wolf of Kearney, secretary, and Donald Boyd of Lincoln, vice-chairman.

Also at the committee meeting held after the meeting a plan was adopted for a program for the coming year which the Executive Committee of the Junior Bar Section will undertake. Thank you.

JEAN B. CAIN: Thank you, Mr. Schatz.

If there are no objections, the report of the Junior Bar Section will be accepted and made a part of the permanent records of the House of Delegates.

The report of the Section on Practice and Procedure, John L. Barton, Chairman.

GEORGE H. TURNER: Mr. Chairman, the chairman of the section has asked me to deliver this report by reason of his absence.

Your Executive Committee of the Section on Practice and Procedure respectfully makes the following report:

The following members of the Executive Committee met on March 5, 1955, at the State House, Lincoln, Nebraska, with President John J. Wilson: C. Russell Mattson, Lowell C. Davis, Raymond McGrath and John L. Barton. The president expressed his desire that those present organize and elect a chairman, vice-chairman and secretary.

Pursuant thereto, the following officers of the Executive Committee of the Section were elected: John L. Barton, chairman; Lowell C. Davis, vice-chairman; and C. Russell Mattson, secretary.

Your Executive Committee then decided that the chairman select two eminent trial lawyers to appear and speak to the members of this section at the annual meeting on October 6, 1955.

Your chairman invited Lester P. Dodd of Detroit, Michigan, and William Knepper of Columbus, Ohio. They accepted.

The sections program was given at 2:15, October 6, 1955, in the ballroom of the Paxton Hotel, and was very well received.

Your Executive Committee of this section believes that with the program just concluded the section has made a very fine and worthwhile contribution to the Association's activities.

Following the program on October 6, the following lawyers were elected to the section's Executive Committee for three-year terms: George Healey, Lincoln, and Robert Hamer, Omaha.

Subsequently the Executive Committee then elected the following named lawyers as its officers for the ensuing year: Lowell C. Davis, chairman; C. Russell Mattson, vice-chairman, and Raymond McGrath, secretary.

JEAN B. CAIN: The report of the Section on Municipal and Public Corporations. Mr. Leininger.

VANCE LEININGER: This section was newly created, pursuant

to an amendment to the Association's by-laws adopted at the 1954 annual meeting of the Nebraska State Bar Association. The first Executive Committee was named by the Executive Council and consisted of the following members: Albert T. Reddish, Alliance; Harold Rice, Creighton; Vance E. Leininger, Columbus; Charles E. McCarl, McCook; Jack M. Pace, Lincoln; and Edward F. Fogarty, Omaha.

At the first meeting of the new Executive Committee, Vance E. Leininger was elected chairman; Harold Rice, vice-chairman; and Edward F. Fogarty, secretary.

Subsequent meetings were held, as a result of which the program at this year's Association meeting was planned and arranged. An attempt was made to arrange for a program which would hold as much universal interest for lawyers interested in matters involving municipal and public corporations as possible. The general topic of eminent domain was settled on for this year's section meeting.

At the meeting of this section held Thursday afternoon, Herbert M. Fitle of the Omaha Bar presented a concise and well arranged discussion of the Uniform Eminent Domain Procedural Act, which was adopted in 1951, and called attention to some of the more pertinent decisions of our court since the adoption of this Act.

The section was particularly fortunate in obtaining the assistance of Mr. Henry B. Curtis, city attorney for the City of New Orleans, and president of the National Institute of Municipal Law Officers, who presented an authoritative and thorough discussion of the problems involved in "Just Compensation under Eminent Domain," including the principles of valuation and types of evidence available in establishing valuation.

Mr. Curtis and Mr. Fitle were then joined by Mr. W. Ross King of the Omaha Bar, attorney for the Omaha School District, and Mr. Harold S. Salter, assistant attorney general assigned to the Department of Roads and Irrigation, who participated in a lively forty-minute panel discussion of procedural and substantive problems in this field. There was splendid participation from the floor during this discussion.

At the conclusion of the program, elections were held to fill the expiring terms of Mr. Albert T. Reddish and Mr. Harold Rice on the Executive Committee. Mr. Reddish and Mr. Rice were re-elected to membership on the committee, each for three-year terms.

The members of the section feel that this section affords an opportunity for expanded service to members of the Association who may be handling matters involving public and municipal corporations. Such further subjects as zoning, school district reorganization, the proper handling of local bond issue proceedings, and the principles applicable to public bodies in the field of the law of contracts have been suggested for future section meetings. We believe they will be of wide-spread interest to members of the Association and recommend that future executive committees of this section take steps to expand the list of possible subjects and pursue their further study in an orderly fashion in future years.

JEAN B. CAIN: Now, Mr. McCown, if you would please come forward. I first want to say that I very much appreciate the honor and the privilege of serving as chairman of the House of Delegates and it is with a great deal of pleasure and I congratulate you upon the selection that you have made of a successor, Mr. Hale McCown, and I now turn the gavel over to you and turn the meeting over to you.

HALE MCCOWN: First, may I express again on behalf of all of you our appreciation for the job that Jean has done as the chairman this past year. I hope, Jean, that I will be able to accomplish as much in the coming year as you have been able to do for us already.

I shall have to rely on the support and co-operation of all of you during the coming year. I hope that I will be entitled to have it, I will hope to do the best that I can with the job that I have. I appreciate it very much.

Is there any unfinished business of this House?

C. RUSSELL MATTSON: Since we have a quorum, I move that we adjourn.

VOICE: Second.

HALE MCCOWN: All those in favor say aye.

Opposed, the same. The motion is carried.

I turn the meeting over to our president, Jack.

PRESIDENT WILSON: Gentlemen, I reconvene the 56th annual meeting of the Nebraska Bar Association.

Is there any unfinished business, Mr. Secretary?

GEORGE H. TURNER: I have none, Mr. President.

PRESIDENT WILSON: Is there anyone else who has any unfinished business?

(There was no response.)

PRESIDENT WILSON: If not, will Wilber Aten come to the rostrum.

Members of the State Bar Association, it has been indeed a pleasure to serve with this organization as your steward for the past year. During the past year I have appreciated the opportunity of being your president and acting as your steward.

I hope that the good that has been accomplished will offset any misfortunes or unwise decisions.

I think this Association is on the road to great success from the work of past presidents and past Executive Councils and the work of the House of Delegates.

The remarks that I have heard from the members present indicate that all are well aware of the duties and the responsibilities of the House of Delegates.

And now it gives me pleasure to present our president-elect, who in just a minute will be the president of this organization; and with that I hand to you your gavel of authority and congratulations.

WILBER ATEN: Fellow members of the Bar, I feel entirely humble. I appreciate the honor and I will do the best I can.

I am going to need a lot of help. I am going to have to call on all of you for a lot of help. I'm going to rely considerably upon my co-workers George and Hale and the other officers of the Association.

I would like at this time to congratulate Jack and his officers and the fellows that assisted him on a very successful year and a very successful convention. I think it has been one of the outstanding years of the Association, and I think that we should at this time thank Jack, and I would like to do that on behalf of the Association, if I may.

As to business, I believe that it is in order at this time that the assembly either approve or disapprove, at least take action upon the business that has been had by the House of Delegates.

JUDGE SPENCER: I move the approval of the business that has been transacted.

JOSEPH T. VOTAVA: Second the motion.

PRESIDENT ATEN: You have heard the motion that the action of the House of Delegates be approved by the assembly.

Is there any discussion?

If not all those in favor—

LAURENS WILLIAMS: Mr. Chairman, I do not like to be rising to points of order, and I am not going to make a point of order, but I am going to suggest that under the rules the converse is true. The action of the House stands unless disapproved by the assembly. Now let us go ahead with the motion. I am all for it.

JEAN B. CAIN: As I understand it, any affirmative action taken at this afternoon's session must be approved by the assembly. I may be in error.

JUDGE SPENCER: Question.

LAURENS WILLIAMS: I did not make a point of order.

VOICES: Question.

PRESIDENT ATEN: Unless there is a point of order taken we will vote on the motion.

All those in favor signify by saying aye.

All those opposed the same sign. The motion carried.

I believe, gentlemen, that this concludes the business of the session, and therefore at this time I will entertain a motion to adjourn the 56th annual convention of the Nebraska State Bar Association.

HARRY B. COHEN: Mr. Chairman, just before you ask for a motion I would like to make a remark, and I am perhaps as guilty as perhaps anybody else here.

I sat here and I saw the new president being inducted before about twenty-five or thirty members of the State Bar Association. Now I have always felt that the presidency of the State Bar Association is an honorable position, something to be sought for with honor by a member of this Bar. I think it is unworthy of the honor of the position and the connotations that it carries with it to have an induction before a small body of the organization as a whole.

I would like to suggest therefore that hereafter because of the fact you are going to run into the situation year after year after

year where nobody is going to be around at the end of the session, that the induction of the incoming president be made at the time of the banquet. It only takes a few more minutes while you have everybody there and while you have your biggest crowd, so to speak. I think that would be a most fitting way to induct our incoming president.

PRESIDENT ATEN: Thank you, Mr. Cohen.

Mr. Secretary, is there anything in regard to our rules in regard to that situation?

GEORGE H. TURNER: No restriction against it.

PRESIDENT AIKEN: I take it, Harry, that that is a suggestion and not a motion.

HARRY B. COHEN: That is right.

PRESIDENT AIKEN: Well, thank you for the suggestion, and we will see what can be done about it.

If there is no further business we will vote upon the motion to adjourn.

All those in favor signify by saying aye.

All those opposed, the same sign.

Motion carried and we are adjourned.

(Thereupon, at 5:20 o'clock p. m., the 56th annual meeting of the Nebraska State Bar Association adjourned, sine die.)

NEBRASKA STATE BAR ASSOCIATION
STATEMENT OF CASH RECEIPTS AND DISBURSEMENTS
OCTOBER 1, 1954 TO SEPTEMBER 24, 1955

Receipts:

Active Members Dues	\$ 37,430.00		
Inactive Members Dues	4,865.00		
Reinstatements:			
1954	\$ 25.00		
1953	25.00		
1952	6.00		
1951	8.00		
1950	8.00		
1949	6.00		
1948	4.00		
1938-1947	12.00	94.00	\$42,389.00
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Miscellaneous			2.95
Statute Books, Etc. Sold	50.65		
Less: Remittance to State Library	50.65		
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Over-payments	31.25		
Less: Refunds	31.25		
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			42,391.95

Disbursements:

Salaries and Payroll Tax	10,326.30	
Office Supplies, Printing, Postage & Stationery	1,561.18	
Directory	950.55	
Telephone and Telegraph	268.58	
Officers' Expense	2,298.55	
American Bar Association and House of Delegates Meetings	1,016.16	
Annual Meeting Expense	7,113.08	
Less: Food Cost Reimbursed and Display	2,256.00	4,857.08
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Executive Council Meetings	731.87	

Nebraska Law Review	4,958.61		
Nebraska State Bar			
Association Journal	1,433.21		
Less: Advertising	1,058.00	375.21	
Public Service	5,054.80		
Less: Reimbursements	498.37	4,556.43	
Tax Institute	2,266.58		
Institute and New Legislation	770.46		
Aid to Local Bars	297.52		
Audit	175.00		
Insurance and Bonds	102.45		
Office Expense	264.75		
Dues	50.00		
Binding Proceedings	75.00		
Judicial Council	41.43		
Committee on Inquiry	535.32		
Committee on Oil and Gas Law	69.25		
Committee on Crime and Delinquency ...	267.63		
Committee—Advisory	973.23		
Committee—Judiciary	80.75		
Committee—Co-operation with			
American Bar Inst.		235.00	
Committee—Municipal and Public			
Corps		87.04	
Committee—American Citizenship		61.03	
Committee—Practice and Procedure		67.35	
Committee—Real Estate Probate			
and Trust		48.90	
Equipment Purchased		696.46	
Miscellaneous		35.46	
Football Tickets (See			
Note 1)	105.00		
A.B.A. Regional Meeting Ex-			
pense (See Note 1)	531.30	636.30	39,737.43
Excess of Receipts Over Disbursements			2,654.52
Cash Balance, October 1, 1954 ..	653.25		
Excess of Receipts Over			
Disbursements	2,654.52		
Cash in Bank, September			
24, 1955	3,307.77		

Represented By:

First National Bank	666.95
Continental National Bank	2,640.82
	<hr/>
	3,307.77
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Note 1: Disbursements for football tickets and Regional Meeting expense represent amounts which are to be reimbursed.

ROLL OF PRESIDENTS

1. 1900	*Eleazer Wakely.....	Omaha	29. 1928	Robert W. Devoe.....	Lincoln
2. 1901	*William D. McHugh.....	Omaha	30. 1929	Anan Raymond.....	Omaha
3. 1902	*Samuel P. Davidson.....	Tecumseh	31. 1930	*J. L. Cleary.....	Grand Island
4. 1903	*John L. Webster.....	Omaha	32. 1931	*Fred Shepherd.....	Lincoln
5. 1904	*C. B. Letton.....	Fairbury	33. 1932	*Ben S. Baker.....	Omaha
6. 1905	*Ralph W. Breckenridge.....	Omaha	34. 1933	*J. J. Thomas.....	Seward
7. 1906	*E. C. Calkins.....	Kearney	35. 1934	*John J. Ledwith.....	Lincoln
8. 1907	*T. J. Mahoney.....	Omaha	36. 1935	*L. E. Day.....	Omaha
9. 1908	*C. C. Flansburg.....	Lincoln	37. 1936	J. G. Mothersead.....	Scottsbluff
10. 1908	*Francis A. Borgan.....	Omaha	38. 1937	*C. J. Campbell.....	Lincoln
11. 1910	*Charles G. Ryan.....	Grand Island	39. 1938	Harvey M. Johnsen.....	Omaha
12. 1911	*Benjamin F. Good.....	Lincoln	40. 1939	James M. Langan.....	Greeley
13. 1912	*William A. Redick.....	Omaha	41. 1940	E. B. Chappell.....	Lincoln
14. 1913	*John J. Halligan.....	North Platte	42. 1941	Raymond G. Young.....	Omaha
15. 1914	*H. H. Wilson.....	Lincoln	43. 1943	Paul E. Boslaugh.....	Hastings
16. 1915	*C. J. Smyth.....	Omaha	44. 1943	Robert R. Moodie.....	West Point
17. 1916	*John N. Dryden.....	Kearney	45. 1944	George L. DeLacy.....	Omaha
18. 1917	*F. M. Hall.....	Lincoln	46. 1945	Virgil Falloon.....	Falls City
19. 1918	*Arthur C. Wakely.....	Omaha	47. 1946	Paul F. Good.....	Lincoln
20. 1919	*R. E. Evans.....	Dakota City	48. 1947	Joseph T. Votava.....	Omaha
21. 1920	*W. M. Morning.....	Lincoln	49. 1948	Robert H. Beatty.....	North Platte
22. 1921	*A. G. Ellick.....	Omaha	50. 1949	Abel V. Shotwell.....	Omaha
23. 1922	*George F. Corcoran.....	York	51. 1950	Earl J. Moyer.....	Madison
24. 1923	*Edward P. Holmes.....	Lincoln	52. 1951	Clarence A. Davis.....	Lincoln
25. 1924	*Fred A. Wright.....	Omaha	53. 1952	George B. Hastings.....	Grant
26. 1925	*Paul Jessen.....	Nebraska City	54. 1953	Laurens Williams.....	Omaha
27. 1926	*E. E. Good.....	Wahoo	55. 1954	J. D. Cronin.....	O'Neill
28. 1927	*F. S. Berry.....	Wayne	56. 1955	John J. Wilson.....	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.....	Omaha
4. 1910-19	A. G. Ellick.....	Omaha			

ROLL OF TREASURERS

1. 1900-	Samuel F. Davidson.....	Tecumseh	6. 1914-16	Chas. G. McDonald.....	Omaha
2. 1901-	S. L. Geisthardt.....	Lincoln	7. 1917-22	Raymond M. Crossman.....	Omaha
3. 1902-03	Charles A. Goss.....	Omaha	8. 1923-37	Virgil J. Haggard.....	Omaha
4. 1904-05	Roscoe Pound.....	Lincoln	9. 1938-	George H. Turner.....	Lincoln
5. 1906-13	A. G. Ellick.....	Omaha			

ROLL OF EXECUTIVE COUNCIL

1. 1900-04	R. W. Breckenridge.....	Omaha	31. 1920-27	Anan Raymond.....	Omaha
2. 1900-08	Andrew J. Sawyer.....	Lincoln	32. 1921-21	Alfred G. Ellick.....	Omaha
3. 1900-02	Edmund H. Hinshaw.....	Fairbury	33. 1921-23	Guy C. Chambers.....	Lincoln
4. 1903-06	W. H. Kelligar.....	Auburn	34. 1922-24	James R. Rodman.....	Kimball
5. 1904-07	John N. Dryden.....	Kearney	35. 1923-26	E. E. Good.....	Wahoo
6. 1905-08	F. A. Brogan.....	Omaha	36. 1924-26	Robert W. Devoe.....	Lincoln
7. 1907-10	S. P. Davidson.....	Tecumseh	37. 1924-24	Fred A. Wright.....	Omaha
8. 1908-09	W. T. Wilcox.....	North Platte	38. 1925-28	Paul Jessen.....	Nebraska City
9. 1909-11	R. W. Breckenridge.....	Omaha	39. 1925-27	Clinton Brome.....	Omaha
10. 1910-12	Frank H. Woods.....	Lincoln	40. 1927-29	Charles E. Matson.....	Lincoln
11. 1910-10	Charles G. Ryan.....	Grand Island	41. 1927-28	Fred S. Berry.....	Wayne
12. 1910-19	Alfred G. Ellick.....	Omaha	42. 1928-29	Robert W. Devoe.....	Lincoln
13. 1911-13	John A. Ehrhardt.....	Stanton	43. 1928-30	T. J. McGuire.....	Omaha
14. 1911-11	Benjamin F. Good.....	Lincoln	44. 1928-34	Harvey Johnsen.....	Omaha
15. 1912-15	C. J. Smyth.....	Omaha	45. 1929-31	E. A. Coufal.....	David City
16. 1912-12	William A. Redick.....	Omaha	46. 1929-29	Anan Raymond.....	Omaha
17. 1913-15	W. M. Morning.....	Lincoln	47. 1930-32	Paul E. Boslaugh.....	Hastings
18. 1913-16	J. J. Halligan.....	North Platte	48. 1930-30	J. L. Cleary.....	Grand Island
19. 1914-14	H. H. Wilson.....	Lincoln	49. 1931-33	W. C. Dorsey.....	Omaha
20. 1915-17	Edwin E. Squires.....	Broken Bow	50. 1931-31	Fred Shepherd.....	Lincoln
21. 1916-16	John N. Dryden.....	Kearney	51. 1932-34	Richard Stout.....	Lincoln
22. 1916-17	Frederick Shepherd.....	Lincoln	52. 1931-32	Ben S. Baker.....	Omaha
23. 1917-17	Frank M. Hall.....	Lincoln	53. 1933-35	Barlow F. Nye.....	Kearney
24. 1917-18	Anan Raymond.....	Omaha	54. 1933-33	J. J. Thomas.....	Seward
25. 1918-18	A. C. Wakeley.....	Omaha	55. 1934-36	Chas. F. McLaughlin.....	Omaha
26. 1918-22	Fred A. Wright.....	Omaha	56. 1934-34	John J. Ledwith.....	Lincoln
27. 1919-19	R. E. Evans.....	Dakota City	57. 1935-35	L. B. Day.....	Omaha
28. 1919-22	Geo. F. Corcoran.....	York	58. 1935-37	James M. Langan.....	Greeley
29. 1919-20	L. A. Flansburg.....	Lincoln	59. 1935-38	H. J. Reguarte.....	Lincoln
30. 1920-20	W. M. Morning.....	Lincoln	60. 1935-38	Raymond M. Crossman.....	Omaha
			61. 1935-40	F. H. Pollock.....	Stanton

* Deceased

62.	1935-41	T. J. Keenan.....	Geneva	93.	1946-48	Harry W. Shackelford	
63.	1935-39	Walter D. James.....	McCook				Omaha
64.	1935-37	Roland V. Rodman.....	Kimball	99.	1946-48	Paul F. Good.....	Lincoln
65.	1936-36	J. G. Mothersead		100.	1947-48	Joseph T. Volava.....	Lincoln
			Scottsbluff	101.	1947-48	John E. Dougherty.....	York
66.	1936-36	James L. Brown.....	Lincoln	102.	1947-55	Lyle E. Jackson.....	Neligh
67.	1937-39	David A. Fitch.....	Omaha	103.	1948-49	Robert H. Beatty	
68.	1937-39	Raymond G. Young.....	Omaha				North Platte
69.	1937-41	M. M. Maupin.....	North Platte	104.	1947-50	Frank D. Williams.....	Lincoln
70.	1937-41	Golden P. Kratz.....	Sidney	105.	1947-50	Thomas J. Keenan.....	Geneva
71.	1938-42	Sterling F. Mutz.....	Lincoln	106.	1948-51	Laurens Williams.....	Omaha
72.	1938-42	Don W. Stewart.....	Lincoln	107.	1949-51	Joseph H. McGroarty	
73.	1940-46	George N. Mecham.....	Omaha				Omaha
74.	1940-42	Abel V. Shotwell.....	Omaha	108.	1949-54	Wilber S. Aten.....	Holdrege
75.	1940-42	Frank M. Colfer.....	McCook	109.	1948-50	Abel V. Shotwell.....	Omaha
76.	1941-43	Virgil Falloon.....	Falls City	110.	1949-55	Paul L. Martin.....	Sidney
77.	1941-43	Joseph C. Tye.....	Kearney	111.	1949-55	Joseph C. Tye.....	Kearney
78.	1941-47	Earl J. Moyer.....	Madison	112.	1949-51	Earl J. Moyer.....	Madison
79.	1937-37	C. J. Campbell.....	Lincoln	113.	1950-	Harry A. Spencer.....	Lincoln
80.	1938-38	Harvey Johnson.....	Omaha	114.	1950-	Paul P. Chaney.....	Falls City
81.	1939-39	James M. Lanigan.....	Greeley	115.	1950-	Paul Bek.....	Seward
82.	1940-40	E. B. Chappell.....	Lincoln	116.	1950-52	Clarence A. Davis.....	Lincoln
83.	1942-45	Fred J. Cassidy.....	Lincoln	117.	1951-55	Barton H. Kuhns.....	Omaha
84.	1941-41	Raymond G. Young.....	Omaha	118.	1952-	Thomas C. Quinlan.....	Omaha
85.	1942-48	Max G. Towle.....	Lincoln	119.	1951-52	George B. Hastings.....	Grant
86.	1942-42	Paul E. Boslaugh.....	Hastings	120.	1952-53	Laurens Williams.....	Omaha
87.	1942-45	John E. Dougherty.....	York	121.	1953-54	J. D. Cronin.....	O'Neill
88.	1942-49	Yale C. Holland.....	Omaha	122.	1954-	Norris Chadderdon	
89.	1943-45	Robert R. Moodie					Holdrege
			West Point	123.	1954-	John J. Wilson.....	Lincoln
90.	1941-45	E. F. Butler.....	Cambridge	124.	1955-	Wilber S. Aten.....	Holdrege
91.	1943-46	Frank M. Johnson		125.	1955-	F. M. Deutsch.....	Norfolk
			Lexington	126.	1955-	Clarence E. Haley	
92.	1944-49	Floyd E. Wright.....	Scottsbluff				Hartington
93.	1945-50	John J. Wilson.....	Lincoln	127.	1955-	R. R. Wellington.....	Crawford
94.	1945-43	Robert B. Waring.....	Geneva	128.	1955-	Alfred G. Ellick.....	Omaha
95.	1944-46	George L. DeLacy.....	Omaha	129.	1954-1955	Jean B. Cain.....	Falls City
96.	1945-47	Virgil Falloon.....	Falls City	130.	1955-	Hale McCown.....	Beatrice
97.	1945-49	Leon Samuelson.....	Franklin				