Nebraska Law Review

Volume 40 | Issue 2 Article 2

1960

Proceedings of the Nebraska State Bar Association House of Delegates Meeting, 1960

Flavel A. Wright
Nebraska State Bar Association, president

Jan. 1961
Vol. 40, No. 2

NEBRASKA LAW REVIEW

PUBLISHED BY THE COLLEGE OF LAW
UNIVERSITY OF NEBRASKA
AND THE
NEBRASKA STATE BAR ASSOCIATION

Annual Subscriptions $5.00
Single Copies $1.50
Bound Volume $6.00

Issued December, January, April, and June
Second-class postage paid at
Lincoln, Nebraska

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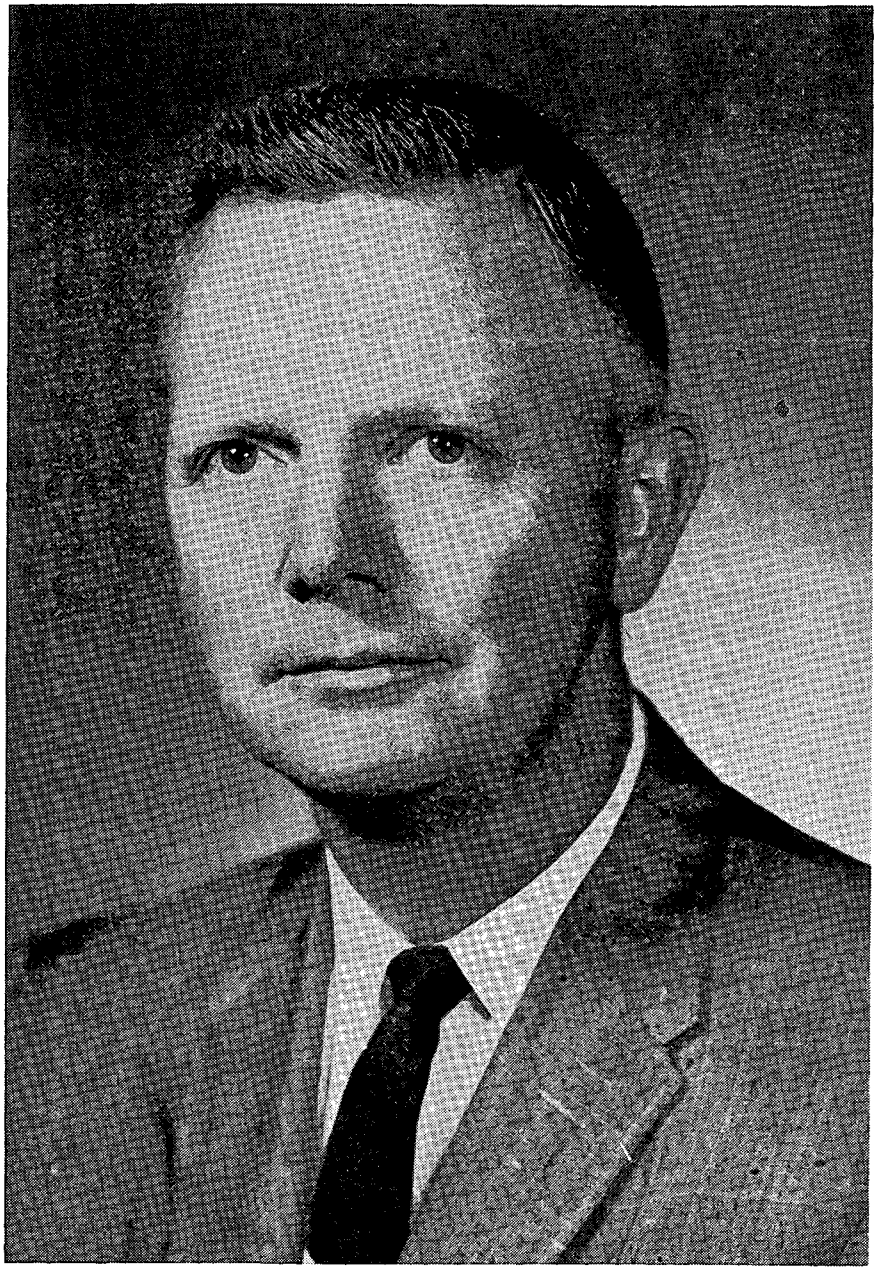

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TABLE OF CONTENTS

PROCEEDINGS OF THE HOUSE OF DELEGATES

COMMITTEE REPORTS

REPORTS OF SECTIONS

PROCEEDINGS OF ANNUAL MEETING

ADDRESSES

SPECIAL REPORTS

INSTITUTE ON REAL ESTATE TRANSACTIONS

NEBRASKA STATE BAR ASSOCIATION

HOUSE OF DELEGATES

WEDNESDAY MORNING SESSION

October 5, 1960

The House of Delegates was called to order at nine forty-five o'clock by Chairman Richard E. Hunter of Hastings, Nebraska.

CHAIRMAN HUNTER: The House of Delegates will please come to order. Mr. Secretary, will you call the roll.

(Roll call by the Secretary.)

SECRETARY TURNER: There is a quorum present.

CHAIRMAN HUNTER: Gentlemen, I think it is very fitting that the members of this Association have elected as the new Chairman of the House of Delegates a member who has contributed so much to the deliberations of this body and who has donated probably more of his time over the past few years to the workings of the Associations through various committees, particularly the Legislative Committee, than practically anyone else that I know of in the Association.

For that reason it gives me a great deal of pleasure to present to the House the new Chairman of the House of Delegates, Mr. Herman Ginsburg.

With my congratulations to him goes the gavel of your office. Congratulations!

CHAIRMAN GINSBURG: Thank you very much.

As I told Mr. Hunter earlier this morning, I had checked on the method and manner in which he had previously guided the destinies of this House and I hoped that I could do as well as he did. I am going to model myself after Mr. Hunter.

I believe the first matter in the order of business for the House is the approval of the calendar. The Chair will entertain a motion that the calendar be approved as printed.

PHIL B. CAMPBELL, Osceola: I move that the order of business as printed be approved.

WILLIAM H. MEIER, Minden: I second the motion.

CHAIRMAN GINSBURG: It has been moved and seconded that the calendar as printed be approved as the order of business of the House. Any discussion? If not, all in favor say "aye"; contrary, same sign. Carried.

The next order of business is the traditional statement by the President of the Association. May I present to you Mr. Flavel Wright.

STATEMENT BY PRESIDENT OF ASSOCIATION

Flavel A. Wright

I am not certain what the purpose of this statement is but it seems to me that I should at least report to you on the assignments given to me by the House of Delegates last year.

One of the assignments was to set up a special committee to study the Uniform Commercial Code. That has been done and the committee has reported, but you will note they are still in the process of studying.

Another was to set up a special committee on the bylaws. With this one I must say we have not made progress. I can put the blame on no one but myself but I did appoint a chairman of that committee. We got together and were not certain just what was supposed to be done. It seemed to me the bylaws weren't in too bad shape. My successor I think will have to appoint that committee to study the bylaws. It apparently will involve a matter of policy which entailed more time than was available for that committee to consider the problem. The blame for not having a report for you in that respect rests on my shoulders.

I was also required to appoint a joint committee to collaborate with realtors. That committee has been appointed and has made a report, which you will find in the program. Mr. Dick Ricketts, I believe, will give that report.

Another committee which you asked have appointed was one to study the restrictions on fees in federal matters like social security. That committee has been appointed and is reporting to you today.

I have also appointed some additional committees. We were requested to appoint a committee relating to atomic attack. The Executive Council suggested that that matter be handled by our Committee on Atomic Energy. They were willing to undertake the assignment and I hope they won't have any opportunity to have to get into that problem.

Another committee which we have appointed, which was done through the Executive Council, was a committee on cooperation with the law schools and you have noted their report. We will hear from that committee later. That was done because of a feeling that the bar and the law schools could accomplish a lot more than

was being accomplished if they would work a little closer, and I think it has paid dividends to have that committee in operation.

One thing that committee has recommended is that the deans of the law schools be members of the Executive Council. That is a suggestion which I think has merit. It has not been acted upon by the Executive Council but it can be acted upon by this group. But if it is acted upon it will require an amendment of the rules governing this body, and it will take a two-thirds vote of this group to accomplish it.

We also appointed a committee to try to devise some method to get the newly enacted laws before the members of the bar in a better fashion than was the case after the last Legislature. That committee will make a report to you and I think their report deserves careful consideration.

Finally, we were approached by students of the law school to see if we would cooperate to put out a brochure of the senior students, giving their qualifications and their interests, similar to the brochures put out by some other schools. That I believe will be handled by publishing the pictures of the senior students and information about them in the January *Bar Journal.*

There is an item which I think will demand careful consideration by the House of Delegates involving a report of the Judiciary Committee which recommends that we proceed with the Merit Plan and try to get a bill through the Legislature. That to me is one of the most important phases of the Bar Association activities. It is my feeling that if we proceed, it should be handled by a special committee that has no other responsibility than that. It certainly wouldn't be fair to Herman Ginsburg to put the load on him to undertake that further task. The Legislative Committee has a very big problem to carry forward without consideration of that matter, and if you think that that should be pushed I think it should be handled by a separate and special committee; probably separate and special from the Judiciary Committee also.

The legislative program which will be contained in Herman Ginsburg's report is an important program. You should realize that the Legislative Committee does have certain powers during the session of the Legislature to bind this organization. They can bind the organization except to the extent that they are restricted by the House of Delegates or by the Executive Council or the President. So if you think there are some areas they should not go into, or that they should be restricted in any way—and I don't recommend that they should be—at least it should be done here if that is your desire.

There will be reports on areas of cooperation with the realtors,

as I have mentioned, and there is also one with the Medical Committee. It isn't included in your reports but they have adopted a code of procedure called the Medico-Legal Code. I believe you will be furnished with copies and it deserves your careful consideration. I don't believe there is anything drastic in it but I think it will help in developing better relations with the doctors.

Those, I think, are the areas that have occurred to me that this body should be concerned with. I have no other recommendations to make. I will be present and may reserve the right to speak on any matter. Thank you.

CHAIRMAN GINSBURG: The next report is the report of the Secretary-Treasurer.

REPORT OF THE SECRETARY-TREASURER

Mr. Chairman, Gentlemen of the House: The books of the Association were audited as of the close of business on August 31. It was necessary to close them early this year, so it covers a fifty-week period. At the suggestion of the accountants, Peat, Marwick, Mitchell of Lincoln, the Executive Council has voted to close the fiscal year each year as of August 31; since the meetings are usually held pretty early in October it doesn't give the accountants time if we wait until the first of the month preceding the meeting. So in the future you will have a full fifty-two week audit but this is a fifty-week audit.

They report: "We have examined the statement of cash receipts and disbursements of the Nebraska State Bar Association for the fifty-week period ended August 31, 1960. Our examination was made in accordance with generally accepted auditing standards which we deemed applicable to the cash receipts and disbursements method of accounting, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

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

"In our opinion, the accompanying statement of cash receipts and disbursements of the Nebraska State Bar Association presents fairly the recorded cash transactions for the fifty-week period ended August 31, 1960, and the cash balance at that date, applied on a cash basis consistent with that of the preceding period. Also the accompanying schedule of cash receipts and disbursements of the

Daniel J. Gross Nebraska State Bar Association Welfare and Assistance Fund for the period July 12, 1959, to August 31, 1960, is presented for analysis purposes only, as such funds, managed by a board of trustees appointed by the president of the Nebraska State Bar Association, have not been audited by us."

That is supported with a detailed statement of cash receipts, the total amount being $46,365.90; total disbursements $41,776.66; or an excess of receipts over disbursements of $4,589.24. Balance at the beginning of the period was $2,039.20, so the cash balance deposited in the First Continental National Bank and Trust Company of Lincoln as of August 31 was $6,628.44.

I might tell you that that has gone down considerably since then, due to publication costs, but fortunately we are solvent.

In addition to the cash balance, the auditors examined and verified the fact that we have $4,000 invested in government bonds.

Then in the statement of the condition of the Daniel J. Gross Nebraska State Bar Association Welfare and Assistance Fund, they show the balance as of August 31, 1960, at $26,615.28. That is made up of the original bequest of $25,000, the gift from Judge Harvey Johnsen of $1,000, and interest income of $615.28 — and no expenses.

CHAIRMAN GINSBURG: We will pass to the next order of business, which is the report of the Committee on Administrative Agencies.

[The report of the Committee on Administrative Agencies follows.]

Report of the Special Committee on Administrative Agencies

The 1959 report of this Committee mentioned as a subject worthy of study the question of the adequacy of notice of proposed rule making or other action by administrative agencies, and whether a publication analogous to the Federal Register would be feasible. That orders of administrative agencies made without adequate notice of hearing to individuals and organizations affected are void for denial of due process is reiterated in the recent case of *Block et al. v. Lincoln Telephone & Telegraph Co.*, 170 Neb. 531 (June 3, 1960). Yet those entitled to notice may be so multitudinous that giving them personal notice is not feasible. Provision for publication of notice in any existing newspaper would result in a notice which would be of such limited circulation as to be inadequate in fact, or would be so costly as to be unduly burdensome. Presently orders are being entered by Nebraska administrative agencies which are of doubtful validity because of the question of the adequacy of notice. The problem is becoming increasingly acute.

The same problem for federal administrative agencies was met by the creation of the Federal Register. It has been in successful operation for some fifteen years. It is the opinion of this Committee that establishment of a Nebraska State Register, comparable to the Federal Register, will solve this problem. Its publication once a week will undoubtedly be sufficient. Legislation should require that all state boards and administrative agencies publish in the Nebraska State Register all notices of proposed rule making, and of other proceedings where the number of persons who may be affected is such as to make personal notice impracticable. It is believed that lawyers, trade associations, individuals, and business organizations who are in businesses likely to be affected by the action of administrative agencies, or who represent such, will subscribe to such a publication, and that notices published in it will effectively reach those for whom they are intended.

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

This Committee is making some investigation to determine to what extent other states have provided for a state publication comparable to the Federal Register or have otherwise solved the problem of notice, but at this writing we are unable to include that information in this report.

A second subject considered by this Committee is the question of whether punitive or revocation proceedings conducted by or before state administrative agencies should be prosecuted by the Attorney General or by members of the staff of the agency. Although statutes covering some such proceedings require that they be conducted by the Attorney General, others are silent on the matter or leave it to the agency to determine whether it shall ask the Attorney General to handle the matter or shall prosecute by its own staff. Presently in some agencies a member of the board or commission or one of its employees sits as a judge while another employee acts as prosecutor. We believe that the principle that the functions of judge and prosecutor should be separate and distinct is sound. It is becoming more and more recognized that it should be applied to administrative law. It should be applied to Nebraska administrative agencies.

This Committee recommends that legislation be prepared and supported by this Association to make it mandatory that the

Attorney General of Nebraska shall act as counsel for, and control the actions as a prosecutor or litigant of, the administrative agency where an agency desires to make an appearance, present evidence and actively participate as a party in any adversary proceeding.

This Committee is not aware of any pressing need for a uniform system of appeals from the orders of administrative agencies although the matter has been discussed by this Committee in this and previous years. The matter is one to which our successors on this Committee may desire to devote more study than we have given it.

The number of administrative agencies, the variety of problems coming before them, and the volume of work handled by them continues to increase. We think it is inevitable that additional questions in this field appropriate for study by such a committee as this will become apparent from time to time. For this reason, and in order to assist in implementing the recommendations made above, *it is recommended that this Committee be continued.*

Edson Smith, *Chairman*
J. Max Harding
Harry R. Henatsch
Elmer J. Jackson
Harry B. Otis
Einar Viren

[The recommendation of the Committee that it be continued was adopted. Upon motion the matter of recommending the establishment of a State Register was referred back to the Committee for further study. The motion of the chairman to approve the recommendation of the Committee that legislation be enacted providing that the Attorney General act as counsel for any agency involved in litigation was lost for what of a second. The balance of the report was received.]

CHAIRMAN GINSBURG: The report of the Committee on Revision of Corporation Law will be called for at this time.

[The report of the Committee follows.]

Report of the Special Committee on Revision of Corporation Law

This Committee reported at the last annual meeting that its first step in the program of revising and simplifying the corporation laws of Nebraska had been completed with the adoption of a comprehensive non-profit law (R. S. Neb. 1950 Supp. § 211901 to 211921). This law seems to have been accepted and utilized by the bar and the public and from all reports is providing non-profit corporations with a satisfactory act.

The next step in the program of this committee, as heretofore announced is the removal from the statutes of many special nonprofit acts which serve no purpose with a comprehensive nonprofit act on the books. A sub-committee headed by Roland Luedtke has made a careful study of this phase of our work and pursuant to his recommendation *the following legislative program of repeal and amendment of such laws is recommended:*

(1) REPEAL Article 4 of Chapter 21 re incorporating *Bridge Companies.*

(2) REPEAL Article 5 of Chapter 21 re incorporating *Real Estate Corporations.*

(3) REPEAL Sections 21-601 through 21-607 in Article 6 of Chapter 21 re incorporating *Charitable and Fraternal Societies.*

(4) REPEAL Article 7 of Chapter 21 re incorporating *Educational Institutions.*

(5) REPEAL Sections 21-816 through 21-830 re incorporating *Protestant Episcopal Parish or Church.*

(6) ADD A NEW SECTION to Article 8 of Chapter 21 (and to amend as required Sections 21-834 through 21-853) to provide a *specific exemption* to all corporations incorporating under the NONPROFIT ACT OF 1959 (including those corporations which so amend their articles to bring themselves under the 1959 nonprofit act) as far as requiring such corporations to comply with the provisions of Article 8 of Chapter 21 as to the formalities of classification, notice for conveyance, etc.

(7) REPEAL Article 9 of Chapter 21 re incorporating *Nonprofit Professional and Similar Associations.* (Including Detective Associations)

(8) REPEAL Article 16 of Chapter 21 re incorporating *Union Depot Companies.*

It is recommended that these proposed repeals and amendments be presented to the 1961 Legislature by way of eight separate legislative bills. It is to be noted that all existing corporations affected by such repealed sections of the corporation laws would be protected by "savings clauses" as was done when the NONPROFIT ACT OF 1959 was passed by the Legislature.

This committee recommends that additional study be made of the following Corporation Laws before any definite position be taken concerning amendments or repeal:

(1) Sections 21-608 through 21-624 of Article 6 of Chapter 21 re incorporating of *Charitable Fraternal Societies.*

(2) Sections 21-834 through 21-853 of Article 8 of Chapter 21 re incorporating *Religious Societies.*

(3) Article 10 of Chapter 21 re incorporating *Burial Associations.*

(4) Article 13 of Chapter 21 re incorporating *Cooperative Companies.*

(5) Article 14 of Chapter 21 re incorporating *Nonstock Cooperative Marketing Companies.*

(6) Article 18 of Chapter 21 re *Membership Corporations and Associations.*

(7) Articles 2, 3, 5, 6, 7, 8, 13, 20, 21, and 22 of Chapter 2 re *Agricultural Associations and Corporations.*

(8) Article 6 of Chapter 12 re incorporation of *Mausoleum Associations.*

The attention of this committee has been called to L.B. 659 (Laws of Neb., 1959, Ch. 240, p. 826) which is a proposed constitutional amendment that would permit the issuance of preferred stock without voting rights and at a different par value than common stock. While this proposed amendment does not go as far in this direction as might be desired, it has long been recognized by the bar that the constitutional restrictions with reference to corporation stock should be eliminated and this committee believes that the bar should generally support the adoption of the above amendment.

The committee has given extensive consideration to the question of whether we should pursue a general revision of our business corporation act patterned after the Model Business Corporation Act prepared by the Committee on Corporation Laws of the American Bar Association. The committee has been aided in this matter by an excellent article in the May, 1960, issue of the *Nebraska Law Review* at p. 575 comparing the Nebraska act with the Model Act. *It is the recommendation of this committee that our private corporation act be revised along the lines of the Model Act.*

It is recommended that this association continue a Special Committee on Revision of Corporation Law until the program outlined herein can be completed.

Bert L. Overcash, *Chairman*
William J. Baird
George L. DeLacy
Roland A. Luedtke
Fred H. Richards
David W. Swarr

[The report of the Committee was adopted.]

CHAIRMAN GINSBURG: The next report is that of the Committee on American Citizenship.

[The report of the Committee follows.]

Report of the Committee on American Citizenship

The Committee on American Citizenship has carried on during the year with the previously approved program of bringing to high school students throughout the state an accurate presentation of trial procedures as practiced in Nebraska.

During the year there were distributed to all members of the committee a sample statement of facts and sample pleadings consisting of a petition, answer and cross petition, and reply for trial of a negligence action in district court. Additional copies have been made available for general distribution. This material did not reach the members of the committee in time for use during the past school year. However, presentations are now being scheduled for the school year about to commence.

As anticipated, in some places where mock trials have been regularly presented as a part of County Government Days, no change in that procedure will be made. In other places where such program does not exist, or where it is considered that the time available during County Government Days is not adequate for a full presentation, a switch to the plan proposed by this committee may be made. The choice is being left to each county.

Your committee believes that the program is now about to come into full production, and recommends that the 1961 committee continue the work which has been commenced until experience shows any modification that may be appropriate.

L. F. Otradovsky, *Chairman*
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Charles W. Baskins
James T. Begley
W. L. Brennan
Robert H. Downing
Lawrence S. Dunmire
Edgar R. Geesaman
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Charles E. McCarl
Frank J. Mattoon

E. W. Moehnert
Melvin Moss
George H. Moyer
W. E. Mumby
Leslie H. Noble
James I. Shamberg
Rodney R. Smith
Dewayne Wolf
Lawrence H. Yost

[The report of the Committee was adopted.]

CHAIRMAN GINSBURG: The next matter of business is the report of the Committee on Atomic Energy Law.

[The report of the Committee follows.]

Report of the Committee on Atomic Energy Law

At reported in the 1959 report of this committee, the 1958 Legislature passed LB 365 which provided that the Governor appoint a state officer as Coordinator of Atomic Development Activities. Under the supervision of the Coordinator, all state departments were to make a study of the need for changes in the laws that arise as a result of the use and presence of radioactive materials in the state, and recommend any changes in the law to the Legislature.

Your committee attempted to contact the Coordinator to discuss any proposed legislation which might be recommended as a result of this survey, but as of the writing of this report, the Governor apparently has not appointed anyone.

Early in 1960 President Eisenhower signed into law Public Law 86-373. This law provided that the Atomic Energy Commission could relinquish certain of its responsibilities to the state through agreement with the Atomic Energy Commission. To qualify for the assumption of these responsibilities in the atomic energy field, Nebraska must satisfy the Atomic Energy Commission that it has statutory authority to exercise the control now being exercised by the AEC. Under this law, a state may assume control over by-product material (radioisotopes), source material (uranium and thorium), and special nuclear material (uranium 233, uranium 235, and plutonium) of less than a critical mass.

Everyone will agree that it is a laudable objective to decentralize governmental control when possible, and further that the legal profession has an interest in any legislation which may be proposed to effect the decentralization of control from the federal to the state level. *Therefore, in view of the fact that legislation may be presented at the 1961 session of the legislature which will be the basis*

for the state's first assumption of control in the nuclear field, your committee suggests that this committee be continued for another year and that it work in close cooperation with the Coordinator of Atomic Development Activities to secure passage of acceptable legislation which would place control of nuclear activity on a state level.

In addition your committee is cooperating with the American Bar Association's Committee on Atomic Attack to determine what legal problems may arise as a result of an atomic attack. The University of Nebraska Law School, through Professor Richard Harnsberger, is also interested in this problem. Professor Harnsberger reports that he plans, as a student project, the investigation of problems which arise in connection with the storage of vital records and proof of destroyed documents when a disaster of even limited proportions causes the destruction of this property.

Robert H. Berkshire, *Chairman*
Leslie Boslaugh
Robert E. Johnson, Jr.
G. H. Seig
William W. Spear
Richard D. Wilson

[The report of the Committee was adopted.]

CHAIRMAN GINSBURG: The next report will be that of the Committee on County Law Libraries.

[The report of the Committee follows.]

Report of the Committee on County Law Libraries

The committee has recommended to the President and the Executive Council that it be relieved of responsibility for shipment of law books out of the state, because of the obvious conflict with its first objective, to establish adequate law libraries in each of the counties. No further work has been done by the committee this year on the "People to People Law Book Project."

Progress in several counties in the establishment and enlargement of county law libraries has been reported to the committee. During the year, the Kearney County Board established a Law Library Commission, composed of the district judge (when in the county), the county judge, and county attorney. A room was set aside in the Court House for a county library; shelves were built; and a budget of $500.00 was set aside for the use of the Commission. By gifts and loans, the library has been expanded so that it now contains more than 1500 useful volumes.

The committee's attention was called to Sec. 51-220, R. R. S.

1943, which specifically authorizes county law libraries in counties having a population of over 150,000. Although the committee is of the opinion that this statute does not restrict such libraries to counties of that size, the committee requested the Committee on Legislation to give consideration to this question.

The Committee on Legislation has been asked to consider proposing legislation to the 1961 session of the Legislature in behalf of the State Bar Association, requiring establishment and maintenance of county law libraries in each county, for the use of the district court, county judge, the county attorney and the bar. The committee urges the bar of each county to support this legislation when it is presented to the Legislature.

We recommend that the committee be continued and that it continue its efforts for adequate legislation, and that it continue efforts for establishment and maintenance of adequate county law libraries in all counties of the state in cooperation with the district judges and the Distict Judges' Association.

William H. Meier, *Chairman*
Leo M. Bayer
Alfred W. Blessing
Frederic Coufal
Robert D. Flory
Russell E. Lovell
George E. McNally
Robert R. Moran
Elmer M. Scheele

[The report of the Committee was adopted.]

CHAIRMAN GINSBURG: The next matter of business is the report of the Committee on Crime and Delinquency Prevention.

[The report of the Committee follows.]

Report of the Committee on Crime and Delinquency Prevention

This committee has held no formal meetings during the year for the reason that no special items of business were assigned to it by the Association and no other pressing matters within its jurisdiction have been called to its attention. The members have, however, corresponded with each other on various subjects of committee interest. Last year's report gave a clear account of the operation of the state-wide probation system which was adopted by the Legislature in 1957 and which long had been one of this committee's goals. In general, the system has amply justified the great amount of work done by all interested groups in procuring its adoption.

The members of the Association are undoubtedly aware of the fact that the voters in Douglas and Lancaster counties will have an opportunity at the November election to decide whether or not they desire separate juvenile courts in those counties. The creation of such courts was authorized by L.B. 127 of the 1959 Legislature. If such courts are approved in either or both counties, next year's committee may very well wish to observe how the new courts function and to recommend needed changes, if any, in enabling legislation.

The adequacy of county attorneys' salaries has long been of concern to the committee. There has been a general feeling that inadequacy of salaries in many counties might be hurting proper law enforcement and delinquency prevention by forcing county attorneys to spend a disproportionate amount of their time in earning a living through private practice. Since salaries are now set by the various boards of county commissioners or supervisors there is naturally a wide discrepancy in the amounts being paid. The adoption of some type of recommended scale of salaries might be helpful. *We recommend this matter be given further consideration by the Committee.*

Alfred G. Ellick, *Chairman*
James F. Brogan
Domenico Caporale
Dale E. Fahrnbruch
Walter G. Huber
John H. Keriakedes
Robert A. Nelson
Betty Peterson Sharp
Gerald S. Vitamvas

[The report of the Committee was adopted.]

CHAIRMAN GINSBURG: The next report is from the Joint Conference of Lawyers and Accountants.

Report of the Joint Conference of Lawyers and Accountants

The joint conference was created in 1951. Since that time the conference has met annually either in Omaha or Lincoln. This year the annual dinner meeting was held at the University Club in Lincoln, Nebraska, on August 10, 1960. In all fourteen persons were present at the meeting. The Nebraska Society of Certified Public Accountants was represented by Philip G. Johnson, Bernard Elrich, Villiers Gerd, Orin Countryman and William Fry. Donald Erion, the president elect of the Society attended as a guest of the Conference. The Nebraska State Bar Association was represented by Roger V. Dickeson, Thomas M. Davies, Warren K. Dalton, John

E. North, John W. Stewart and Harry B. Cohen. Flavel A. Wright, the President of the Association and George H. Turner, the Secretary of the Association, attended as guests of the Conference.

A very interesting discussion was held on the question of areas of conflict between the two professions. Primarily the discussion pertained to the hiring of attorneys by accounting firms. It was pointed out that the larger accounting firms are requiring that the lawyer employees are to have accounting education and experience and are further required to study accounting, if they do not have such education and experience, and that these employees only render accounting services and do not render legal services. It was the consensus of opinion, that for the past year, there were no incidents that involved areas of conflict.

The greater portion of the meeting was devoted to a discussion of the possibility of the professions annually sponsoring an Income Tax Institute under the auspices of one or the other of the two universities (Creighton University and the University of Nebraska) as a part of their adult education program and in furtherance of the further education program of the two professions. It was suggested that the annual institute be arranged for and managed and conducted in a manner similar to the annual Colorado institute. This institute has been tried by the Accountants Society. Generally the institute comprehends:

1. Sponsorship by the two professions.
2. Holding under the auspices of one of the two above named universities as a part of their adult education program.
3. Attendance limited to those registering and paying the registration fee.
4. The preparation and delivery of prepared papers on predetermined subjects, with the papers being published in book or pamphlet form and to be included in the registration fee.
5. The institute being part of the continuing education program of the two professions.
6. The organizing, determination of subject matter to be presented, obtaining of qualified speakers, etc. to be undertaken and carried out by a joint committee appointed from the two professional organizations.

After a full discussion, a motion was made, seconded and passed, that the separate committees from the two professions constituting the conference, recommend to their respective parent organizations that an Income Tax Institute be organized and held annually, that same be created, organized and managed in the

manner suggested in this report, and that, if at all possible, the first institute be held in May of 1961.

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

[After discussion an amendment to the report was adopted providing that the proposal for a Joint Income Tax Institute, recommended by the Committee, be referred to the Committee on Legal Education and Continuing Legal Education. A motion was adopted to the effect that the House of Delegates go on record as generally favoring a joint institute with accountants for a one year period.]

CHAIRMAN GINSBURG: Next is the report of the Committee on Judiciary.

Report of the Committee on Judiciary

The House of Delegates in 1959 took action approving continuing efforts to secure adoption of the Merit Plan for selecting judges and recommending to the Executive Council and the Judiciary Committee the institution of a program to educate the bar and the public in that regard.

The Judicial Council is interested in this and in related matters of judicial administration. It was concluded that a State Conference on Judicial Selection and Court Administration, sponsored jointly by this Association and the Judicial Council should be held. This would serve as a medium of education. More particularly it would serve as a means for arriving at a consensus as to what should be undertaken with respect to judicial selection and the other matters considered.

The background of this undertaking was a National Conference on Judicial Selection and Court Administration held in Chicago in November, 1959. This was attended by Mr. Wright and Mr. Turner and they were enthusiastic as to this type of discussion meeting.

The State Conference referred to was held at the University of Omaha on June 9, 10 and 11, 1960, and followed the Chicago Conference pattern. Those attending were divided into panels

and at successive sessions teams of discussion leaders met with each panel in turn and presented and provoked discussion of the particular topic to which the team was assigned.

It was the general opinion of those in attendance that this was an effective and desirable method. The facilities provided by the University were very suitable and the Committee acknowledges its indebtedness to President Bail and members of the staff for their cooperation and assistance. The Woods Charitable Fund made a grant of $500 in support of the Conference. This contribution is very gratefully acknowledged.

The Conference had the assistance as speakers of William W. Crowdus of St. Louis, who discussed the Missouri Plan for judicial selection; Hon. Hugo T. Wedell of Wichita, who described the program to secure reform in Kansas; Lon Hocker of St. Louis, who spoke at the Conference dinner; and Prof. William T. Utley of the University of Omaha.

A total of 105 lawyers and laymen participated in the Conference. The substantial attendance of lawyers from towns and cities in Nebraska outside of Omaha and Lincoln was very gratifying.

Those who served as discussion leaders and reporters prepared and submitted to the final session of the Conference a draft of the consensus of the Conference on each of the several topics. These statements were discussed, amended in minor particulars and adopted. Copies of the Consensus were sent to all who participated in the Conference, and the Consensus was printed in the July issue of the *Journal*. It is by reference made a part of this report, but in view of its previous general circulation, it is not now reproduced in the printed program.

The principal purpose and concern of the Conference was the subject of judicial selection, and that is the matter with which this Committee is charged. However, there were a number of recommendations of the Conference on other subjects which merit consideration. Some of these are under study by the Judicial Council. This report will be concerned principally with the matter of judicial selection.

The conclusion of the Conference was in favor of the adoption for Nebraska of the "Merit," or "Missouri" or "American Bar Association" plan for selecting judges. The Conference is on record as favoring a strong effort to secure the necessary constitutional and legislative changes to accomplish this. Your committee endorses this decision.

The Conference realized, however, that a well planned and a well organized program on a broad front will be required to

get this job done. Your Committee also agrees with this. Responsible Nebraskans who have considered the subject favor a change. This sentiment is not confined to Omaha, as is sometimes supposed. Several outstate districts have this year had occasion to realize that this is not solely a metropolitan problem. Yet it is true that throughout much of the state nothing exists or has taken place to cause any strong feeling of need for a change. Nor can it be supposed that there is an entire absence of potentially active professional opposition.

There are important matters of timing. The first essential step is the proposing of a constitutional amendment. This could be done by legislation, by initiative petition or by a constitutional convention. If a constitutional convention were called, this proposal would, of course, be presented. But this is much too uncertain a contingency to depend upon. Another initiative petition would certainly be undertaken only if efforts to get the Legislature to act failed.

It follows that every effort should again be made to secure from the coming session of the Legislature a proposed constitutional amendment, and the committee so recommends.

We believe it would be best if the proposed amendment were substantially in the form of LB 354 submitted to the last session. Any proposals for shortening the text should be considered. However, there is a certain minimum of language required to identify the desired plan, and alternatives rapidly move toward the other extreme of a provision merely that judges shall be chosen as the Legislature may provide. Perhaps this is what some would like, but it is not what we are talking about or consider acceptable. The constitution should continue to provide the basic method of selecting judges and whatever language is necessary to do this is therefore proper.

All plans should be made on the assumption that securing such a constitutional change will require a major effort. It will involve extensive organizing inside and outside of the profession and substantial financing. There is interest in the project in many groups whose aid can be enlisted. Note is taken of the recent action of the District Judges Association in approving the principle of the Merit Plan.

While making no specific recommendation in that respect, the Committee suggests careful consideration of the matters referred to in the Conference Consensus relating to Judicial Compensation and Pensions.

The Committee recommends that the Association should seek to secure by the next Legislature approval of a proposed constitu-

tional amendment for the Merit Plan for the selection of judges, and should make the necessary plans to support adoption of the amendment when submitted.

Tracy J. Peycke, *Chairman*
Milton R. Abrahams
James N. Ackerman
Wilber S. Aten
Paul P. Chaney
Julius D. Cronin
Robert B. Crosby
Robert V. Denney
James M. Knapp
A. J. Luebs
Alexander McKie, Jr.
Robert D. Moodie
Donald R. Ross
Ralph E. Svoboda
Farley Young

[The report of the Committee was adopted.]

CHAIRMAN GINSBURG: The next report is that of the Committee on Legal Education and Continuing Legal Education.

Report of the Committee on Legal Education and Continuing Legal Education

The membership of the Committee was increased during the 1959-1960 year to a total of nine members, with the terms of three of the members expiring each year. Thus the Committee members will serve on a rotating basis, and the Committee will have the benefit of continuity from year to year. The Committee membership includes representatives from each of the law schools and a wider geographic representation.

The activity of the Committee has been expanded during the past year. It has undertaken a review of the entire legal education program in Nebraska and has formulated plans for improving this program during the current year and in the future.

In general, the Committee has recommended that certain changes be made in the present program of presenting practical institutes of value to the lawyer in general practice. These institutes are co-sponsored by the Sections of the State Bar Association and in some instances by the law schools. The current program is as follows:

The tax institute will be presented during the week of December 12 and is sponsored by the Section on Taxation.

The Creighton University Law School will present an institute on trial practice, to be presented on Wednesday evenings from October 12 through November 16.

An institute on business enterprises, presented by the University of Nebraska Law School and co-sponsored by the Junior Bar Section, was presented at the University on September 23 and 24, 1960.

The State Bar Association meeting will feature an institute on real estate transactions, which will be presented on October 6 and 7, in lieu of the previous presentation of separate Section programs. This institute will be co-sponsored by the Section on Real Estate, Probate, and Trust Law.

The Nebraska Association of Plaintiffs' Attorneys will present an institute on medical-legal topics immediately prior to the State Bar Association meeting, on October 5.

The Committee has recommended that outlines of all presentations be printed in advance and distributed to the lawyers attending these institutes in order to help them understand the matters being presented by the speakers and in order to give them material which can be placed in their law offices for future reference. It is our recommendation that these materials be printed in a size which will fit into a desk book and can be placed on a lawyer's bookshelf for ready reference. The first use of this new form of printing of outlines will have been made at the Nebraska Law School Institute on Business Enterprises.

The Committee also is recommending that the outlines be reviewed by the Executive Committees of the co-sponsoring Sections of the State Bar Association prior to their presentation.

The Committee is recommending that fees be charged to the registrants attending the various institutes, except the institute at the State Bar Association annual meeting, in order to defray the expenses of printing and other expenses of presenting the programs. The Creighton Law School institute held in the fall of 1959 was the first institute at which charges were made, and the Nebraska Law School institute being presented in September, 1960, is the second.

The major change recommended by the Committee during the year was the coordination of the educational material presented at the State Bar meeting into one coordinated institute, as distinguished from the previous practice of holding separate Section meetings, many of which were held concurrently. The Executive Council approved the Committee's recommendation, and the first coordinated institute will be presented at the present meeting. It is to be presented on the subject of real estate transactions and is

co-sponsored by the Real Estate, Probate, and Trust Law Section. If the coordinated institute is deemed successful, it will be continued at future annual meetings.

A subcommittee has worked closely with Robert E. Johnson, representing the Junior Bar Section, in the planning of a new type of institute to be presented to the young lawyer to help the lawyer bridge the gap from law school to active practice, by giving him practical instruction on many of the basic functions of a lawyer. Materials which have been presented in other states have been received, and plans are being formulated to conduct such an institute as a pilot program, offering it immediately following the bar examination and the admission of the young lawyers to practice in June of each year. If the pilot program is successful, it may be offered once in other sections of the state for the benefit of lawyers who did not have the opportunity to participate in the pilot program.

We wish to report that we have received excellent cooperation from both of the law schools and from all the Sections of the Bar Association in our efforts to improve the program of continuing legal education offered to Nebraska lawyers. In due course advanced or specialized institutes will be worked out in cooperation with the law schools. The Chancellor of the University of Nebraska has indicated great interest in our programs, and it is likely that the facilities of the new Nebraska Center for Continuing Education will be available for programs sponsored by the State Bar Association and the University of Nebraska Law School in the future, inasmuch as the building will be available for use sometime during the year 1961.

One final subject of study by the Committee is the possibility of obtaining on a part-time or full-time basis a professional administrator to direct and coordinate the activities of the Committee and the educational program of the State Bar Association. Your Chairman attended a meeting in Washington, D.C., on the occasion of the recent annual meeting of the American Bar Association, at which professional administrators from several states discussed the work of their State Bar Associations. The Joint Committee of the American Bar Association and the American Law Institute has strongly recommended the establishment of professional administrators for the legal education programs in the various states. A subcommittee comprised of Joseph Tye, Wilber Aten, and George H. Turner is studying this problem.

We recommend that the entire program of the Committee on Continuing Legal Education, as reflected in this report, be approved,

and that the Committee be encouraged to continue to develop the program in accordance with the policies reflected in this report.

John C. Mason, *Chairman*
Wilber S. Aten
David Dow
Richard E. Hunter
Donald P. Lay
Keith Miller
John E. North
Albert T. Reddish
Joseph C. Tye

[The report of the Committee was adopted.]

CHAIRMAN GINSBURG: Next is the report of the Committee on Legal Aid.

Report of the Committee on Legal Aid

Your Committee on Legal Aid respectfully submits the following report:

During the last year legal aid clinics or bureaus have continued to function in Omaha, Lincoln and Sidney. As indicated in the last report of this Committee, the Legal Aid Bureau at Scottsbluff was inactive. Apparently this status has not changed.

The Legal Aid Clinic at Omaha handled 250 cases during the past year. Approximately 25 of these cases involved court action of some type.

The Cheyenne Legal Aid Bureau at Sidney in the year 1959-1960 handled three divorce cases, one claim for salary and one case where a divorcee was seeking legal advice on child support.

In Lincoln the Legal Aid Clinic has undergone a partial reorganization. The office space for the Clinic is donated by the University of Nebraska Law College with the students participating in the handling of the cases. The expenses for the operation of the clinic are paid by the Community Chest; and the Lincoln Bar Association contributes to the operating expenses. The Legal Aid Bureau in Lincoln from June, 1959, to June, 1960, interviewed 182 clients and handled approximately 106 cases.

Your Committee is of the opinion that the above Legal Aid Clinics are operating satisfactorily. Local bar associations are urged to establish local legal aid services so that no one in Nebraska may go without the needed services of an attorney.

William D. Blue, *Chairman*
Kenneth H. Elson
Melvin K. Kammerlohr

Jack Knicely
Winsor C. Moore
John E. Wenstrand

[The report of the Committee was received and placed on file.]

CHAIRMAN GINSBURG: The next report is that of the Committee on Legislation.

Report of the Committee on Legislation

Upon the appointment of the Committee on Legislation there was referred to this Committee by the Executive Council for study and report, certain communications received relative to the present Juvenile Court bill. The parties making said communications were contacted and extensive correspondence was had with them, as well as personal interviews between members of this Committee and such interested parties. It quickly became apparent to the Committee that a great deal of the difficulty was due to the fact that there was a misunderstanding on the part of the aggrieved parties; and that actually the Bar Association was being criticized for matters for which it was not responsible. Upon our making explanation of the true facts, it appeared that the complaints were satisfied. It was evident that the parties in question desired certain amendments to the present Juvenile Court bill and particularly desired to have the bill extended so that it would be applicable to all counties in the state. It was pointed out by this Committee that these were matters involving public policy generally and over which the Bar and its Committee had no authority. There were suggested various amendments as to the procedure of the Juvenile Court, but it was not felt that any of these matters concerned the Bar Association, as such. *The Committee, therefore, reports that no action with reference to the Juvenile Court legislation is required by this House at the present time, and we recommend that nothing further be done relative to said matter at the present time.*

A number of suggestions for proposed legislation were received and considered by the Committee. With reference thereto the Committee recommends the following:

(1) Amendment of Sections 25-1329 and 25-1912 so as to establish a definite time when a judgment shall be deemed to have been rendered for purposes of appeal. This subject is also currently under study by the Judicial Council; and it was the opinion of this Committee that it should offer to cooperate with any committee of the Judicial Council in working out satisfactory legislation.

(2) Remedial legislation to make retroactive, so far as pos-

sible, the legislation providing for the removal of liens for alimony and child support judgments.

(3) Possible amendments to the reverter bill adopted at the last Legislature.

(4) Legislation to grant jurisdiction to the probate courts of this state to admit to probate last wills and testaments of nonresident testators, who have died leaving property in this state and whose will may not have been previously admitted to probate in the foreign state.

(5) The adoption of the Uniform Act for Simplification of Fiduciary Security Transfers.

(6) In addition to the foregoing, the Committee was of the opinion that legislation providing for a Uniform procedure for appeals from administrative tribunals and agencies should be enacted. This subject was referred to the Administrative Agency Committee for report, but no report had been received, and it is assumed that that Committee deemed such legislation unnecessary at this time. However, it is still the opinion of this Committee that this subject deserves attention, and that a bill establishing a uniform mode of procedure for appeals from all administrative tribunals should be enacted.

The following matters were submitted to this Committee, either by individual members of the association or by other committees and this Committee reports thereon as follows:

(7) The Committee on County Law Libraries requested the sponsorship of legislation to compel the establishment of such libraries in every county in the State. It was the opinion of this Committee that Section 51-220, R. R. S. 1943 should be amended so as to grant permission to the county boards of all counties of the State to establish and maintain law libraries. It was the opinion of this Committee, however, that any attempt by the Bar Association to sponsor legislation making it mandatory for all county boards to establish such libraries would arouse considerable antagonism against the Bar and would create a number of problems making it very difficult for this Committee to carry out the legislative program of the Association. *It was felt that, for the present, it would be best simply to make the present statute permissive, and to then leave the actual working thereunder to the local people concerned.*

(8) The Committee next considered a proposed amendment to the Constitution to provide for the service of retired district judges as active judges of the District Court anywhere in the State when needed. The Committee considered the fact that this legislation had been sponsored at a previous session of the Legislature and that the

Judiciary Committee of the Legislature had failed to approve the same. It was pointed out that any attempt by the Bar Association to sponsor this legislation would entail a commitment to thereafter undertake such sponsorship in the way of the provision of necessary funds and support as might be required in the submission of such a proposed constitutional amendment to the electorate. It was felt that unless the Bar Association was willing to authorize such an effort and the incurrence of such expense, it would not be advisable for this Committee to undertake the sponsorship of such legislation at this time. It was also pointed out that there is some thought currently expressed, that the entire state Constitution may be amended by a constitutional convention; and it was felt that this particular subject should be considered as a part of the redraft of the entire Judicial Code in the event of such constitutional amendment. It was decided that this matter should be referred to the House of Delegates for its consideration without any recommendations by this Committee at this time.

(9) There was submitted to the Committee a suggestion that the Committee sponsor legislation concerning the disposition of ancient tax records. It was decided that this was a matter for disposition by the Association of County Officials and was not properly within the jurisdiction of this Committee.

(10) It was suggested that this Committee sponsor legislation granting to the County Courts generally, in the first instance, jurisdiction to construe wills, with provision for appeal to the District Court. The Committee was in sympathy with the intent of this legislation, but it was pointed out that there was involved the constitutional provision prohibiting the County Courts from exercising any jurisdiction in any action wherein the title to real estate was involved; and it was therefore felt that it would be difficult to write any such legislation that would be constitutional. It was decided that this should be a matter for further study; and that in the meantime all interested parties are requested to express their views and forward their suggestions to this Committee. Should it be determined that such legislation would be constitutional, this Committee would recommend the enactment of such legislation in order to clarify the present state of the law.

Other proposed matters were discussed in general, but no specific action was deemed necessary relating thereto, and such matters are not reported upon at this time. It is felt worthwhile, however, to call to the attention of the members of the bar generally, the general limitations applicable to legislation to be sponsored by the Bar Association. There seems to be a feeling among some of the members of the bar that the Bar Association and its

Committee on Legislation should sponsor or be active in any and all fields of legislation. Various matters having no applicability to the profession of law have been submitted to this Committee. In this regard attention should be called to a recent opinion of the Supreme Court of Wisconsin wherein it was pointed out that a State Bar can engage in legislative activities limited only to matters concerning the administration of justice, court reform, and legal practice. (See *Lathrop vs. Donohue,* 102 N. W. 2d 404, page 409.) This Committee is of the opinion that the legislative program of this Association should properly be limited to such subjects only and that all other matters are without the scope of the legitimate legislative activities of this Association.

It is the recommendation of this Committee that this report be approved; that the recommendations herein set forth be adopted as the legislative program of this Association before the next session of the State Legislature, subject to such additional matters as may be presented by this House and by the Executive Council of the Association.

Herman Ginsburg, *Chairman*
C. E. Barney
Kenneth B. Holm
Richard E. Hunter
Walter P. Lauritson
Raymond McGrath
R. R. Perry
L. R. Ricketts
William A. Sawtell

Supplement to Report of Committee on Legislation

Since the preparation of the formal report by this Committee, there have been received various suggestions as to proposed legislation to be sponsored by this association as to which this Committee has had no opportunity to act. These matters are reported to this House in this supplemental report for such action as the House may deem appropriate.

We have received a copy of the report of the Special Committee on Administrative Agencies, which proposed the sponsorship by this Committee of certain legislation. The action of this Committee thereon will of course depend upon the action which this House may take on the report of said Special Committee on Administrative Agencies. However, it will be noted that said Special Committee is not in accord with the recommendation of this Committee, that legislation should be enacted establishing a uniform mode of procedure for appeals from all administrative agencies. The

contrariety of opinion between this Committee and said Special Committee on Administrative Agencies should be settled by this House.

There has been recommended to this Committee for sponsorship, legislation to provide a quick, convenient procedure to permit executors, administrators, guardians and trustees to make sales of oil and gas interests owned by minors, incompetents or others in a similar status.

There has also been received a suggestion that this Association sponsor legislation to amend Section 48-187 of the Revised Statutes to provide for the elimination of filing fees for appeals to the District Court in Workmen's Compensation cases.

There has also been received a suggestion to have amended Section 7-113 of the Revised Statutes to provide that it shall be the duty of every attorney to act as a guardian ad litem for an infant, incompetent or defendant under legal disability in any suit when so appointed by an order of the court.

This Committee has received no report from the Special Committee on The Uniform Commercial Code, but has received a great deal of literature from the American Bar Association suggesting that Nebraska adopt the Uniform Commercial Code. Doubtless the Special Committee will make a report at this session.

While this Committee has had no opportunity to act upon any of the foregoing matters, it may be advisable, in view of the upcoming session of the Legislature, for this House to pass upon the foregoing matters at this time.

Herman Ginsburg, *Chairman*

[On motion, No. 10 was eliminated from the recommendation of the Committee.

An additional motion was made and carried that the House of Delegates recommend legislation to conform state procedure in the giving of instructions to the procedures of the federal rules of procedure.

On motion, No. 4 was amended to add a recommendation that such curative action be taken by the Legislature to remove the doubt of validity of wills previously probated.

The chairman of the committee stated that Item No. 6 in its report would not be included in the legislative program of the Association.]

CHAIRMAN GINSBURG: Next is the report of the Committee on Cooperation with the American Law Institute.

Report of the Committee on Cooperation with the American Law Institute

In accordance with the action of the House of Delegates, the Nebraska State Bar Association was represented at the annual meeting of the American Law Institute held in Washington, D. C., May 18th to 21st, 1960, by the Chairman.

The members of the Nebraska State Bar Association are generally familiar with the work done by the Institute, and an extensive report is not permitted by either time or space. The Model Penal Code received extensive attention during the year, and work on the Second Restatement of Law was also given a good deal of time, as well as the Second Restatement on Torts. The Committee on Continuing Legal Education of the American Law Institute and the American Bar Association is continuing its efforts to provide better cooperation and unified action between the membershp of both associations for the extended service in the field of continuing legal education.

The contribution of the American Law Institute in the practical field of improvement and development of the law itself, as well as in the field of jurisprudence, and to the continuing legal education of practicing attorneys, continue to be, as they have been in the past, a very real and definite service to the profession and the public. It is the opinion of your committee that the work done by the American Law Institute justifies the continuing cooperation of the Nebraska State Bar Association and each of its individual members.

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

Hale McCown, *Chairman*
Richard L. Berkheimer
James A. Doyle
Henry M. Grether, Jr.
Fred T. Hanson
Daniel Stubbs

[The report of the Committee was adopted.]

CHAIRMAN GINSBURG: There is a Special Committee on Military Law that isn't listed in our printed program. Mr. Gerald Vitamvas will report for that Committee.

Report of Special Committee on Military Law
Gerald S. Vitamvas

Gentlemen, mine will be a very short report. I will give you a little bit of the history of this and then move on to what we anticipate the functions of this Committee will be.

On the 14th of June of this year I received a letter from the Judge Advocate of the Fifth Army in which he suggested the possibility of a Special Committee on Military Law or a special section. It was felt that a special section was not warranted in the State Bar but a committee might well be able to do some good. So on the 19th of June this year there was presented to the Executive Council a proposal that such a committee be appointed. On August 25 of this year a committee was appointed, with all the military services represented on that committee.

Generally speaking, we have not had a chance to draft a formal report nor have we had a chance to have a formal meeting. However, I have gathered with several members of the committee, including a representative from all the services, and they seem to be very much in favor of the idea of formulating such a committee with purposes primarily to assist in studying and recommending projects which might be of mutual interest to the military lawyer and the members of the Nebraska State Bar Association.

Along that line it might be well to remind you and each of you that a lot of our citizens of our state are still serving in the Armed Forces; they are still members of the Armed Forces and will be required to be in the future. In addition, we are going to have that situation with us for some time to come. Therefore we are concerned really with military law.

Actually, we are not down to specifics but these are some of the areas in which we probably could operate; and remember, gentlemen, these are not recommendations; these are just matters which the committee proposes it might study: Problems as to the procurement of a military lawyer; membership in the Judge Advocate Generals' Departments of the various services and the legal offices of the Navy; aid and assistance to the military lawyer while he is on duty and also when he may return from the service back to his home area, particularly this State.

Another area is the problem or question of fostering—I misquote myself when I say "problem" because there is really no problem, but we can always foster better relations between the Bar and the military lawyer, and this committee proposes to enter into that picture.

Finally, there is a concern with respect to military law since

our citizens and our boys are going to be involved in the services, so questions which arise as to the operation of the military justice system certainly should be within the concern of each and every lawyer of the State of Nebraska.

Along with that is a continuing study from the state angle of the functions of the military justice and how it operates. We propose that through the *Nebraska Bar Journal* and articles in it that perhaps we can draft articles for information to the general membership of the Bar as to the operation of military justice.

Those are some of the items which we feel we could cover but we do not feel that we will be limited to that, and after we have further time and opportunity to study we may be able to give a more detailed report with specific recommendations.

CHAIRMAN GINSBURG: Since the report contains no recommendations for action, the report will be received and ordered placed on file.

The next order of business is the report of the Committee on Unauthorized Practice of Law.

Report of the Committee on the Unauthorized Practice of Law

The records of the Committee on Unauthorized Practice of Law again graphically reflect the prevalence of efforts by laymen and lay agencies to practice law.

It is discouraging to note the continued activity and encroachment of laymen upon the practice of law. It is also discouraging to observe the complacency of some lawyers toward the problem and the willing, or sometimes unintentional, assistance some lawyers lend these laymen.

To balance these conditions, however, the Committee notes greater diligence on the part of both laity and the professional lawyer in directing the attention of the Committee to situations of unauthorized practice and its dangers.

Lawyers are licensed for the protection of the public; a continuing effort to curb unauthorized activities of laymen is essential to the preservation of that protection.

Fields of activity of the Committee have remained much the same, with some fluctuations of emphasis.

Simulated Process. This insidious device is generally directed to persons most susceptible to coercion, most in need of legal guidance, but most reluctant to seek it. This device not only offends

the Court and its processes; it equally jeopardizes the welfare of the individual and of the public generally.

Reports of use of simulated process have multiplied several times the past year. Your Committee again has notified each agency reported using simulated process of the dangers of its use. Probably only a small percentage of the instances of use are reported to the Committee; it is, nevertheless, encouraging to observe that only one "repeater" has been reported to the Committee. The Nebraska Collectors Association continues to cooperate enthusiastically with your Committee in its efforts to eliminate use of simulated process, and no member of that association has been reported to the Committee this year.

We should use every possible device available to law to wipe out this practice. The Association has approved recommendation of legislation expressly outlawing simulated process, with accompanying civil sanctions. Your Committee has referred this proposal to the Committee on Legislation. Continued vigilance and aggressive handling are essential for protection of the public against the coercion of this device.

Realtors. Pursuant to recommendation of this Committee, a special Bar committee was appointed to collaborate with the Nebraska Real Estate Association. The special committee has informed the UPL Committee of its activities, and it appears that substantial progress has been made toward accomplishing the objectives stated in the 1959 report of the UPL Committee. An incidental benefit of the 1959 UPL Committee report and subsequent formation of the special committee has been a substantial reduction in complaints concerning realtors.

Municipal Bond Firms. Most municipal bond firms have voluntarily changed their fiscal agent forms to eliminate objectionable features. Your Committee has met with representatives of these firms, enjoying a spirit of enthusiastic cooperation.

The primary problem remaining appears to be to curb salesmen in excessive representations of services rendered by bond firms as fiscal agents. This appears to be primarily a matter of internal policing.

Estate Planning. Serious complaints have developed in this field since the Committee's 1959 report. One firm of life underwriters clearly exceeded the limits of the Statement of Principles. After review, the Committee decided to submit the matter to the National Conference of Lawyers and Life Insurance Companies.

Several instances of "package plans" of pension and profit-sharing offered by lay salesmen and corporations have been investigated by the Committee. Some of these plans include sug-

gested or even final forms of plans and procuring Internal Revenue approval. In one instance the chairman of the Committee met with representatives of a firm to review its activities, with indications of satisfactory changes in its procedure. Other instances are under investigation; one matter is being referred for primary investigation to the UPL Committee of the state where the program originates.

The Committee also has written several publications which advertised "will kits" and the UPL Committees in the states where newspapers containing the ads are printed, suggested the questionable character of these materials. Apparently the advertising is sometimes effective, as one client of a local lawyer submitted a printed form received in response to the ad for use in preparing his will. At least one Nebraska newspaper has refused to carry "will kit" advertising.

With the substantial increase in mutual fund salesmen, it appears some of them may be approaching unauthorized practice in their zeal to sell prospects. Marginal activities include suggestions of cancellation of life insurance or converting policies to a paid-up status, and placing amounts of premium payments in mutual fund shares. This frequently defeats the protection and the distribution plans and the purposes of the life insurance. Expansion of these activities can easily lead these salesmen into positive acts of unauthorized practice.

Few fields reflect such great potential danger of loss to the victim of unauthorized practice as that of estate planning. Uninformed and misguided advice blindly followed can destroy the benefits of the best possible plan and prove costly in defeating desired distributions, increasing tax load, and causing extensive litigation. Not only lawyers, but trust officers, accountants, bankers and all laymen must be alert to eliminate the substantial unauthorized practice of law by laymen in the estate planning field.

County Officials. Your Committee received one specific complaint against a county judge, which appeared to justify investigation and possible action. Required information has not been supplied, however, in response to committee request. It appears this judge, and perhaps others, advise on legal action, draw wills, recommend attorneys, discourage retaining of lawyers, and discourage commencing probate proceedings. Occasionally fees are charged for these activities by judges who are not lawyers.

Likewise, in smaller counties it appears some county officers, as county clerks, draw deeds, notes, mortgages and similar instruments, and sometimes advise on their consequences.

Where unauthorized practice actually exists, lawyers should

cooperate in revealing the facts supporting a complaint. Perhaps the Bar Association also should sponsor informative discussion of limits upon activities of county officials and dangers of unauthorized practice in programs before county judges and other county officials.

Coordination of Activities. Your Committee has recommended to the President-Elect and the Association Executive Council that a member of the UPL Committee be included in any conference, collaboration or cooperation committee the bar forms with any other lay or professional group. This should assure comprehensive coverage of the field through the combined services of the substantive lawyer and the lawyer who is acutely aware of the unauthorized practice problem.

Conclusion. The past three years the Committee has noted an increased awareness of the dangers of unauthorized practice of law. Not only lawyers, but other professional and lay associations and laymen generally appear better informed on the problem. Cooperation has increased greatly in most fields. Offsetting this improved situation, however, is increasingly aggressive activity by unauthorized persons, particularly in estate planning. It is impossible to conceive of the extent of unauthorized practice and the resultant damages without reviewing the volume of correspondence received by the Committee. Each lawyer owes it to himself, the courts and the public to remain constantly alert to the existence of unauthorized practice and achieving its elimination.

Your Committee recommends:

1. *Assistance of the entire Bar in procuring legislation outlawing use of simulated process, and including civil sanctions against its use.*
2. *Fulfillment of recommendations of the Special Committee to collaborate with the Nebraska Real Estate Association.*
3. *Aggressive opposition to activities of unauthorized persons in all aspects of estate planning.*
4. *Curbing of unauthorized activities of county officials, including county judges, through an active information program by the Bar Association, in cooperation with various county officer organizations.*
5. *Adamant refusal of lawyers to encourage or assist laymen or corporations in unauthorized activities.*
6. *Continued and constant vigilance of all lawyers to the problems and existence of unauthorized practice and elimination of each instance of unauthorized practice where observed.*

7. *Preparation and distribution of a pamphlet for public information describing the services of a lawyer, necessity of relying upon a lawyer in legal matters, and the dangers of unauthorized practice of law.*

Albert T. Reddish, *Chairman*
Raymond M. Crossman, Jr.
Charles E. McCarl
Clarence A. H. Meyer
Walter H. Smith
William A. Stewart, Sr.

[The report of the Committee was adopted.]

CHAIRMAN GINSBURG: Next is the report of the Committee on Medico-Legal Jurisprudence.

Report of the Committee on Medico-Legal Jurisprudence

During the past two years the Committee has met on several occasions with representatives of the Nebraska State Medical Association, the last meeting being held on July 14, 1960, at Lincoln, Nebraska. In addition, the committee has accumulated and studied a number of interprofessional codes adopted by various bar and medical groups. The joint committee has concluded that no further efforts should be made at this time to obtain legislation relating to expert medical evidence and that the efforts of the joint committee should be directed toward adoption of a medico-legal code of cooperation by the two associations. A subcommittee consisting of George Healey, Harry Welch, Dr. J. P. Gilligan and Dr. John T. McGreer has undertaken further study and preparation of the proposed code to be submitted to the joint committee at a meeting on September 15, and if acceptable, to be submitted to the two associations for consideration and adoption.

Since it is necessary that this printed report be submitted in advance of the meeting of the subcommittee, the recommendations of this committee will be submitted orally to the House of Delegates. It is anticipated a code of principles and conduct relating to the medico-legal field will be approved and adopted by the joint committee and submitted to the House of Delegates with the recommendation that it be approved and adopted by that body.

Earl Cline, *Chairman*

Inter-professional Code for Physicians and Attorneys

The provisions of this Code are intended as guides for physicians and attorneys in their inter-related practice in the areas covered by its provisions. They are not laws, but suggested rules

of conduct for members of the two professions, subject to the principles of medical and legal ethics and the rules of law prescribed for their individual conduct.

This Code constitutes the recognition that, with the growing inter-relationship of medicine and law, it is inevitable that physicians and attorneys will be drawn into steadily increasing association. It will serve its purpose if it promotes the public welfare, improves the practical working relationships of the two professions, and facilitates the administration of justice.

Medical Reports

The physicians, upon proper authorization, should promptly furnish the attorney with a complete medical report, and should realize that delays in providing medical information may prejudice the opportunity of the patient to settle his claim or suit, delay the trial of a case, or cause additional expense or the loss of important testimony.

The attorney should give the physician reasonable notice of the need for a report and clearly specify the medical information which he seeks.

Conferences

It is the duty of each profession to present fairly and adequately the medical information involved in legal controversies. To that end the practice of discussion in advance of the trial between the physician and the attorney is encouraged and recommended. Such discussion should be had in all instances unless it is mutually agreed that it is unnecessary.

Conferences should be held at a time and place mutually convenient to the parties. The attorney and the physician should fully disclose and discuss the medical information involved in the controversy.

Subpoena for Medical Witness

Because of conditions in a particular case or jurisdiction, or because of the necessity for protecting himself or his client, the attorney is sometimes required to subpoena the physician as witness. Although the physician should not take offense at being subpoenaed, the attorney should not cause the subpoena to be issued without prior notification to the physician. The duty of the physician is the same as that of any other person to respond to judicial process.

Arrangements for Court Appearances

While it is recognized that the conduct of the business of the courts cannot depend upon the convenience of litigants, lawyers,

or witnesses, arrangements can and should be made for the attendance of the physician as a witness which take into consideration the professional demands upon his time. Such arrangements contemplate reasonable notice to the physician of the intention to call him as a witness and to advise him by telephone, after the trial has commenced, of the approximate time of his required attendance. The attorney should make every effort to conserve the time of the physician.

Physician Called as Witness

The attorney and the physician should treat one another with dignity and respect in the courtroom. The physician should testify solely as to the medical facts in the case and should frankly state his medical opinion. He should never be an advocate and should realize that his testimony is intended to enlighten rather than to impress or prejudice the court or the jury.

It is improper for the attorney to abuse a medical witness or to seek to influence his medical opinion. Established rules of evidence afford ample opportunity to test the qualification, competence and credibility of a medical witness; and it is always improper and unnecessary for the attorney to embarrass or harass the physician.

Fees for Services of Physician Relative to Litigation

The physician is entitled to reasonable compensation for time spent in conferences, preparation of medical reports, and for court or other appearances. These are proper and necessary items of expense in litigation involving medical questions. The amount of the physician's fee should never be contingent upon the outcome of the case or the amount of damages awarded and shall not be the personal obligation of the attorney.

Payment of Medical Fees

The attorney should do everything possible to assure payment for services rendered by the physician. When the physician has not been fully paid the attorney should request permission of the patient to pay the physician from any recovery received by the patient.

Payment of Witness Fees

While a physician can be subpoenaed and required to testify for the statutory witness fee, ordinarily it should be understood that the physician is entitled to charge a fee as an expert witness based on the time involved and the value of his services. This fee

should be reasonable and commensurate with the standing and learning of the physician.

Consideration and Disposition of Complaints

The public airing of any complaint or criticism by a member of one profession against the other profession or any of its members is to be deplored. Such complaints or criticism, including complaints of the violation of the principles of this Code, should be referred by the complaining doctor or lawyer through his own association to the appropriate association of the other profession; and all such complaints or criticism should be promptly and adequately processed by the association receiving them.

[The report of the Committee and the Proposed Code were adopted.]

CHAIRMAN GINSBURG: Next we will consider the report of the Committee on Oil and Gas Law.

Report of the Special Committee on Oil and Gas Law

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

The year 1960 continues to find the production of oil and gas to be one of the major industries of the State. In addition to the increase of production in the Panhandle Counties of the State, major discoveries in other parts of the State foretell a large increase in the area of the State vitally interested in the various phases of mineral law.

Since the last report of this Committee, the members of the Oil and Gas Commission have been appointed. The Commission has been organized and is functioning in an excellent manner, apparently to the general satisfaction of the oil industry.

Your Committee has studied to a considerable degree, all suggestions made for changes in the statutes affecting oil and gas law and feel that while no major legislation should be recommended there should be some changes made to facilitate procedure and remedy certain defects in the present statutes.

Your Committee, therefore, recommends to the Committee on Legislation that bills be prepared for presentation to the coming Legislature as follows:

(1) Provide that forfeiture and cancellation of oil and gas leases by the Board of Educational Lands and Funds be final and conclusive but provide further for the filing of a copy of the Order

in the office of the County Clerk where the land is located. (Sec. 72-905, R. S. N. 1943)

(2) Provide that the bond of an applicant for drilling should provide not only for plugging each dry or abandoned well but should in addition, require compliance with all of the provisions of the laws of the State of Nebraska and the rules, regulations, orders and requirements of the Commission. (Sec. 57-905 (3) (d) R. S. N. 1943, 1959 Cum. Supp.)

(3) Provide that pooling of acreage under oil and gas leases by governing boards of all lands of the State of Nebraska, except the Board of Educational Lands and Funds on a proportionate acreage or OTHER AGREED EQUITABLE BASIS so as to conform to pooling provisions applicable to State school lands. (Sec. 57-221 R. S. N. 1943)

(4) Provide for personal service or registered or CERTIFIED United States mail on appeal to the District Court from any rule, regulation or order made by the Nebraska Oil and Gas Conservation Commission. (Sec. 57-913 (1) R. S. N. 1943, 1959 Cum. Supp.)

(5) Provide for legislation permitting oil and gas liens to reach overriding royalities.

(6) Provide for garnishment of oil and gas purchases where a nonresident is making its purchase.

(7) Provide for legislation for service on the Secretary of State as agent of nonresidents acquiring an interest in minerals or performing work or service for oil development in the State of Nebraska.

(8) Provide for legislation requiring that the operators of any producing well be required to record their names and addresses together with the names and addresses of all owners of interests in the oil and gas lease from which such production is obtained in the office of the County Clerk in the County where the well is located.

(9) Amend the last sentence of Sec. 57-911(4) R. S. N. 1943, 1959 Cum. Supp. to read as follows:

> *"In all cases where (a) there is an application for the entry of a pooling order, or (b) where a complaint is made by the Commission or the Director of the Nebraska Oil and Gas Conservation Commission, that any part of any provision of Sections 57-901 to 57-921, or any rule, regulation or order of the Commission is being violated, notice of the hearing to be held on such complaint shall be served on the interested parties in the same manner as is provided in the code of civil procedure for the service of process in civil actions in the District Courts of this State."*

The Committee also make the following recommendations:

(1) That the Committee be continued;

(2) That the suggested statutory changes be referred to the Legislation Committee of the Nebraska State Bar Association for attention.

(3) That all members of this Association be requested to submit to this Committee for study their problems in connection with any phase of desirable oil and gas legislation.

Paul L. Martin, *Chairman*
Robert J. Bulger
J. H. McNish
R. L. Smith
Ivan Van Steenberg
Floyd E. Wright

[The report of the Committee was adopted.]

CHAIRMAN GINSBURG: The next report is that of the Committee on Public Service.

Report of the Committee on Public Service

Members of this Committee met on two occasions during the year, but the actual working time of the Committee is not reflected by the number of meetings, but by the excellent preparations across the State for Law Day, U. S. A., which has now grown into an excellent program.

Splendid cooperation with the ABA and the local Bar Associations resulted in not only TV, radio and newspaper coverage of the signing of the Law Day Proclamation by Governor Brooks, but also outdoor advertising across the State of this event. Billboards across the State were made available by outdoor advertising firms for the signs made available through the ABA.

Mr. Richard Knudsen of Lincoln did an excellent job in preparing and coordinating the various aspects of this program. Schools, churches and civic clubs also cooperated well in arranging group meetings where our speakers appeared.

Newspaper articles on some legal subject were distributed bi-weekly to newspapers across the State. Radio programs have continued over an Alliance station throughout the year. Others have participated.

Distribution of pamphlets has continued throughout the year and your Committee wishes to take this opportunity to remind the membership that they can replenish their supply of pamphlets

by contacting the Secretary of the Association or a member of this Committee.

Because the possible functions of this Committee are so varied, any member of the bar—whether a member of the Committee or not—could render valuable service by offering his assistance and participation in one or more public service functions.

Edward F. Carter, Jr., *Chairman*
Auburn H. Atkins
Tyler B. Gaines
Patrick W. Healey
Richard A. Knudsen
Edmund D. McEachen
C. Russell Mattson
P. M. Moodie
Donald F. Sampson
Bernard M. Spencer
Joseph C. Tye
John J. Wilson

[The report of the Committee was received and placed on file.]

CHAIRMAN GINSBURG: The next report is the report of the Committee on the Uniform Commercial Code.

Report of the Committee on Uniform Commercial Code

The Uniform Commercial Code is a monumental work covering the whole field of commercial law. The avowed purpose of the sponsoring organizations was to bring commercial law up to date and to simplify and modernize the rules governing commercial transactions.

The Code incorporates and revises previously existing uniform laws, extends the area of statutory coverage relating to commercial law, and includes new definitions, new terminology and some new legal concepts.

It was a joint project of the American Law Institute and the National Conference on Uniform State Laws.

The State of Nebraska has adopted five Uniform Acts which will be amended and necessarily repealed by the Commercial Code, as follows:

1. Uniform Negotiable Instruments Act.
2. Uniform Sales Act.
3. Uniform Stock Transfer Act.
4. Uniform Trust Receipts Act.
5. Uniform Warehouse Receipts Act.

Six states have adopted the Uniform Commercial Code.

1. Pennsylvania (1953)
2. Massachusetts (1957)
3. Kentucky (1958)
4. Connecticut (1959)
5. New Hampshire (1959)
6. Rhode Island (1960)

A study of the Code is going forward in a majority of the states under various sponsorships looking toward the eventual enactment of the Code by the legislatures of the respective states. Because of its tremendous size (the official text contains 226 printed pages) and the changes that may be made in the field of commercial law by its enactment, it is essential that the Code be annotated to the existing laws and court decisions in Nebraska before the Code is submitted to the Legislature. It also seems desirable to undertake an educational program to obtain the viewpoint and to enlist the aid of such groups as the Bankers Association, who have a very real interest in the Code. In some of the states the legislative council has taken an active part in the preliminary studies. The necessary ground work that must be done before the Code is offered to the Legislature in Nebraska, cannot be accomplished before the 1961 legislative session in Nebraska. Nor is such haste necessary considering the small number of states which have adopted the Act so far. It is probably safe to predict that more and more states will enact the Code into law in the next two years which will probably place Nebraska in a position in which the Act should be considered by the 1963 Legislature.

It is the recommendation of your Committee that a special committee on the Uniform Commercial Code be continued for the purpose of achieving annotations to the Code for Nebraska and to determine whether the Code should be offered for enactment to the 1963 legislature. The committee should seek the advice and views of groups outside the Bar Association such as the Bankers Association.

Daniel Stubbs, *Chairman*
Allan Axelrod
Lee Bloomingdale
John W. Delehant, Jr.
Robert G. Frazer
Robert C. Guenzel
Chauncey Sheldon
Arthur C. Sidner
Walter H. Smith

[After discussion an amendment was offered and accepted by the chairman of the Committee to provide that determination of whether the Code should be offered to the Nebraska Legislature be deferred until the 1961 meeting of the Association. As amended the report was adopted.]

CHAIRMAN GINSBURG: Next is the report of the Committee on Publication of Laws.

Report of the Special Committee on Publication of Laws

The Special Committee on Publication of Laws met at the State Capitol Building, Lincoln, Nebraska, on August 25, 1960, at two o'clock P. M., with all members of the Committee present except one who was unable to attend because of prior commitments.

The Committee was informed as to the purpose of their formation and called in for consultation Clarence A. H. Meyer, Deputy Attorney General, State of Nebraska, and Walter James of the office of Revisor of Statutes.

After considerable discussion the Committee recommends to the Bar Association of the State of Nebraska, in the interest of properly disseminating any laws enacted by the Legislature, not only for members of the bar but for the public at large, the following:

That the office of the Clerk of the Legislature send out to each clerk of the district court of each county in the State of Nebraska, daily, all action taken by the Legislature while in session. The reason the clerks of the district court have been selected as the recipients of these mailings, which include the bills as introduced, the amendments thereto, the final reading copy and the journal showing action taken is because they have a centrally located office in the court house in each county, and such information would be on file in their offices for the benefit of each lawyer in the county and any citizen of the State to examine.

The Committee further recommends that the District Judges Association be contacted at their next meeting, with a request that they give consideration to promulgating an order in their separate counties under Section 25-2214 Revised Statutes of Nebraska, requiring the clerks of the district court to maintain a file on the information received, which would include filing the bills as introduced, the amendments made to each bill, the final reading copy and the action taken thereon so that at any time during the period of the legislative session any person could trace any bill and find out its status.

The Committee finds and determines that a number of the

clerks of the district courts in the State have been contacted and they are agreeable to work on the project.

The Committee discussed the fact that someone might get confused by looking at a final reading copy of a bill and think it was a law simply because it was included in the clerk's file of final reading copy, but the Committee decided that by keeping the file and checking the journal, if a bill failed to pass the clerk could note that fact on the face of the final reading copy. The same situation exists when a bill contains the emergency clause but only gets enough votes to pass but not enough votes to pass with the emergency clause; then the clerk simply strikes the emergency clause on the final reading copy.

The Committee further recommends that this Committee contact the Chairman of the Executive Committee of the Legislative Council to attempt to enlist the cooperation of the Executive Committee of the Legislative Council to put this program into action.

The Committee further recommends that further action should be given to this subject matter to provide that the same program be offered to members of the Nebraska Bar Association as a subscription program; that the individual members of the Bar could pay a reasonable fee for the cost of such service to be sent to their individual offices, as some offices are not located near the county seat.

The Committee further recommends that the Clerk of the Legislature continue to compile what is known as "slip laws" with index; that any attorney can purchase at a reasonable cost immediately at the close of the Session of the Legislature a loose leaf binder of all laws passed by the Legislature to be used as a direct reference until such time as the official session laws are printed.

All of which is respectfully submitted.

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

[The report of the Committee was adopted.]

CHAIRMAN GINSBURG: The next matter of business is the report of the Committee to Collaborate with the Nebraska Real Estate Association.

Report of the Special Committee to Collaborate with Nebraska Real Estate Association

This Special Committee held meetings on May 7, 1960, and on June 18, 1960. The second meeting was a joint conference with the representatives of the Nebraska Real Estate Association. In addition a special meeting of subcommittees of the two Associations was held on May 21, 1960, for the purpose of preparing the way for the joint meeting of the full committees on June 18th.

The principal stated objective of this Special Committee was "to produce a statement of principles governing the relationship between lawyers and realtors." At the first meeting of the Committee it was pointed out that such a statement of principles and policies had already been rather extensively developed on a national level in the so-called "Memphis Resolution" which was approved and adopted by the American Bar Association on August 25, 1943, and by the National Association of Real Estate Boards on November 19, 1943. The full text of the resolution appears in Martindale Hubbell Law Directory, 1960 Edition, Vol. I, page 126A. Considering the present status of the law concerning the relationship of lawyers and realtors, it was and is the opinion of this Committee that the "Memphis Resolution" more than adequately covers the applicable principles and policies and that it would be difficult, if not unwise, to attempt now to enlarge upon them or to be more specific. Consequently it is believed that the principal objective of this Committee would be accomplished by adoption and ratification of the "Memphis Resolution" on the state level.

It appears to the Committee that the real present need is for a program informing the members of the Bar and of the Real Estate Association of the policies and principles contained in the "Memphis Resolution." In this connection it is recognized that it is much more difficult for the Real Estate Association to accomplish an educational program because of the fact that there are many licensed real estate brokers in Nebraska who do not hold membership in the Association. It is possible that the Nebraska Real Estate Board could be of assistance in this respect.

The Committee was impressed with the many objections and criticisms leveled at the so-called "Uniform Purchase Agreement" which has been used by members of the Nebraska Real Estate Association for a number of years. In order to meet these objections, and in accordance with the provisions of Article I, Section 2, of the "Memphis Resolution" which recognizes the need and right of real estate brokers to make use of a standard form of earnest money contract if it has been legally approved by the local bar

association, the joint committees of the two associations have developed and now recommend a form of "Offer to Purchase" and an "Acceptance of Offer." The proposed form accompanies this report as Appendix "A" to Exhibit "A".

The Committee also believes that it would be very desirable to create a permanent joint committee of lawyers and realtors. Such a committee could, from time to time, consider the adoption of further statements of policy and principle, and could be of service in possible cases of controversy between lawyers and realtors. This type of committee has been created in a number of other states, including Wisconsin, and our own Association has for a number of years had similar joint committees with the accountants and the medical profession.

To accomplish the above purposes the committee has drafted a Statement of Principles and Agreement between the two associations. This Statement follows closely the form now in effect in Wisconsin. It accompanies this report as Exhibit "A".

Your committee therefore recommends:

(1) That this report be approved;

(2) That the Statement of Principles and Agreement between the Nebraska State Bar Association and the Nebraska Real Estate Association, including the proposed form of earnest money contract, be adopted and approved; and

(3) That until such time as a permanent joint committee of Lawyers and Realtors is created, any unfinished business of this special committee be referred to the Standing Committee on Unauthorized Practice of Law.

Lewis R. Ricketts, *Chairman*
H. L. Blackledge
Raymond Frerichs
Willis Hecht
Harry R. Henatsch
Robert L. Smith

Statement of Principles and Agreement between Nebraska State Bar Association and Nebraska Real Estate Association

WHEREAS, the primary purpose of the lawyers and realtors is to serve the public, and

WHEREAS, it is in the best interests of the public that there should be a close cooperation and harmony between lawyers and realtors, and that each shall engage only in his respective field, and

WHEREAS, it is in the interest of the public, the lawyer, and

the realtor that a joint committee be formed to implement the purposes stated above,

THEREFORE, IT IS AGREED between the Nebraska State Bar Association and the Nebraska Real Estate Association as follows:

Article I

1. The statement of principles and policies contained in the "Memphis Resolution," approved and adopted by the American Bar Association on August 25, 1943, and by the National Association of Real Estate Boards on November 19, 1943, is hereby ratified and affirmed by both Associations, subject however to the inherent power of the Supreme Court of Nebraska to determine what is and what is not the practice of law in any particular situation. The text of this Resolution appears in Martindale Hubbell Law Directory, 1960 Edition, Vol. I, page 126A.

2. In accordance with Article I, Section 2, of the "Memphis Resolution," both Associations have approved and promulgated a form of earnest money contract which accompanies this Statement as Appendix "A".

Article II

1. A Nebraska Committee of Lawyers and Realtors is created to consist of three (3) lawyers, active members of the Nebraska State Bar Association, appointed by the president thereof, and three (3) realtors, members of the Nebraska Real Estate Association, appointed by the president thereof. Their terms shall be for a period of three (3) years, and the terms shall be staggered.

2. The committee shall seek to have the Nebraska State Bar Association and the Nebraska Real Estate Association:

(a) Engage in a common effort to simplify laws and procedure governing real estate transactions, and to reduce the cost thereof to the public;

(b) Maintain a constant liaison for exchange of information concerning any practices on the part of their members which may be detrimental to the public or to members of either Association.

3. The Nebraska committee may consider any controversies between realtors and lawyers which may be referred to it by the Nebraska Real Estate Association or the Nebraska State Bar Association, and shall seek to settle and dispose of the same.

4. The Nebraska committee, in line with the prinicples herein stated and ratified, shall from time to time issue such further

statements of principles as may be agreed upon which are deemed in the public interest and in the interests of realtors and lawyers, and which are approved by the Nebraska State Bar Association and the Nebraska Real Estate Association.

5. The Nebraska committee, in the public interest and for the purpose of implementing and making effective the carrying out of the principles herein stated and ratified and which may hereafter be promulgated, and the amicable and cooperative solution of disputes or misunderstandings in relation thereto, shall seek to be of assistance in an advisory capacity to all real estate brokers who may not be members of the Nebraska Real Estate Association and to all Nebraska lawyers.

OFFER TO PURCHASE

....., 19.....

I (We) do hereby offer to purchase the property described as

.....

.....

.....

.....

.....

and including.....

.....

.....

.....

.....

for the sum of.....dollars payable as follows:

The sum of.....dollars deposited herewith as evidenced by receipt appearing below and the balance of $..... to be paid as follows:.....

.....

.....

.....

.....

.....

.....

If this offer is accepted, seller (sellers) shall furnish an abstract of title on or before.....

.....showing marketable title. I (We) agree to furnish to seller (sellers) or his, her or their agent or attorney, a written opinion from my (our) attorney showing defects, if any, in the title to the above described property.

This transaction shall be closed on or before .....

at which time seller (sellers) shall convey said property to .....
.....by good and sufficient
..... deed (or, if payments are above specified to be deferred beyond possession date on an installment basis or otherwise, seller (sellers) and buyer (buyers) shall make and enter into a formal Contract of Sale with customary provisions and including forfeiture upon default of any payment and for delivery of said deed in escrow.)

The property shall be conveyed free and clear of all liens and encumbrance except .....
.....
.....
.....
.....

Seller (Sellers) shall pay all taxes to and including.....
Taxes for the year.....
.....
.....
....., together with interest and rents, if any, shall be prorated to date of possession. Risk of loss or damage to said property, prior to closing date, shall rest on the seller.

It is understood and agreed that in the event sellers hold title to said property as joint tenants, they are contracting as joint tenants in their acceptance of this offer.

I (We) shall have possession of said described real estate and property on or before.....
.....
.....

This offer is based on my (our) personal inspection or investigation of the premises herein described and not upon any representation or warranties of conditions made by the seller (sellers) or his, her or their agent.

It is agreed that in the event of my (our) refusal or failure to consummate the purchase, the seller (sellers) at his, her or their option, may retain all or any part of the money deposited herewith as liquidated damages for such refusal or failure.

Address..... .....
Phone..... .....
....., 19.....

Received from .....
the sum .....dollars to apply on the purchase price of the above described property under terms and conditions as stated above, it being hereby understood and agreed

that in the event the above offer is not accepted by the owner or vendor of said premises or that in the event the title is not marketable and cannot be made so after the purchaser has filed or caused to be filed with us written notice thereof, the money hereby paid is to be refunded.

This receipt is not an acceptance of the above offer, it being understood that the above proposition is taken subject to the written approval and acceptance of the owner (owners) on or before ....., 19.....

.....Agent

Witness..... By.....

ACCEPTANCE OF OFFER

I (We) hereby accept the offer to purchase appearing on the reverse side hereof upon the terms and under the conditions as therein stated, including the holding of money paid by the buyer (buyers), by .....

.....

.....

.....as my agent until closing date.

I (We) further agree to pay the above named agent a cash commission as agreed in the listing contract.

Accepted this .....day of ....., 19.....

.....

.....

.....

.....

STATE OF .....}
..... COUNTY} ss.

On this ..... day of ....., 19....., before me the undersigned, a Notary Public duly commissioned and qualified for said county, personally came.....

.....

to me known to be the identical person whose name..... affixed to the foregoing instrument and acknowledged the same to be ..... voluntary act and deed.

Witness my hand and notarial seal the day and year last above written.

.....

Notary Public

My Commission expires the ..... day of ....., 19.....

Receipt of executed copy of this instrument is acknowledged this ..... day of ....., 19.....

.....

.....

Seller (s)

Receipt of executed copy of this instrument is acknowledged this ..... day of ....., 19.....

.....

.....

Buyer (s)

[The report of the Committee was amended by the chairman by substituting the word "Accepted" in lieu of "Adopted and Approved" in the second paragraph of its recommendation, and by substituting the word "Accepted" for the words "Approved and Promulgated" in Article 1, Paragraph 2, of the Statement of Principles. The report was approved as amended.]

[Later a motion was unanimously adopted stating that it was the sense of the House of Delegates that its action in approving the report be not understood as approving the form and legality of the Offer to Purchase, but merely as agreeing that the use thereof by real estate brokers does not constitute unauthorized practice of law.]

CHAIRMAN GINSBURG: Next is the report of the Committee on Attorney Fees in Government Matters.

Report of Special Committee on Attorneys' Fees in Governmental Matters

The American Bar Foundation is devoting considerable effort and attention to improving the economic condition of the American lawyer. One phase of this activity has to do with federal statutes and federal administrative regulations which limit, restrict, or condition attorneys' fees in the specialized situations involved. A copy of the first American Bar Foundation report rendered in July, 1960, is attached hereto.

We have been advised that the Junior Bar Conference of the American Bar Association is performing a similar study with respect to state statutes and regulations in this field. Contact with the Nebraska representatives indicates that our Nebraska Junior Bar Conference is not yet engaged in such a project.

There are twenty-one federal statutes and fourteen federal administrative regulations which substantially affect the extent and quality of legal services. In these thirty-five instances there

is some limitation or restriction imposed with respect to attorneys' fees. None of these include cases which leave the allowance of attorneys' fees to the sound discretion of a court. There is an excerpt from a study made by the New York State Bar Association which is worthy of quotation as a course of action and conduct for the American Bar Association and the various state associations in a joint and cooperative effort to remedy the situation.

> " . . . your committee recommends that statutes, such as the Federal Tort Claims Act imposing an inflexible limit on the power of the court in determining a fair fee for counsel, be amended so as to allow the court to do justice in each case according to the circumstances . . . your committee further recommends that a dignified campaign of education be undertaken to enlighten governmental officials as to the standards and function of the legal profession. . . . But to enable the administrative officer to act just as fairly as a judge, the statutory maximum, where it exists, should be removed so as to give the officer a true discretion. Experience and time will do the rest."

With respect to these 35 situations, some impose a dollar limitation, others impose a percentage limitation, and others provide for a reasonable fee with the approval of an administrative officer.

For example, a $2.00 attorney fee is provided for an agent or attorney of record in a veteran's claim for increased benefits and $10.00 in an original claim for benefits. On the other hand the Coast Guard Life Saving service claims and Old Age and Survivors' Insurance claims permit fees "up to $10.00". In some Veterans Administration regulations, the dollar limit is subject to agency approval. With respect to foreign claims or claims on veterans' insurance, fees up to ten per cent of the award are permitted. Federal tort claims and trading-with-enemy claims require agency approval up to a maximum of ten per cent. The Tort Claims Act also provides that in the event the case goes to judgment, and the court fixes the claim, there is a ceiling beyond which the court cannot go. Administrative officer approval is required under certain Indian statutes, longshoremen's claims, public utility holding companies, old age and survivors' insurance and railroad unemployment insurance. There are many others that could be cited.

It must be noted that most of the *statutes* make it a misdemeanor for an attorney to demand, accept or retain a fee in excess of the limitation. In 1895, in *Frisbie v. U. S.*, (157 U. S. 160) the Supreme Court of the United States upheld a conviction against an attorney who retained more than $10.00 for an attorney fee arising out of a veteran's claim. There are numerous other de-

cisions upholding this proposition of law. The Supreme Court has consistently held that it does not violate the constitutional sanctity of due process to restrict and limit an attorney in the fee that he gets with respect to claims under federal statute.

The limitation of attorney fees causes a failure of justice, in that litigants are denied services of counsel. The Hoover Commission, in 1955, stated:

> "The statutory limitation on fees which may be charged by representatives before the Veterans Administration makes it virtually impossible for all such services to be rendered by individual lawyers."

The American Bar Foundation report notes that in the congressional hearings on the various bills which enacted fee limitation provisions, no representative of the bar appeared to protest, except with respect to the Federal Tort Claims Act, where the Chicago Bar Association and the Federal Bar Association made some objection to the limitation.

The various statutes and regulations have been set forth in tables attached to the American Bar report. In the event this committee's report is published in the *Nebraska Law Review,* your Committee feels that this might be information which is of interest to Nebraska lawyers and we therefore include these tables within our report.

It is therefore recommended that this Committee be continued for the purpose of bringing to light other and additional matters than found or covered in the American Bar Foundation report, and to aid and assist all interested bodies in securing a remedy of the evils and restrictions upon attorneys' fees. It is the sense of this Committee that not only in the area of federal law, but in all areas, this association go on record against the regulation, restriction, or limitation of attorneys' fees, except under court supervision. Attorneys, as in all of their relationships with their clients, are subject to the disciplinary action by the courts. Any variance from court supervision is not only inimicable to the legal profession, but indirectly is not in the best interests of the public, because such legislative and executive restrictions can result in injustices and inequities.

Leo Eisenstatt, *Chairman*
Joseph Cashen
H. B. Evnen
Theodore L. Richling
Ray C. Simmons
Richard L. Spangler, Jr.

[The report of the Committee was adopted.]

CHAIRMAN GINSBURG: The next report is that of the Committee on Cooperation with Law Schools:

Report of the Special Committee on Cooperation with Law Schools

The above captioned Committee respectfully reports as follows:

The Committee met and organized in February, at which time was discussed the relationship of the Bar Association with the two law schools in the state; the advisability of printing a brochure setting forth the pictures of seniors graduating from the two law schools and giving some biographical data; the idea being to send these brochures to the members of the Association. Also discussed was the question of the relationship of the Association with the law schools; a program of summer preceptorship for senior law students; and other related subjects.

The question of the preceptorship was referred to committee member Ivan A. Blevens of Seward, who very diligently and efficiently selected with approval of the Committee lawyers or law firms located in 20 cities in the State. Each was requested to express an opinion. The result of this poll was generally in favor of the idea, but it was pointed out that service under a preceptor should not be a compulsory requisite for graduation and that the same should be entirely upon a voluntary or optional basis on the part of the student. Copies of replies received are attached to this report, but in the interests of brevity are not made a part hereof. *The Committee recommends that further study be given to this subject.*

A subcommittee composed of W. W. Nuernberger and Charles E. Oldfather investigated and reported on the feasibility of publishing a brochure containing biographies of seniors graduating from our two law schools. The Special Committee's report is in part as follows:

> "The special committee is not in favor of expending a large sum of money on such a brochure. It is our recommendation that we adopt the suggestion of the Executive Council that such a brochure be published in the January issue of the *Nebraska State Bar Journal.* We have checked with Mr. George H. Turner as to whether there would be any cost involved in such a publication and he has stated that there would be no additional cost. It is suggested that the seniors in each law school be requested in October to prepare a biography which will be published. This biography should be limited to not more than fifty words. The exact content of the biography would be left to the discretion of the individual law school. The biography

would be turned over to the respective Deans and then forwarded on to be included in the *Nebraska State Bar Journal.* There would be a statement included that if any person was interested in additional information or a picture of any senior, that this could be obtained by writing to the respective law school."

The Committee has approved the report and recommends that the Nebraska State Bar Association, in cooperation with the law schools, undertake such a program.

During the year, there was referred to the Committee the question of making it possible for each of the two law schools in Nebraska to name a person who is an active member of the Association to represent it as an active member of the Executive Council of the Nebraska State Bar Association. The Committee recommended favorable action.

The continuance of the Committee is recommended.

W. W. Wenstrand, *Chairman*
Robert D. Baumfalk
Edmund O. Belsheim
Ivan A. Blevens
James A. Doyle
James J. Fitzgerald, Jr.
Walter P. Lauritsen
Wilfred W. Nuernberger
Charles E. Oldfather

[The report of the Committee was adopted.]

SECRETARY TURNER: Mr. Chairman, the report of the Trustee of the Rocky Mountain Mineral Law Foundation is not a required report but is filed for record purposes only.

CHAIRMAN GINSBURG: It will be so received and made a part of the Proceedings of this meeting.

Report of the Trustee of the Rocky Mountain Mineral Law Foundation

The year 1959-60 is the sixth year of the existence of the Rocky Mountain Mineral Law Foundation. Each year of its existence has seen an increase in activities in the services which it renders to the oil, gas, and mineral industry and in the quality of the work which it performs. The Nebraska State Bar Association has been an active participant in the work of the Foundation since its inception.

The continued publication of the Gower Federal Service by the Foundation has been very satisfactory. Improving upon the

already excellent work performed by Mr. Frank Gower has not been easy. Plans are under way for expansion of the service by preparation of an improved index, by addition of rules of practice, and by inclusion from time to time of annotations of selected current topics. Under consideration also, is the publication of a service similar in nature covering the solid minerals field. The Gower Service is of invaluable help to the oil and gas industry.

During the past year, mineral law scholarships have been awarded to a law school found worthy of recognition in each of the nine member law schools belonging to the Foundation. The Rocky Mountain Mineral Law Foundation scholarship has become a mark of distinction among law students and establishes the recipient as one possessing and demonstrating outstanding ability in the field of mineral law.

The Rocky Mountain Mineral Law Foundation essay contest has again this year been carried to completion. Entries were received and judged by a committee of outstanding judges, attorneys, and law professors and determination made of the winner.

The Foundation this year completed a five-volume up-to-date treatise on the laws of mining written by men of recognized ability in the field of mining law and edited by the Foundation. Completion of this treatise is an outstanding accomplishment and it will stand as an enduring monument to the efforts of the editorial board and all who took part in the preparation.

Plans are now being formulated for the establishment within the offices of the Foundation and Mineral Law Research Center. It is intended that this center will gather index and make available to interested persons large bodies of material concerning mineral and oil and gas law. This material will include essays submitted in essay contests, special writing performed on Foundation projects, annotations, special research studies, sponsored and fostered by the Foundation, and briefs of counsel in important cases so far as they can be obtained.

This year the annual institute was held at Boulder, Colorado, at the University of Colorado. It was well attended and extremely successful. The panel of speakers contained some of the most capable authorities on mineral law in the entire country.

The Nebraska State Bar Association has taken an active part in the work of the Foundation. I feel that the project is extremely worthwhile and with the growth of the oil and gas industry in Nebraska, the close alignment of our Association with the Rocky Mountain Mineral Law Foundation will enure to the benefit of all the members of the Association.

Serving as the Trustee of the Rocky Mountain Mineral Law Foundation as the representative of the Nebraska State Bar Association and as a member of the Executive Committee of the Foundation during the past year has been a privilege and a pleasure.

Paul L. Martin

[The meeting adjourned until 4:00 P.M. on October 7, 1960.]

THURSDAY MORNING SESSION

OCTOBER 6, 1960

[The opening session of the Sixty-First Annual Meeting of the Nebraska State Bar Association, convening in the Ballroom of the Hotel Paxton, Omaha, Nebraska, was called to order at ten o'clock by President Flavel Wright of Lincoln, Nebraska.]

PRESIDENT WRIGHT: Ladies and Gentlemen: If you will take your seats we will open the first session of the Sixty-First Annual Meeting of the Nebraska State Bar Association.

I will ask the Reverend Herbert H. Bair, Senior Minister of the First Central Congregational Church of Omaha, to give the invocation. Reverend Bair!

INVOCATION

Reverend Herbert H. Bair

Almighty God, our heavenly Father, may we be conscious this day of our great responsibilities to Thee, to Thy children, to our fellowmen, to our nation, and to our world.

With an understanding that each of us is an important part of the great machinery of the family of man; with the realization that here, this day, this group about to meet has dedicated responsibilities for the welfare of mankind; with an understanding, too, that we all share a mutual vision of Thy kingdom on earth, peace, and brotherhood; and with all the factors, the anathemas, and all the misunderstandings and disillusionments in our world, guide us, give us wisdom, give us the courage of deep abiding convictions, and above all things give us a triumphant faith in Thee. Lift up our eyes to Thy vision and rededicate that which we have to the glory of Thy name through Jesus Christ, our Lord. Amen.

PRESIDENT WRIGHT: I will now call on Mr. Marvin Schmid, President of the Omaha Bar Association, for his address of welcome.

ADDRESS OF WELCOME

Marvin G. Schmid

Mr. President, Distinguished Guests, Ladies and Gentlemen: This Association has been meeting annually, as most of you know, for sixty-one years and most of the recent meetings have been here in Omaha. The Chamber of Commerce here calls meetings such as these "conventions". We are a little more modest in this

Association and perhaps a little more precise, but Omaha really is a city of conventions.

We will have had forty conventions in Omaha this month, bringing in 24,000 people at an average of $120 per person, which brings in quite a nice monthly amount to the merchants and businessmen, and I suppose a little of it filters into the offices of the Omaha lawyers.

But it is not because of any monetary return that we especially welcome you here this morning. We welcome you because all of us here in Omaha have friends in every city and town in the State, and these meetings give us an opportunity to sit around the same table, to join in thought and food and drink and exchange serious views as well as some of the episodes of colleagues, and I think for a brief time at least the world is somewhat metamorphosed, purged of a little of its tyranny and its greed and its hate and its passions.

We can look with pride on the growth and stature of our profession but we must gaze long and carefully into the mirror of today. I think we must re-evaluate our Association with the measure of changing needs and a look into the future, for it isn't history that make a strong bar association; it is a strong bar association that makes history.

Changes in the world are occurring faster than we can comprehend. We are on the threshold of a new world, and perhaps without realizing it that new world is here and now. I think, as you surely must, of the Red Queen's remark to Alice: "Here now if you want to stay in the same place you must run as fast as you can, and if you want to go some place else you must run twice as fast."

Our Association is strong today. Its influence is significant and substantial, but we will be weak tomorrow unless we plan for the future with wisdom, with a sense of history and understanding of the problems before us, have the capacity to chart a course, and then the determination to pursue that course.

Now with that sort of a philosophical background let me tell you that we are not going to be hosts tonight, as we have many years in the past, to a cocktail hour because we think we have a better place to put our money this year. I would like to tell you a little about it because I think then you will have a sympathetic understanding.

The cocktail hour that we have had in the past costs in the neighborhood of $1,000. This year we have a unique situation with respect to the election of judges. We have, of course, nine district judges here and seven of them are retiring, which means that only

two are standing for re-election. In the municipal court we have seven judges of whom four are running for district court, so we have only three there standing for re-election. Our problem here is not the same as the problems in Columbus, or Fremont, or Schuyler, or Nebraska City or any other town that we know of because in Columbus, for instance, all the voters know Judge Flory and they know Vance Leininger and Judge Lightner and all the rest of them, but that is not true here. So in the absence of a Missouri Plan for the selection of judges or an American Bar Plan for the selection of judges we had to do the next best thing.

The Bar Association determined to recommend nine candidates for the District Judge and seven candidates for the Municipal Court. We have done that and we have a real energetic program going on. We are spending about $15,000, so we need not only everything we have in our own till but we have to go out and solicit funds from the lawyers and others. We have joined hands with the Citizens Committee here and have a program now that we think will bring to the bench jurists of stature, and we have received commendation from the American Bar on down and from many of you, too.

With that understanding I hope you will forgive us this year for not having this cocktail hour. You know, life for the most part moves along really at a dead level but now and then comes a rare and luminous movement which is unlike any other time we can remember, for we believe we can achieve something, that we can create something, that we get a glimpse of a vision and under that inspiration or transfiguration we think things we never thought before and we believe ourselves capable of achievements which yesterday seemed unattainable. Most often these moments come when we are together, thinking and acting in concert as we will be the next couple of days, and I hope and predict that this is that kind of a meeting commencing this morning, to which the Omaha Bar Association and all of Omaha join in a very hearty welcome to all of you.

PRESIDENT WRIGHT: The response to the address of welcome will be made by Robert A. Barlow of Lincoln.

RESPONSE

Robert A. Barlow

President Wright, Mr. Schmid, Distinguished Guests, if any, and Members of the Nebraska Bar Association: It is a pleasure to respond on behalf of the out-state Bars to Mr. Schmid's welcome from the Omaha Bar. I do hope, however, that I am able to return to Lincoln for less than $120.00.

We from the hinterlands come to the State Bar meeting every year for entertainment and enlightenment. We prefer to come to Omaha for both, because unlike Lincoln and the other backward areas of the State, when we go out for entertainment in Omaha we don't have to take our enlightenment with us.

There are also other reasons why we prefer to come to Omaha. The main reason is that the hospitality of Omaha and the Omaha Bar every year becomes more gracious, and I say that notwithstanding the fact that it has just been announced there will not be a cocktail party tonight. I think the reason is certainly imperative and I will say that the Omaha Bar is forgiven, particularly since implicit in Mr. Schmid's remarks it sounded very much to me like it will be resumed next year.

The graciousness of the Omaha Bar is also reported to us by our wives who very much appreciate the ladies' program that is put on for them by some of the members of the Omaha Bar and their wives. It has been a pleasure for us to be your guests year after year, and we thank you in advance for your hospitality this year.

ADDRESS OF THE PRESIDENT

Flavel A. Wright

It is with some humility that I approach this task but it is required by the rules.

I welcome, however, the opportunity to acknowledge my great debt to George Turner for his advice, guidance, and assistance throughout the year. This Bar Association would not have the excellent organization and program which it has had these many years in the absence of George Turner's excellent and faithful service.

I would also be remiss in my duties if I did not advise you of the splendid cooperation which I have had from the various committees and section members, from the officers, the Executive Council, and from the various local bar groups and associations.

Finally, I recognize that this organization, at least as it existed when I assumed my duties, reflected the cumulative effort of the able men who have served as its President in the past. While their accomplishments have been many, I desire to mention particularly the fine organizational setup which they have developed. Through their efforts we have a Judicial Council, an excellent program of continuing legal education, an excellent committee and section program, a House of Delegates, and an Executive Council which I

can testify operates without any semblance of "Bar Association politics" or individual exaltation.

Finally, I am particularly impressed with the advantages which will accrue from the procedure of electing the succeeding President one year in advance of the date he assumes office. This procedure permits the incoming President to familiarize himself with the Bar Association activities and programs, not only of the Nebraska Bar but of other bar associations, well in advance of the time he is required to assume his office and permits him to push forward the Bar Association program at the time he assumes the office of President without any delay.

To illustrate that, Hale McCown this year has all of the committee assignments prepared ready for announcement at this meeting. That hasn't been possible in the past.

Few programs of a bar association can be brought to a successful conclusion within one year's time. I am convinced that this Association will benefit to a large extent from the continuity which will result from this method of selecting the President of the organization. I recommend to my successors in office that the President and the President-Elect operate as a team with the President-Elect taking an active part in all of the Bar Association programs sponsored by the President or the Executive Council, and particularly with reference to matters which may not be completed with certainty before the President-Elect assumes his office as president.

With this fine organizational setup and with the fine cooperation of the committees and sections of the Bar, coupled with the excellent services rendered by George Turner and by the Executive Council, the Association has moved forward and in my judgment has carried on a creditable program of Bar Association activity.

The program of continuing legal education, which is one of the most important phases of bar association activity, has become better co-ordinated through the efforts of the Committee on Continuing Legal Education. This Committee, working with various sections, has organized and supervised such programs as the Annual Tax Institute, the Institute on Business Organizations, sponsored by the Junior Bar Section, and the program to be presented at the Annual Meeting by the Section on Real Estate, Probate and Trust Law.

This year the educational phases of the Annual Meeting are being presented entirely by the Real Estate, Probate and Trust Law Section. This is an innovation, the success of which remains to be seen. It was established with the hope of eliminating some of the problems and criticisms which resulted from the prior system which provided for separate programs for each section at conflicting

times. Those in charge of the program this year are hopeful that the material presented will be of greater value and usefulness to the Bar generally and that many of the problems which have existed in the past will be eliminated. I know there will be some of the members of the Association who will be disappointed and will feel we are making a step backward. If that is true and they happen to be in the majority there is nothing to prevent us from going back to the old system, but this is a system that has worked elsewhere and it was recommended to the Executive Council and we thought it was worth a try.

Another area in which considerable progress has been made during the past year involves the cooperation and collaboration between the Bar Association and the two law schools within the state. A special committee was created for the purpose of promoting better relations between the Bar and the law schools and suggesting ways in which this program could be carried forward. The efforts of this committee have already produced results and I can state positively that both of the law schools are now cooperating with the Bar Association to the fullest extent to the mutual advantage of this Association and of the two law schools.

The legislative program of the Association is in good hands and is well co-ordinated. Time does not permit detailing the progress which has been made by all of the other sections and committees. Particular mention must be made, however, of the activities of the Committee on the Judiciary and particularly with the progress which has been made toward improvement of our method of selecting judges.

The records of this Association reveal that the Presidents of this Association for more than thirty years have advocated, almost universally the adoption of some program to provide for the initial appointment of judges rather than to permit their selection to depend upon the hazards and uncertainties of the elective process.

Judge Vanderbilt has indicated that the process of judicial reform "is not for the short-winded". While some of you may now be convinced that the Nebraska State Bar Association has an inexhaustible supply of wind, it would seem that the time is at hand to develop a specific program which will accomplish the constitutional revision necessary to carry out these recommendations.

One of the chief problems in accomplishing any change in this regard has been the apathy and the lethargy within the Bar itself. This has been due, in part, to the fact that the elective system has worked fairly well in Nebraska in a great many areas of the State, not because of any attribute of the elective system but in spite of the attributes of that system.

Marvin Schmid mentioned the fact that in Columbus they know the judges fairly well there and it is a better situation, at least in his opinion, than it is in Omaha. Some of the people in Columbus may think otherwise.

As a matter of fact, in the past, to a considerable extent, the initial selection of our judges has been by appointment. This was true because judges were inclined to remain in office until their death, with the result that there was a vacancy which must be filled by appointment. Although there have been no controls over the appointive process, the governors have ordinarily given some consideration to the Bar Association recommendation.

This situation has changed and the lawyers and laymen of Nebraska are becoming aware of this fact. In the next election, at least sixteen new judges will be elected because of compulsory retirement of existing judges. Some of the candidates for some of these vacancies are grossly unqualified to serve if elected. While the lawyers in Omaha have been aware of this problem of unqualified candidates for many years, many of the lawyers out-state, for the first time, are beginning to realize the catastrophe which could result to the judicial processes in the particular area if the electorate does not make a wise choice or if, by reason of death of a candidate, the unqualified candidate is automatically elected to office.

In June of this year the Committee on Judiciary, under the able leadership of Tracy Peycke, and with funds supplied by the Woods Foundation and by the State Bar Association in collaboration with the Judicial Council, sponsored an Arden House type conference on judicial administration and judicial selection. More than one hundred lawyers and laymen participated. The results were outstanding. Not only did the conference serve to crystalize the thinking of the Bar Association and of the laymen in attendance, but also the promotion of improved relations between the Bar and the public which resulted from this conference, in and of itself, justified the time and expense involved.

I might say that after the conference was completed, several of the laymen who had attended took occasion to stand and express their appreciation and were much better friends of the bar when that conference was concluded than they were before. One of the representatives who made such a statement was a representative of a labor organization.

The Executive Council has recommended that similar conferences be held throughout the State and this program should be carried out as promptly as possible.

Indicative of the results of the conference is the change in

attitude of the District Judges Association toward this problem. In the past the District Judges have exhibited some apathy to this situation but after the conference in June that Association unanimously approved a resolution endorsing the Merit Plan for selection of judges. I note that in the House of Delegates yesterday the Judiciary Committee report was submitted without any voice in opposition to it.

There is one further reason why it is particularly important that we push forward with action in this respect as promptly as possible. At the annual banquet of the Missouri State Bar Association the speaker was Paul Nevin, a CBS Washington news correspondent. He has resided in Russia for more than a year, has been there several times; he is well acquainted with President Eisenhower and Vice President Nixon; he has first-hand knowledge of the characteristics of Khrushchev and other Russian leaders. The message which he delivered to the Missouri Bar was one which should be carefully considered not only by every lawyer in the United States but by every citizen of the United States.

We are all aware of Mr. Khrushchev's boasts as to the ultimate success of the communistic system, economically and politically. We know that when he came to the United States last year in a more friendly vein than presently exists, he boasted that the communistic system would "bury the United States." We have been satisfied that this was just another evidence of his wild claims and that such event could never occur. Nevin indicated the possibility that it could.

Soviet Russia has been and is now marshaling all of its assets and manpower in an all-out effort to carry out Mr. Khrushchev's boast. The ablest men in Soviet Russia are its leaders. They are capable men and are master politicians. At the present time the United States has the manpower, the abilities, and the materials to more than hold its own with the Soviet Union in this contest. We must recognize, however, that Soviet Russia is utilizing its best talent and abilities in this contest and is focusing all of its efforts in the areas of competition with the United States. The question is: Are we doing the same? This factor, plus the inherent advantage that the dictatorship has in being able to channel its efforts without regard for the wishes or desires of the people it purports to serve, results in a formidable opponent who is not to be taken lightly.

We have no assurance that we can defeat Russia in this political and economic contest or any other contest with our second team. Neither can we be assured of victory with the first team unless it has prepared itself for the contest and is willing to make the all-out

effort required to achieve victory. We need look only at the present situation in the space race or at the last Olympics to demonstrate the correctness of these statements.

If we are to succeed we must make certain that we are using our best available talent and that this talent is well trained for the job and puts forth its best effort. The time has passed when we can "rock along" relying upon the inherent advantages which we have had and enjoying the results without putting forth our best effort. This was Nevin's message. I understand that Senator Jackson gave the same message. I hope it is the Democratic message but I didn't intend it to be a political message. At any rate I do think it is important that we encourage our best people to get involved in these areas which are most vital to us.

Nevin, for example, suggested that the term "politician" has come to be used disparagingly. And I used it disparagingly this morning when I told you that there was no evidence of Bar Association politics in the Executive Council. Many of our best citizens are reluctant to enter into politics. Many cannot afford to enter into politics. If we expect to compete with Russia successfully this situation must change. We must encourage our best people to enter this contest on our side and we must be willing to pay them accordingly for their services.

The judicial system is just one element of this great struggle. While we know there is nothing in the Russian system which can compare with the judicial system of the United States it behooves us to make certain, not only that this favorable situation continues, but also that measures are taken to insure that our judicial system operates to its best advantage and that everything is done to avoid providing Russia with any examples of weaknesses in our judicial system.

It may be argued that the effect which we could produce here in Nebraska by improvement of our own judicial system will be so small as to be insignificant in the great international struggle. The answer to this argument is that the ultimate success of democracy involves the necessity for each citizen to put forth his best effort in promotion of the democratic process. If that argument is accepted and controlling in each instance where it is raised we might as well give up and resign ourselves to the fact that we will live under a communistic system.

In any event the benefits which will result from improvement of our judicial system are benefits to the people of Nebraska, which benefits in and of themselves are well worth the effort. The time for action is right now. Each of us must insure that nothing is left undone which will insure the election of the best qualified can-

didates for judicial office in the coming election. Each of us must make certain that nothing is left undone in our effort to obtain from the next Legislature enactment of a bill to submit to the voters a constitutional amendment providing for the Merit Plan. Each of us must make certain that nothing is left undone in educating the members of the bar, the judiciary, and the public concerning the need for this change and the ultimate adoption of the constitutional amendment. The best qualified lawyers in the State of Nebraska must be interested in becoming judges. The time has arrived to make certain that the best qualified lawyers in the state are selected as our judges.

To accomplish this result involves not only improvement of judicial salaries but also elimination of the elective process of selecting judicial office holders which permits a candidate with "voter appeal," but with little legal ability, to be elected over a well-qualified candidate with less "voter appeal." We must eliminate this process which requires a judge, who should and must be free from outside influences and who must render decisions which do not necessarily have "voter appeal," to submit to a political campaign for re-election with all of its unjudicial and degrading aspects.

The Merit Plan has been in operation in the State of Missouri for over twenty years. I have made a particular point to consider the success of that plan in the State of Missouri and can testify, without reservation, that the Plan has been an overwhelming success in Missouri and is universally accepted by the responsible lawyers of the Missouri Bar.

In a recent incident in St. Louis, a Missouri judge was subject to adverse publicity for placing on probation a defendant who was represented by the judge's son and who had pleaded guilty to the charge of possession of a quantity of narcotics. This judge was one who had originally obtained his office by popular election and was held over under the Plan.

One other Missouri judge has been removed from office under the procedures provided by the Merit Plan. Again the judge involved was one who had been elected and retained in office when the Plan became effective. The judges who have been appointed in Missouri under their Plan almost without exception have been well qualified and have faithfully carried out their duties as judges.

Progress is being made in the adoption of the Plan in our neighboring states. Kansas has adopted the Plan with respect to its Supreme Court judges and Iowa has taken the first step in adopting the Plan by obtaining the enactment of a bill amending its Constitution accordingly. Under the Iowa Constitution the bill must

be submitted again to the present Legislature and, if enacted, will then be submitted to the people of the State of Iowa.

This should be the No. 1 project and effort of the Nebraska State Bar Association until it has been accomplished. No greater contribution can be made by this Association to the people of the State of Nebraska or the citizens of the United States than to procure the adoption of this plan. To accomplish this result will require a great deal of time and effort on the part of all of the lawyers of the State of Nebraska. It may require the contribution of funds, as it has in Omaha with the Omaha Bar. We should be willing to contribute to such a cause. It will require energetic and imaginative leadership. The necessary organization and leadership are available in this Association. Under that organization and leadership the result will ultimately be accomplished and I submit that the time to accomplish it is right now.

PRESIDENT WRIGHT: Ladies and gentlemen, we have been fortunate in the scheduling of our program in that we have been able to have with us this morning the Attorney General of India who is also the President of the Bar of India. At this time I would like to present to you Mr. M. C. Setelvad, the Attorney General of India and President of the Bar of India, who will address you for a few minutes.

ADDRESS

M. C. Setelvad

Mr. President, Ladies and Gentlemen: It is a rare privilege to have the opportunity of addressing the annual gathering of the Bar Association of this State. And the pleasure is greater because I have the privilege of having known the Chief Justice of this State for some years. Ever since he visited India some years ago I have been in correspondence with him, and he has been kind enough to send to us in India literature which can be useful for the legal development in India, as well as literature which may help the Bar in India.

I wish to say this morning a few words about the law prevailing in India, the judicial system in India, and the bar in India so that you may know how we in India are very much like you in the United States. When I say "we" I mean members of the bar.

As to the law prevailing in India, it would be correct to say that it is by and large based on the English common and statute law which, I understand, is the basis also of the laws of a number of states in the United States.

'Way back in the Eighteenth Century or even earlier when the English came to India, they settled down in various coastal towns, like Bombay, Madras, and Calcutta, and established courts which, naturally, were based on the pattern of English courts, and the laws which they introduced and which governed the inhabitants of these areas which the English settled in 'round about the coasts were also the English common law and the then-prevailing English statute laws.

In the rest of the country the law, the general law, was in most part the Mohammedan law because the Mohammedan rules were then governing the country. Slowly the British spread their influence inland, and as they spread their influence inland the law in the coastal regions, what we call the British towns, spread inland so that gradually English common law and statute law spread inland.

That law was enacted and was called "regulations." Naturally, in the beginning there were conflicting regulations, some in Bombay, some in Madras, and some in Calcutta—not all on the same pattern. But later, when the government of India passed from what was originally law by administration by chartered companies (the British company known as the East India Company) to the Crown around 1830 or 1840, a unified system of laws began to be administered in India.

That arose in this way: There were constituted in England what were called law commissions presided over by distinguished English jurists who were entrusted with the work of codifying Indian law generally applicable to the whole Indian territory. These commissions began their work around about 1837. The first one was presided over by the distinguished politician and jurist, Lord Macaulay, and they began their labors framing different codes which were to govern India. The first of the codes which they framed and which came into force around about 1860 was the criminal law of the land, called the Indian Penal Code. That Code has the word Indian in it and has been the major criminal law of India ever since 1860, with some minor amendments. That Code has been said by distinguished writers, like Sir Frederick Pollock and others, to really represent English criminal law simplified and modified to suit Indian conditions. That is an illustration of the criminal law.

If I may refer to a major civil law, the law of contracts, that is the Indian Contract Act of 1872. That again was framed by a law commission based mainly on the rules of English common and mercantile law. That law is still in force, the 1872 Contract Act, with certain modifications which are found necessary in the course of time.

It will be interesting to recall that the Indian Contract Act framed by the law commission embodied certain provisions of a New York draft code on the contract law which Sir Frederick Pollock tells us never became law in New York, but I understand from what he has written that it did become law in some other states in this country. That has been the law of contracts.

Similarly, in other departments of laws we have codified laws, mainly based on the English common mercantile and statute law, and excepting perhaps what would be called the personal laws—when I say the "personal laws" I mean the law of succession, the law of inheritance, the law of marriage, the law of divorce. These have not been codified until recently, and the laws which have governed are sectional laws. Hindus are governed by the Hindu law; and Moslems are governed by Moslem law. These laws are to be found in the ancient texts, Sanskrit so far as Hindus are concerned, Arabic so far as Moslems are concerned; but these "personal laws" were administered by the courts, and the courts originally gathered the laws from learned men who told them what the law was in the ancient books. Later distinguished judges and jurists, both English and Indian, translated these books into English so that they were available to the courts for reference whenever these questions came up before them for decision.

Recently even these personal laws are getting codified and we have now the Hindu Succession Act, a codified law governing all personal matters relating to Hindus.

Now I have gone into this merely to show you that the background of our law is so closely similar to English law that we are in many matters using English cases as precedents and frequently referring to their pleadings not only in Supreme Court cases, not only in House of Lords cases, but also in cases in courts of first instance, like King's Bench and Chancery.

A few words now about the system of courts. As I told you a little while ago, the courts were founded with an English background and they continue even now to be on the same pattern. We have the same method as you—the adversity system, examination of witness, his cross-examination, his re-examination, the rules of evidence which govern the questions and answers to be asked and to be given. They are codified again in a law called the Indian Evidence Act, and ultimately we have counsel appearing, of course, for both sides, counsel addressing the court, one for the plaintiff, the other for the defendant, and ultimately a judgment will be delivered straightway or, on occasions, reserved. Then we have the Court of Appeals and a final Court of Appeals also.

One thing which may interest you is that instead of your dual

system of courts, though India is now a federal union like the United States, we have not two systems of courts like the state courts and the federal courts, but we have one integrated system of courts by which all matters, whether relating to state or federal laws, go to the state courts. They go in on appeal to the highest court of the state, which we call the High Court, and in matters of importance or of larger value an ultimate appeal lies to the Supreme Court of India, which is the highest Court of Appeals.

That, gentlemen, is our system of courts, and the proceedings are conducted, at any rate now, in the English language and it is not uncommon now, after the Constitution of 1950 which incorporates a Bill of Rights which is in a certain measure based on the Bill of Rights in your Constitution, that liberal citations are made from the United States Reports, particularly on matters in which our Constitution has comparable rules with yours; for example, the rule as to the equal protection of laws, and so forth. And we have followed the principles laid down by your courts as to classification and the rationality of the classifications, etc., etc., so much so that a year or two ago I had a New York lawyer listening to a court case being conducted in the Supreme Court of India, and I met him in New York the other day, a few days ago, and he said he had since gone to Britain, and had sat in listening to the Privy Council; and he said that if you shut your eyes you wouldn't know whether you were in an Indian court or whether you were in a British court or an American court. That emphasizes the similarity between your institutions and our institutions.

Finally, a few words about the bar. The bar there is a state bar at the moment. Each state has a bar of its own. Admission to it is regulated by a body called the State Bar Council and an advocate —we call our lawyers there advocates—an advocate who is registered on the rolls of that state high court becomes entitled to practice in that high court and all the courts subordinate to it in that state. Now that has been the practice and we can of course with permission also appear and practice in neighboring states or other states but a scheme is now afoot legislatively to integrate the whole bar and make it an all-India bar so that we have a common roll of advocates. Admission to it will be regulated by the all-India Bar Council. If an advocate wishes admission to that roll he would apply to his state bar council. The state bar council would admit him provisionally, forward his application to the all-India body, and on being admitted to the all-India body he would be an all-India advocate so that he would be entitled to appear and practice in the courts of every state in India. This bill is now before the Indian Parliament and we expect it to become law within a few months' time.

Now that is the statutory provision. In addition to the statutory provision the bar in India recently met early this year and inaugurated an Association of the Bar of India somewhat on the pattern of the American Bar Association. I requested the President of India to inaugurate that Association, and in inviting him to inaugurate it I related to those present the multifarious activities of the American Bar Association and asked the Indian bar to band themselves together on the same pattern so that they may be useful not only to the profession but to the administration of justice generally and to the citizens of the country also.

Well, gentlemen, I think I have given you briefly a picture of the three things in India—the law, the judicial system, and the bar. I am obliged to you for the kind hearing you have given me.

PRESIDENT WRIGHT: Thank you, Mr. Setelvad, for your very informative and constructive talk.

REPORT OF SECRETARY-TREASURER

George H. Turner

Mr. President and Members of the Association: As Secretary-Treasurer I wish to report that the books of the Association have been audited by Peat, Marwick, Mitchell & Company of Lincoln. We closed the books two weeks early this year. Our meeting date is a little earlier than usual, and at the auditors' request the Executive Council has now fixed August 31 as the close of the fiscal year each year so there will be time between that date and the date fixed for each annual meeting for the auditors to complete their examination of the books.

This report covers a fifty-week period, since the books were closed as of August 31. The auditors report that the total receipts of the Association during that fifty-week period were $46,365.90. The total disbursements during the same period were $41,776.66, leaving excess of receipts over disbursements of $4,589.24, which, together with cash on hand at the opening of the period in the amount of $2,039.20, made a total on hand on August 31 of $6,628.44. I can assure you that that balance is not with us at this time because a great deal of expense, of course, goes into the preparation of our annual meeting, but I am very pleased to report that we are solvent.

In addition, the auditors examined the government bonds which the Association owns in the amount of $4,000. For the first time this year the auditors also examined the funds of the Daniel J. Gross Nebraska State Bar Association Welfare and Assistance Fund which, as you know, is administered by three trustees. They

report a total of $26,615.28 as a balance. Their investments amount to $25,419.02, leaving cash in the bank at the present time of $1,196.26.

Only this morning a member of the Bar spoke to me about what he considered a genuine hardship case. Any of you who know of such cases should communicate with the trustees of the fund. The Chairman is Harry Welch of Omaha, the other members are John Mason of Lincoln and Earl Lee of Fremont. To date there have been no disbursements from the fund.

PRESIDENT WRIGHT: The next item of business is the report of the Executive Council, which is brief.

REPORT OF THE EXECUTIVE COUNCIL

Flavel A. Wright

The Executive Council has met throughout the year. Matters being considered have been mainly routine. We have established a Committee for Cooperation with the Law Schools, which I think has done an excellent job.

We have established a committee to see what could be done toward getting legislative bills to members of the bar promptly after enactment or during the process of enactment. There have been considerable complaints during the last sessions of the Legislature that there were laws being enacted and in effect that the lawyers of Nebraska did not even know about. We are hoping we can remedy that situation this year. This Committee has made a report to the House of Delegates.

We have established a committee to investigate what could be done with reference to various federal laws where there are restrictions on attorney fees which are wholly unrealistic.

We have established a Committee on Military Law.

During the year we received the resignation of Tom Quinlan who was President-Elect of this Association. We were reluctant to have Tom resign but since he had left the active practice of the law he felt he should, and it was up to the Executive Committee therefore to designate his successor and Hale McCown was designated as the President-Elect.

The Executive Council considered the advisability of holding this judicial conference in Omaha and approved it, and I think with good success. We also considered a change in the program in the annual meeting, and as I have informed you we approved that change.

One other suggestion with reference to institutes, it has been suggested some charge be made for these institutes. In Iowa, for

example, they hold an annual tax school which is conducted on a very exhaustive and thorough basis, and I am informed that they have greater attendance at their tax school than they do at their annual meeting, and they have a very substantial attendance at their annual meeting. They charge a substantial fee at their tax school and they are able with that fee to use funds to better the institutes. It has been suggested that we at least make a modest charge in order to permit us to put on more institutes and give you something for your money.

That, generally, has been the activity of the Executive Council.

The next item of business is the report of the American Bar Association Delegate, John J. Wilson.

REPORT OF AMERICAN BAR ASSOCIATION DELEGATE

John J. Wilson

The American Bar this year held their largest gathering of all history. They thought two years ago that the Los Angeles meeting was going to be the largest one of all times but there were more than 200 in excess of the Los Angeles meeting at the Washington meeting. It was also held in conjunction with lawyers from England, Australia, and Canada. Actually it was one of the finest American Bar meetings I have attended socially, business-wise, and in conducting the affairs of the Association.

The lawyers from England were very enjoyable to visit with, they were interested in our system of law and they liked the hospitality of the Americans while they were there.

The meeting itself was well rounded. There were more than 250 speakers who spoke at the different sections of the American Bar Association.

Of course one of the big problems was the Connolly Amendment, and I see the President of our American Bar Association here. He took a very active part. I think the papers carried a wrong inference of the Connolly Amendment.

Many years ago the American Bar, through the House of Delegates, went on record with a resolution asking that the so-called Connolly reservation be repealed. This time the proponents of the resolution were for retaining the Connolly reservation and to override the resolution adopted a number of years ago. I saw some of the items in the papers after I returned and probably it was difficult to know what happened, but after a very close vote of 114 to 107 they retained the resolution that was adopted in 1947 and 1949 asking that the Connolly reservation be taken out of the International Court of Justice bill.

The House adopted a resolution on communist tactics and asked that local and state Bar committees be provided speech material and that we carry out our part of it showing that communism is dangerous and infringes upon our rights of freedom.

There has been a working arrangement with the selections of federal judges through the American Bar Association and each year the Attorney General of the United States has called upon a man to approve or sit in on these selections. Now all federal appointments to judgeships are screened by the American Bar Association, and through that screening the members of the Senate have come to recognize the vitalness of such a screening, so we hope that from now on judges will be selected on their merits and not on their political ambitions.

There will be a regional meeting close to Nebraska this fall for those who want to take a jaunt down south. They have announced the regional meeting at Houston on November 9-12. That will be the closest regional meeting of the American Bar this year.

The House also approved a resolution by the Atomic Energy Law Committee which urges that the states be given an opportunity, free from interference by the federal government, to improve their own statutes with respect to workmen's compensation for radiation injuries.

Chairman William Mitchell of Washington, D.C., reported that on September 23, 1959, legislation became law amending the Atomic Energy Act of 1954, shifting responsibility in certain areas for health and safety regulations in the atomic industry from the federal government to the states, and last year our state Legislature adopted an Atomic Energy Committee.

Canon 35 was still postponed. Our present President of the American Bar Association was Chairman of the Special Committee on Canon 35. They have done a great deal of work between the media and the American Bar on a joint committee and they are attempting to find someone who will sponsor a study to be conducted both by this joint committee of the American Bar and by the media. But so far nothing further has been done and Canon 35 stands as it always has.

A formal opinion was requested which attracted wide interest, should judges and lawyers appear on television and radio simulated trial programs? The chairman of the Professional Ethics Committee is going to make an announcement soon as to whether or not that is professional conduct.

The House approved three uniform laws, the Securities Ownership by Minors Act; Testamentary Dictions to the Trust Act; and the Uniform Acknowledgement Act.

They also went on record as adopting a resolution urging federal administrative agencies to adopt rules prohibiting members in Congress and others from lobbying on behalf of friends or constituents during the final proceedings before the regulatory agency. It seems as though Congressmen and Senators and Chambers of Commerce representatives and others have had a right to speak at these hearings after all evidence has been introduced. They are trying to work out, through the administrative agencies, rules that they must appear and take part in the proceedings the same as others and do no lobbying after the conclusion of the testimony.

There were a lot of other matters which were interesting to some but I think one of the things that was as interesting as anything else to us at home was that the Omaha Bar was awarded a Certificate of Merit for the work they had done; so Nebraska did get some recognition.

PRESIDENT WRIGHT: Thank you, Mr. Wilson.

Unless there are questions the report will be received and placed on file.

At this time I would like to ask Whitney North Seymour to stand and be recognized. Mr. Seymour is President of the American Bar Association.

[The audience arose and applauded.]

PRESIDENT WRIGHT: I would also like to ask Mrs. Seymour if she will stand.

[The audience arose and applauded.]

PRESIDENT WRIGHT: We are very fortunate in having them with us. They came in yesterday and plan to stay through the entire meeting. The Nebraska Bar is in their debt.

The next order of business is the report of the House of Delegates by Herman Ginsburg, the new Chairman of the House of Delegates.

REPORT OF HOUSE OF DELEGATES

Herman Ginsburg

Mr. President, Members of the Nebraska State Bar Association, Honored Guests: The report of the House of Delegates, if I were to go into any detail, would be altogether too lengthy for the time that we have available. I will confine myself to calling your attention to the agenda of the House of Delegates which appears on pages 4, 5 and 6 of the printed program and to tell you that this agenda was fully carried out and completed. Necessarily that includes action upon the reports of the committees which you will also

find in the printed program, and I hope that you are all familiar with every one of those reports. They constitute the business, in essence, that was transacted at the meeting yesterday.

I will make no comment concerning the reports which were accepted or adopted as given. Those you will be able to read, as I have mentioned, in the printed program. However, there was some action taken with reference to reports constituting modifications or changes or eliminations that I feel you should be advised of, and therefore I will take a few moments of your time to tell you about the action taken only with reference to reports that were not accepted as given by the committees.

The report of the Committee on Administrative Agencies was modified so as to refer back to the Committee for further study its recommendation relative to the establishment of a state register. The recommendation of that committee that the Attorney General shall be required to act as counsel in all cases involving administrative agencies was not approved.

The report of the Joint Conference of Lawyers and Accountants was approved subject to an amendment to the effect that the holding of the institute therein proposed be referred to the Committee on Continuing Legal Education for action. The special committee was continued for another year; and the House went on record as generally indicating that it favored a trial tax institute to be held jointly with the accountants.

The report of the Committee on Judiciary was approved with the addition that a special committee be appointed by the Executive Council to particularly have charge of supporting the adoption of the Merit Plan for judges. Mr. Wright in his report has referred in greater detail to that matter.

The report of the Committee on Legislation was approved with the following changes:

The recommendation relating to the granting of authority to the county court to construe wills was *not* adopted.

The recommendation for a bill to establish a uniform mode of procedure for appeals from administrative tribunal was *not* adopted.

The recommendation relating to the granting of jurisdiction to the probate courts to admit to probate the last wills of nonresident testators was adopted with the amendment that such legislation shall also validate any proceedings previously had in the courts of this state admitting such wills to probate.

Then there were added as additional matters to be included in the legislative agenda of this Association suggestions which came

up after the formal report of the Committee had been made and these additions were as follows:

A bill to eliminate filing fees in workmen's compensation cases.

A bill for a constitutional amendment to provide for the use of retired District and Supreme Court judges on call by the Supreme Court.

A bill to conform the Nebraska instruction procedure to the procedure set forth in the federal rules; and

A bill recommended by the Committee on Unauthorized Practice to penalize the use of simulated process.

These items now constitute the legislative program of this Association.

The Committee on Medico-Legal Jurisprudence presented an inter-professional code for physicians and attorneys prescribing rules of conduct for the guidance of the relationship between the members of such professions, which code was approved.

The report of the Committee on Uniform Commercial Code was accepted with the amendment that the committee was to make a further report by the next meeting.

Probably the most controversial—and I should eliminate the word "probably"—*the* most controversial matter that aroused discussion on the floor was the report of the Special Committee to collaborate with the Nebraska Real Estate Association. If you have not already done so, please be sure, at your leisure and when you have plenty of time, to digest it. Read the report of that Committee which commences on page 19 of the printed program.

As a part of that report there was a recommendation that we go on record as approving or accepting the result of the so-called Memphis Conference and also a standardized form of real estate contract which the realtors propose to use willy-nilly. By a narrow margin the report of the Committee was adopted with the amendment that the proposed form of contract therein set forth be accepted by the Association as a lawful one, but not be formally adopted as requested in the report. To clarify the action of the House a subsequent motion was adopted to the effect that in accepting said report the House of Delegates was not to be understood as approving the form of the contract in question but simply to indicate that the use of such form was not contrary to law and did not constitute unauthorized practice of law as used by the realtors.

The Committee on Attorney Fees in Governmental Matters made a supplemental report in substitution for their printed report and thereby recommended that the Association go on record as opposing any restriction on attorney fees except as may be im-

posed under court supervision; and the Committee further moved that this Committee be continued. The report of the Committee was adopted.

A resolution was proposed and accepted to the effect that the House go on record as approving proposed Constitutional Amendment No. 2 dealing with the issuance and sale of preferred stock.

All other reports requiring no action by the House of Delegates were accepted and placed on file.

It is hoped that all the members of the Association will familiarize themselves with the reports as printed and distributed and the action of the House of Delegates taken thereon.

The meeting of the House was a very worthwhile and fruitful one and the actions taken I believe of great value not only to the Bar but to the public generally. I personally feel it was a great honor and a privilege to have had the opportunity of presiding at that meeting and to make this report on behalf of the House.

PRESIDENT WRIGHT: I think it would have been worthwhile for every member of the Bar Association to have attended that meeting of the House of Delegates yesterday. During the debate on the report of the Committee to Collaborate with the Nebraska Real Estate Association, I thought about everybody in the House spoke on the matter. They spoke with some authority and they knew about which they were speaking. It was really the legislative process in its best form, in my judgment.

Ray Young will report on the activities of the Advisory Committee.

REPORT OF ADVISORY COMMITTEE

Ray Young

Mr. President, Gentlemen of the Association: The work of the Advisory Committee, the Committees on Inquiry, and the disciplinary activities may be summarized as follows:

1. Upon request of complainant, the Advisory Committee reviewed a record from the Committee on Inquiry of the Fourth District. It was found that the issue, one of division of fees, had been passed upon by the county judge; that no appeal had been taken; that the question was one of legal rights rather than ethics; and the determination of the Committee on inquiry was sustained and the charges dismissed.

2. *A* charged that attorneys acting both for him and for the administrator of an estate in which he was interested were conducting the proceedings in such a way as to discriminate against

him in favor of the other heirs. *A* was informed (a) that no disciplinary action would be taken while the court proceedings were pending and (b) that charges against a member must first be made to the Committee on Inquiry under Article XI, 3, (a) of the Rules.

3. In the Seventeenth District the charge was that respondent, although having taxable income, failed for two years to file federal income tax returns. He pleaded *nolo contendere* to the information in the federal court and was sentenced to pay a fine of $500 and placed on probation for one year. The determination of the Committee on Inquiry was sustained and complaint was filed in the Supreme Court.

4. On review from the Fourth District a complaint charging withholding of a client's funds was sustained and filed in the Supreme Court.

5. The members of the Committee on Inquiry being disqualified, the Advisory Committee took jurisdiction of charges from the Seventeenth District. An investigator was employed. The Advisory Committee met and, all members being present, considered the course to be taken. While the conduct in question is involved in proceedings actively in progress in the courts, your committee is likewise actively engaged in making a complete and thorough investigation.

Supreme Court

In the Supreme Court there were three judgments of suspension for one year; two attorneys who were suspended in 1959 were reinstated; and one has an application for reinstatement now pending. Two complaints are pending in the court.

Advisory Opinions

The advisory opinions rendered during the year which may be of general interest may be summarized as follows:

1. The inquiring lawyer prepared for *A* deed by which *A* conveyed to *B*. The question was whether, in an attack by third parties upon the validity of the deed, the lawyer may properly represent both *A* and *B*. The Committee expressed the opinion that there is no conflict since both *A* and *B* are interested in sustaining the deed, and that the lawyer may properly act for both *A* and *B*, or for neither of them, but not either of them alone. (Canon 6; Drinker, pages 104, 105)

2. A county attorney may not act for a private litigant who seeks a determination of inheritance tax, unless special counsel is employed to represent the county.

3. A savings and loan association proposed to send to its shareholders a bulletin relating to the Nebraska personal property tax on its shares held by Nebraska residents. It quoted an opinion by its attorneys. The problem discussed was one common to all Nebraska shareholders. The attorneys' names did not appear. The bulletin suggested that questions be referred to the shareholder's attorney. The Committee held that there was no impropriety on the part of the attorneys or of the association.

4. Canon 27 prohibits the publication of a professional card in a newspaper. Such medium cannot properly be used for announcement of the opening of an office, the removal of an office, or the establishing of a branch office. We have had many requests for opinions on that. It is very simple and clear. We just can't advertise in the newspapers under Canon 27.

5. The listing of a lawyer's name in distinctive type in a telephone or city directory is condemned as a violation of Canon 27.

6. In two cases the Committee declined to express an opinion where the question was essentially one of law rather than of ethics. It is not the province of the Committee to interpret constitutions, statutes, or principles of law. Its function is the interpretation of the rules of professional conduct (Rule VIII, 14) as expressed in the Canons (Rules, Art. X).

7. The Committee will not, by an advisory opinion, prejudge a case which may come before it for review or decision.

8. Enlarging upon an earlier opinion *(Nebraska Law Review,* Volume 39, Issue 1, January 1960, p. 47) the Committee stated its views that — and we have had a lot of questions about this:

(a) It is improper for a city attorney to represent a defendant in a criminal matter for an offense alleged to have been committed within the city or within the county in which the city is located.

(b) The prohibition against representation by a city attorney applies with equal force to a village attorney.

(c) A city attorney is precluded from handling the defense of criminal cases in counties other than the county of his residence, where it is a part of the duties of the city or village attorney to prosecute violations of municipal ordinances in criminal courts.

9. An announcement that a firm is engaged in "general practice, insurance law, investigations, probate and tax law, trials and appeals" offends against Canons 27 and 46.

10. The Committee held that Canon 6 prohibits a lawyer from acting for another in suing the lawyer's client, even though the latter's liability is fully insured.

11. Whether an attorney who is administrator may properly

receive fees for his services in both capacities is essentially a question of law.

12. There is no impropriety in an attorney's permitting a bank to carry his name on its letterhead designating him "counsel" or "general counsel" (or, perhaps "attorney", but not "attorney at law"), provided it is not used in such a way as to amount to solicitation of employment for the attorney.

Committees on Inquiry

In Districts Nos. 2, 5, 6, 12, and 18 there were no matters to engage the Committee's attention.

In Districts Nos. 8, 10, 11, and 14 informal investigations resulted in dismissals.

In District No. 1 charges in one case were heard and dismissed for lack of merit.

In District No. 3 (Lincoln) eight matters required Committee action. Three of them were disposed of without a hearing. Hearings in three resulted in findings in favor of respondents. Two are awaiting further action.

In District No. 4 (Omaha) hearings were had in nine matters. Seven of them were settled or disposed of by agreement of parties, one was dismissed by complainant and one is pending in the Supreme Court. Charges in four cases are awaiting hearing by the Committee.

In District No. 7 one case was heard and charges dismissed by the Committee. Charges in one case are being investigated.

In District No. 9 charges are pending in one case. Informal investigation of one matter resulted in finding of no merit in the charges.

In District No. 13 one hearing resulted in dismissal. One case referred by the Secretary of the Association is under consideration.

The only matter coming before District No. 15 was satisfactorily adjusted.

In District No. 16 the only matter pending at the beginning of the year has been adjusted. No new charges were received.

In District No. 17 hearing in one case resulted in a complaint which was filed in the Supreme Court. Respondent was suspended. One case is in the hands of the Advisory Committee because of disqualification of the members of the Committee on Inquiry. Charges in two matters were dismissed by the Committee after investigation. One case is under investigation.

The Hon. Walter Raecke, who was for many years the Chair-

man of the Committee on Inquiry for District No. 6 and an able and outstanding member of the Association, died in April. Mr. L. F. Otradovsky of Schuyler was appointed to succeed Mr. Raecke.

A fine spirit of professional obligation prevails in our membership, due in large measure to the fact that in every part of the State, in each of the eighteen judicial districts, there is an active and willing committee of five or more members well acquainted with our standards, purposes and procedures. These committees are doing a splendid service to the profession and to the public.

It is recommended by the Advisory Committee that every practicing lawyer have in his library some of the authoritative works on the ethics of the profession. A list of the more useful books on the subject is appended.

PRESIDENT WRIGHT: Thank you, Mr. Young. The report will be received and placed on file.

One of the problems of the Bar Association is what to do about past Presidents. Particularly in this Association you have a fine group of individuals who have been President of this Association and we want to use their services. Ray is a classic example of how those services can be used and he has done a fine job on his committee.

I might mention, too, that Anan Raymond represented us at the University of Chicago opening and we were happy that he was able to do that for us.

The next order of business is the report of the Judicial Council by Mr. Carter.

REPORT OF JUDICIAL COUNCIL

Edward F. Carter

This past year has been an off year insofar as legislative sessions are concerned. Since we deal only with procedural problems our work has been limited to preparation of proposed bills for the consideration of the 1961 legislative sessions.

The Judicial Council does have several important matters before it in which you may be interested and on which you may have suggestions to offer. I shall therefore briefly review the matters pending before the Council.

1. We have for consideration a possible amendment to Section 29-2020 relating to the preparation of bills of exceptions in criminal cases for the purpose of conforming the procedure in criminal cases to that in civil cases.

2. We have for consideration the amendment of Section 25-

1329 to provide notice to counsel of the rendition of judgment after a case has been taken under advisement. We are working jointly on this matter with the Legislative Committee of this Association. The need for such an amendment has been agreed upon and it appears that an adequate amendment providing for such notice will be drafted and submitted to the Legislature for enactment into law.

3. An amendment to Section 30-217 has been agreed upon which deals with the probate of foreign wills.

4. We likewise have before us a proposed bill to clarify the right of an incompetent spouse to elect to take under the statute and the right of the executor or administrator to make the election during incompetency.

5. The Council has before it the matter of vesting county courts with authority to render summary judgments.

6. The Council has undertaken a study of the administration of justice in this State through a subcommittee of the bench and bar. The general purpose of the program is to devise a method for overcoming delay in the trial of cases in areas of the State where the volume of business or other considerations result in abnormal delays in the trial of cases. Court congestion and the better use of judicial manpower are within the scope of the subcommittee's study.

7. The Council through a subcommittee is also investigating possible changes in the law of evidence.

We have several matters pending which have little general interest. We are continuing to work on the matter of uniform legal notices. An amendment to Section 5-106 relating to the jurisdiction of the municipal courts of Omaha is receiving the attention of the Council. We are considering the matter of the right of review in criminal cases, the object being to provide for an alternative right of appeal in the same manner as in civil cases.

The work of the Judicial Council will gather momentum as the next session of the Legislature approaches. We again request the bar to call attention to mistakes and inadequacies in the statutes. If the matters submitted are procedural we shall examine into them. If they are not procedural we will refer them to the proper agency for their consideration.

The development of our procedural law is essential to the prompt and efficient administration of justice. The saving of time and money for litigants wherever we can is necessary if the public is to have respect for courts and the law. The Judicial Council is a clearing house for suggestions of this kind. We urge each of you

to send in your recommendations and suggestions regarding the improvement of our legal procedures.

PRESIDENT WRIGHT: Thank you. Your report will be received and placed on file.

Is George Bodenmiller of the John Hancock Mutual Life Insurance Company in the audience? Will you come forward and give a report with reference to our group insurance.

REPORT ON INSURANCE

George W. Bodenmiller

The report of the John Hancock Mutual Life Insurance Company in regard to your group life program which was installed two years ago December 1:

As you recall, in our report last year the experience on the case was such that in the first year of the policy's existence we were able to pay a $14,000 dividend. The experience on the case last year up to December 1 of 1959 showed that premium income was $93,748.56; and incurred claims were $105,000, which represented 112 per cent of the premium; therefore there was no dividend.

I have received information from our home office as to the status of the case as of this year and it looks like, unless there are unusual claims for the balance of the year between now and December 1, there will be a dividend.

We had an open enrollment date this year between July 1 and August 1 which resulted in an increase of $433,000 of volume.

We appreciate the opportunity of serving this fine Association and look forward to a steady growth of the case.

PRESIDENT WRIGHT: The next item of business is announcement of new officers.

ANNOUNCEMENT OF NEW OFFICERS

George H. Turner

Following the Constitution of the Association the Executive Council met in July to nominate officers for the coming year. They nominated Ralph E. Svoboda of Omaha as President-Elect; Alfred G. Ellick of Omaha as member-at-large of the Executive Council; and John J. Wilson of Lincoln to continue as Association representative in the House of Delegates of the American Bar Association.

Also as provided by our Constitution a notice of these nominations was sent to all active members immediately following the action of the Executive Council. Under the Constitution further

nominations may be made by petition. None was made. These gentlemen are automatically elected to the offices for which they were nominated.

PRESIDENT WRIGHT: If it is necessary that I declare they are elected, I so declare, and as soon as McCown wants to take over, come forward. I think we will wait until the evening meeting tonight.

The final item of business at this time is the report of the Committee on Memorials. Joseph T. Votava, one of our past Presidents, will you please come forward.

REPORT OF COMMITTEE ON MEMORIALS

Joseph T. Votava

Mr. President, Fellow Members of the Bar: Your Committee on Memorials, Mr. Earl J. Moyer, Mr. Robert H. Beatty, and I, respectfully present: Forty-three chairs occupied a year ago stand vacant; forty-three of our brethren have departed during the year to the undiscovered, unknown country. Our faith tells us that they are still alive; that they live a happier and a more blissful life than we can possibly picture in our dreams. Our earthly reason tells us: "We do not know." It is a question not to be solved by human reason or answered by eye witness testimony.

A troubled patriarch centuries ago asked: "If a man die, shall he live again?" Whether our departed brethren live again beyond these earthly boundaries, and where and how, only our faith can answer; but our human reason can and does tell us with complete conviction that they do live and will continue to live; they live and will continue to live in their work, in their accomplishments, and in our hearts and in our memories.

We have known them; some have achieved high public distinction and received professional honors; others have served modestly in their communities helping their fellow citizens as trusted agents, as wise counselors, and as dependable leaders. They all have faithfully carried out the trust reposed in them as members of our profession. They held high the torch of loyalty to duty, fidelity to trust, of devotion to truth and justice under law. They have kept the faith.

Each and every one was an honor to our profession. Their lives are a challenge to us, the living; an example to emulate, a prayer also to keep the faith. Each and every one equally has earned our respectful memory.

Let us stand in loving remembrance and pay solemn respect to all of the deceased members of our Association, and especially

those who left us during the past year. Please remain standing while I read the names of those who have departed since our last meeting:

N. C. Abbott, San Gabriel, California
Walter L. Anderson, Lincoln
Michael J. Barry, Omaha
Ralph E. Barry, Lincoln
Eugene N. Blazer, Omaha
Rupert A. Boehmer, Lincoln
D. E. Bradshaw, Omaha
Ralph G. Brooks, McCook
Gilbert S. Brown, Omaha
Frank C. Builta, Omaha
A. P. Coleman, Walthill
P. James Cosgrave, Lincoln
Charles P. Croft, Amarillo, Texas
John E. Curtiss, Lincoln
Charles F. Davis, Omaha
R. H. Ewart, Wahoo
Howard S. Foe, Red Cloud
Francis S. Gaines, Omaha
Albert S. Johnston, Lincoln
Samuel E. Kaiman, Omaha
Joseph M. Lovely, Omaha
John C. Lunk, Omaha
Earl D. McLean, Lincoln
Payson D. Marshall, Pacific Palisades, California
Ross G. Moore, Anthony, New Mexico
Edmund B. Morcom, Los Angeles, California
T. Simpson Morton, Nebraska City
Elmer B. Nordell, Omaha
Charles E. O'Brien, Omaha
Carl J. Peter, Omaha
Harrison J. Pinkett, Omaha
George C. Proud, Arapahoe
R. W. Proudfit, Los Angeles, California
James C. Quigley, Valentine
Walter R. Raecke, Central City
Millard H. Raymond, Council Bluffs, Iowa
Frank S. Rizzuto, Omaha
G. Eli Simon, Cambridge
William Sternberg, Omaha
Cloyd L. Stewart, Portland, Oregon
Don W. Stewart, Lincoln

R. A. Van Orsdel, Honolulu, Hawaii
Anthony Zaleski, Omaha

[The Thursday morning session adjourned at eleven forty-five o'clock.]

INSTITUTE ON REAL ESTATE TRANSACTIONS

THURSDAY AFTERNOON SESSION

October 6, 1960

MODERNIZING NEBRASKA CONVEYANCING PROCEDURES

[The first session of the Institute on Real Estate Transactions was called to order at two thirty-five o'clock by President Wright.]

PRESIDENT WRIGHT: As I explained to you this morning, this is an innovation. We have changed the procedure from the former procedure at Bar meetings.

We have put the responsibility for the entire educational program of the Bar on one section of the Bar. We have relieved the other sections of any responsibility at the Bar meeting but we have not relieved them of other responsibilities as section leaders, or the responsibility of the lawyers generally to keep the Bar advised as to pertinent matters that pertain to the section business or the laws relating to the section's activities. So I do hope that the sections will continue to operate, but they can realize that their responsibility, if this plan continues, will be to put on a real topnotch school, as it were, once every three or four years or five years and in the meantime to see what they can do about having perhaps a separate clinic at some other occasion during the year.

The Committee on Continuing Legal Education headed by John Mason has done a tremendous amount of work in getting this thing ready. That work is matched, at least, by the work which has been done by the Real Estate, Probate and Trust Law Section. From now on the proceedings will be in charge of Mr. Franklin Pierce, a lawyer from Grand Island, formerly with the Federal Land Bank, in active practice in Grand Island, and now the Chairman of the Executive Committee of the Real Estate, Probate and Trust Law Section of the Nebraska Bar.

CHAIRMAN FRANKLIN L. PIERCE: Mr. President, Members of the Association: Contemplating that a discussion program will inevitably be a part of this presentation, we will proceed on the basis that the discussion will be withheld until after each of the speakers has presented his particular subject. After that is done we will proceed with the matter of questions and discussion.

SOMETHING NEW IN MORTGAGES

Norman M. Krivosha

Thank you. I take it I would probably do well to stop at this point.

Because we are running late Mr. Pierce asked me to explain to you that my purpose here is to deliver a paper, and your purpose is to hear one. If you should finish before I do please feel free to leave. I hope perhaps we can finish in a dead heat.

As I look out across the sea of faces I think of the lawyer Mr. Turner told me about who several years ago attended a State Bar meeting and vigorously participated in a section on alcohol which was being held on the first floor. After a full day of active participation he eased himself off the stool and headed for the elevator. There was a large crowd. The elevator door opened and they all moved in and he was the last one in. Much to his surprise he discovered he was standing with his back to the elevator door facing a sea of faces. His mouth dropped, he took a deep breath, looked up and said, "I suppose you're wondering why I called this meeting."

Likewise I suppose you are wondering why we called this meeting. The title is "Something New in Mortgages." I think the advertising people would say that the title is a "grabber." What I propose to discuss with you is not really something new in mortgages. It is simply an attempt to revise our present mortgage form so that in fact it will reflect what the law actually is in regard to mortgages.

The form is a tentative proposal. It is our hope that you will take these forms back with you and during the coming year you will examine them, you will write to us, give us your suggestions and your criticisms so that perhaps next year we might adopt a uniform mortgage form that will be used by the entire bar.

The form that you have couldn't possibly satisfy every situation. As you all are aware, a form at best will take care of most situations but certainly there are cases where it must be changed. I think, however, the proposed form in the main discusses those portions which are generally applicable to all mortgages.

I think probably it would be presumptuous of me simply to propose a new mortgage form, to say that we do away with what we have without first examining how it is we got this creature, the mortgage, how it is that what is obviously only a security transaction has developed into what appears on its face to be a conveyance, or at least a conditional conveyance.

This information may be something all of you are aware of but if you will bear with me I would like to review briefly the

history and development of the mortgage so that perhaps it will be easier for us to discuss the new mortgage form and easier to do away with the form we now have.

A mortgage in itself is certainly not a new innovation; it is as old as civilization; it is a necessity of civilization. The need to borrow money and give security for the borrowing of the money has always existed. It appears, however, that our present form of mortgage had its original inception during the Anglo-Saxon period in England.

At that time two types of mortgages were known, a "Vif Gage," which meant a live pledge, and a "Mort Gage," which was known as a dead pledge. I am sure probably many of you have been unhappy to find that what you have is in fact a "dead pledge." But the original meaning was that the live pledge, the rents and profits from the live pledge, were applied to pay the principal indebtedness, whereas in the case of the dead pledge or Mort Gage, the rents and profits were not applied to take care of the principal indebtedness. In both cases it was absolutely imperative that physical possession, or possession be given to the gagee. If this was not done it was held that the Mort Gage was void.

One of the problems which came about from this was that although the gagee had possession, the all-important matter of seisin remained in the mortgagor, and he could at any time he wanted to, dispossesses the gagee of possession and because of only the existence of the law courts and the fact that seisin remained in the mortgagor, the mortgagee was without any remedy to acquire back the security, his only remedy being to come into the law court and sue the mortgagor on the debt—as you can see this didn't make for much security, with the mortgagor having this election.

Well, man being as ingenious as he is, the next form which came about was a conveyance for a term of years whereby the mortgagor would convey to the mortgagee for a term of years, usually identical with the length of the indebtedness, with the provision that upon payment of the debt, the lessee, I take it, would return possession to the mortgagor. And this worked fine until the development of the common law prohibition against a creation or springing of a freehold interest after a term of years. It was held that you could not create a freehold springing interest after there had been a term of years. So there was a place in there where, if the mortgagor failed to make payment, there wasn't any way for the mortgagee to acquire absolute possession.

In order to remedy this they then went to what we now have, and that was a conditional conveyance, a form which in all re-

spects was identical with a deed except that there was a provision that upon payment of the debt the property would be reconveyed to the mortgagor, or in some cases an absolute sort of thing where the mortgagor paid the indebtedness the property immediately went back to the mortgagee.

Consistent with this sort of thing and following this type of conveyance, the law courts recognized that the conveyance was only intended to be a security transaction, that it was not intended to be an absolute or conditional conveyance, but because of the strictness of the law courts and their inability to hand out equitable relief, they were unable to do anything with this. Chancery, on the other hand, again recognizing the true intent of the conditional conveyance, provided that regardless of what the conveyance recited if the mortgagor at any time paid the mortgagee the principal indebtedness he was entitled to recover back the property.

In order to prevent an indefinite period so that the mortgagee could come back at *any* time, the Court of Chancery created a limited period within which the mortgagor could make payment to the mortgagee, even after default, and recover back the property. This is simply what we know as Equity of Redemption.

During the Anglo-Saxon period, then, because of necessity, we have an instrument which appears to be a conditional conveyance but enforced by the equity court with an Equity of Redemption.

As you can see, there is nothing magic or imperative that a mortgage contain words "convey and sell" or contain an *habendum* clause. These things were inserted because at the time that the instrument came about there was no other way to enforce a mortgage. I think we have traveled far enough along in our law, in our jurisprudence, that this is not necessary any longer and that we need not be reluctant to take out the words "sell and convey" because, in fact, what we are talking about is simply a security transaction.

We have a statute in Nebraska, Section 76-276, which provides that in the absence of a stipulation to the contrary, title and possession remain in the mortgagor. If you examine the common form of mortgage we use, you will find it says that "the mortgagor sells and conveys," and at the bottom there is always the clause "it is hereby the intention to convey absolute title including homestead and dower," and even in light of that language we are all aware of the fact that the court says this is not a conveyance; this is simply a security transaction.

Well, if the instrument that we now have says it is the intention to convey absolute title, which would seem to take care of

the stipulation required by the statute, and the court nevertheless, and properly so, says this is simply a security transaction, it is obvious that this language can't possibly have any proper meaning and you can't stipulate to the contrary. Either you convey it or you don't convey and that is all there is to it.

Furthermore there are several decisions in our jurisdiction which are similar to decisions in other jurisdictions, and particularly those jurisdictions which follow the lien theory doctrine in regard to mortgages. In the *Orr* case—and I will just mention these names briefly; the citations are in the outline, I won't take time to refer to them completely—in the *Orr* case our courts said that a mortgage on real estate in this State does not convey any title or vest any estate before or after condition broken, but merely creates a lien upon the mortgaged property. Now I think this language is particularly important because they even go so far as to say that even after a condition is broken, it doesn't vest any title. It is still necessary to come into court and you foreclose on the mortgage. Obviously nothing you say in the mortgage is going to make it appear to be an absolute conveyance. Furthermore, in the *Morrill v. Skinner* case, which was a case involving an instrument that did not contain words of conveyance and the court held that nevertheless this was still a mortgage because of the intention of the parties, the court said: "While the latter instrument is not in the form of a mortgage, it has its essential characteristics. It has proper parties' names, describes the land and the debt, and evidence is clearly an intention to charge the land with a lien as security for the debt. This is the sole operation of a mortgage in this state. A mortgage does not here convey an estate; it merely creates a lien. As words of conveyance are inoperative, they are not essential."

This perhaps dispels any fear of what will happen to a mortgage if we take out words of conveyance. Obviously nothing will happen to it and we will simply be placing the mortgage in its proper context.

Some of the reasons which came to me in preparing this was that lawyers are frequently placed in an embarrassing position of attempting to explain to a client why it is that this instrument talks about "selling and conveying," and "to have and to hold," words which indicate that it is a deed, when in fact all that they intend to do is vest the mortgagee with a lien upon the property.

The mortgage which we propose to adopt will eliminate that problem and all that it does is simply to recite what the transaction actually is.

Turning briefly to the instrument itself, first I will take up what I consider to be the essential requirements and then after that

the frosting that we might insert without encumbering the length of the mortgage and still protecting the parties.

Obviously the mortgage must be in writing. You cannot in Nebraska create an oral mortgage. Secondly, you must identify the parties, for various reasons. You must have the name of the mortgagor, the name of the mortgagee. Obviously if you propose to foreclose the mortgage you have got to know against whom it is that you are foreclosing and who claims to own the property. Furthermore the author in *Corpus Juris Secundum* points out that if no person is named as the mortgagee in any part of a mortgage it is null and void and incapable of foreclosure. Likewise I take it the same thing would hold true in regard to the mortgagor.

Secondly, the instrument should state the consideration. This is something that perhaps we don't all do. Frequently you find "$1.00 and other valuable consideration." There is a Nebraska statute in regard to this which provides that all deeds, mortgages, and conveyances of real estate must state the actual consideration and, furthermore, failure to do so constitues a misdemeanor which may be punishable by fine. I take it maybe if there are no county attorneys here we can go on and discuss that. I am not aware of anyone who has been prosecuted for failure to insert the actual consideration.

The mortgage likewise should describe the indebtedness. Now obviously the purpose of the mortgage is to secure the indebtedness; in the absence of the debt there cannot be any mortgage; and the payment of the debt extinguishes the mortgage. Even if the mortgagee fails to release the mortgage, the fact that the debt has been paid extinguishes the mortgage and permits the mortgagor to require the mortgagee, or to request the district court to order the register of deeds to release the mortgage. So the mortgage should describe the indebtedness it seeks to secure for purposes at least of identification and to contain an express provision that it is for the purpose of securing a particular indebtedness.

The mortgage should properly describe the due date. Many examiners I am sure have been confronted with the problem of going back and reading an abstract, finding reference to a mortgage, no release, and nothing said in the mortgage as to whether there is a due date or whether there isn't any due date. Then it is necessary to send the abstract back and require the abstracter to at least note on the entry that there is no due date. This is due to the statute in Nebraska which provides that a mortgage of record is no longer a lien or notice of a lien ten years after the due date or twenty years after the execution in the absence of due date. Certainly the mortgage should provide then for the due date for this purpose.

I am inclined to think that with the execution and acknowledgment, if these facts and these facts alone are contained in an instrument you have a sufficient mortgage, nothing more is needed. Nor is the mortgagor required to do anything more. I don't think he is required to pay the taxes in the absence of any provision, I don't think he is required to pay the insurance in the absence of any provision, but in order to make the mortgage of any value, obviously if we are taking security we want it to be secure and we should provide for these things, and these result in what I consider to be fringe provisions in a mortgage but which I think should be necessary and should be included in a mortgage.

The mortgage should provide that the mortgagor will purchase and maintain insurance of at least sufficient value to secure the indebtedness. Some comment that was received was that the mortgagor should be required to maintain insurance sufficient for the principal or original amount of the indebtedness. Perhaps this, in our day and age and the cost of insurance, perhaps this is requiring more of the mortgagor than should be required. If he doesn't want to carry any insurance for his own protection I don't think we should require him to, but certainly we should require that he carry insurance at least sufficient to protect the mortgagee with a loss payable clause to the mortgagor and mortgagee as their interests may appear.

This also has another value in regard to the acceleration clause, which I will talk about in just a minute. I think the mortgage should likewise provide that the mortgagor will pay the taxes. Under Nebraska statute in the absence of such a provision or stipulation the taxes are assessed against the mortgagor and the mortgagee in a proportion equal to their interest in the real estate. Obviously we want the mortgagor to pay the taxes, and therefore it is necessary that such a stipulation be placed in the mortgage. Again this has further effect in regard to the acceleration clause.

Likewise I think it is of advantage to further provide in the mortgage that upon the failure of the mortgagor either to pay the taxes or to purchase insurance that the mortgagee may do so and include it as part of the original indebtedness; so if he is required to ultimately foreclose the mortgage he may include these additional expenses which really are connected with the mortgage and foreclose for the entire amount. I think perhaps in the absence of such a provision if the mortgagor were to pay the taxes or the insurance, he would not be permitted to include these in the principal amount of the indebtedness he was foreclosing.

There is a Nebraska statute which provides that if you pay the taxes you have a lien for the amount of the taxes. Some question

might arise as to the priority of that lien. You have a mortgage, you record it. It is a lien from the time you record it. A judgment comes in, then you purchase insurance. In the absence of a provision can you go back and include the insurance in the original indebtedness or is the insurance portion of it even if it is a lien or in the case of taxes, even if it is a lien, is it ahead of the judgment or does it come after the judgment? In order to avoid any problem with this we would suggest that this provision be contained in the mortgage and eliminate the problem.

The mortgage should likewise provide for an acceleration; that is, that if the mortgagor fails to make any single payment or perform any of the conditions, that is, pay the taxes or purchase the insurance, or whatever the conditions may be, that the mortgagee at his election may declare the entire indebtedness due and proceed to foreclose at once. The reason, I take it, is obvious. In the absence of such a provision, if the mortgagor failed to make a single payment the mortgagee's only relief would be to recover or foreclose with a single payment. He would have to do it payment by payment. If you have got a mortgagor who has failed to make a payment or failed to pay the taxes or failed to purchase the insurance, your property is in jeopardy, your security is in jeopardy and it is to your advantage to be able to declare the entire indebtedness due and foreclose for the full amount.

Furthermore, our court has held that once the mortgagee elects to foreclose and accelerate the indebtedness, that the mortgagor can do nothing to prevent this short of tendering full payment. Now if you just had single payments and you started to foreclose the mortgagor could come in, tender the payment that was delinquent, and he would now be back in good graces and the foreclosure would stop; whereas in this case should he fail to make a single payment you can stop the entire mortgage by beginning to foreclose immediately and recover back either your entire indebtedness or the security.

I think the mortgage should likewise provide for payment to the mortgagees as joint tenants, if this is the intention. Obviously, in the case of a corporate mortgage you don't have this problem, but I think in regard to the individual this is an essential requirement if that is your intention. I won't take a great deal of time to talk about *Buford v. Dahlke* — Bob is going to take it up — but I think what applies there likewise applies here. As you recall, in the *Buford* case the Dahlkes were the owners of the property in joint tenancy to begin with. They then sold the property under contract and the court held that having done that they transferred it from realty to personalty, and because in the absence of a specific provision they now held as tenants in common, the court there said

that even as to a purchase agreement or a contract of purchase, the vendor held the title simply as security for the debt. Well, if it is true in regard to a contract obviously it is going to be true in regard to a mortgage where title has already been vested in the mortgagor, and therefore I think this is an absolute necessity. Furthermore when we change the form of the mortgage, or *if* we change the form, we delete the portion about "conveying and selling" to the mortgagees as joint tenants. Therefore it is necessary that we have some type of provision in there to take care of that situation.

I would further suggest that the mortgage provide that either of the parties or their survivors could release the mortgage. Probably in the case of a joint tenancy if one of them died the survivor under the joint tenancy would be entitled to release the mortgage. In the absence of that the statute simply says "the mortgagee or his personal representative". If they don't happen to be in joint tenancy, one of them dies, and you don't have a personal representative, you have no one to release the mortgage; you are required perhaps to have a personal representative appointed simply for the purpose of discharging the indebtedness or the mortgage, whereas a simple provision in the instrument would eliminate that problem.

In regard to the matter of signing and acknowledging the mortgage, I don't think we need to take a great deal of time to discuss that. The statute specifically provides that it must be signed and acknowledged by the mortgagors because of the requirements of homestead principally, and because of the fact that you are attempting to get all of the parties as parties to the transaction and for purposes of recording, so that certainly the instrument should be signed and acknowledged.

I think when we have an instrument which contains these provisions which I have discussed, we have a mortgage which is sufficient and we have a mortgage which actually does what the law says it does today. It is sufficient in every respect. Now there may be other provisions we are going to have to include because of a particular situation but in the main I think these clauses would take care of the general mortgage.

What have we deleted? Well, we have taken out the part "know all men by these presents," and I will be quite frank with you, I don't know what that means. I take it it came about when they used to nail these things up to the courthouse door or the London dock, but either we have to eliminate it or be fair and state "Know all men and women by these presents."

We have likewise eliminated the words "sell and convey"

because it is not intended to be a conveyance; therefore, it is not necessary that it have any words which indicate that it is a conveyance and the court has said that because words of conveyance are inoperative they are not essential. If they are not essential, they are not necessary—let's eliminate them.

Likewise this provision about "it is the intent of the party to convey absolute title." It is not the intent of the parties to convey absolute title nor is it the intent of the court to permit the parties to convey absolute title. It is unnecessary—let's eliminate it.

We have likewise eliminated the *habendum* clause. First of all it is not a conveyance so you don't need it. Second, it appears you don't even need it in a conveyance, in a deed. The author, after examining the authorities in 16 A.M. JUR, pointed out that in formal deeds the *habendum* is that part of the deed following the premises which set forth the estate to be held and enjoyed by the grantee. In modern conveyancing the *habendum* clause in deeds has degenerated into a mere useless form where the premises contain the names of the parties and the specification of the thing granted and the deed becomes effectual without any *habendum*. If we don't need them in a deed we certainly don't need them in a mortgage.

The other matter which I have eliminated from the deed and which is oftentimes found, is a provision which provides after reciting the intention to convey and sell certain property "with all appurtenances thereto". Now I have eliminated this clause. I think it is unnecessary. In the *Butts* case cited in the outline our Supreme Court said: "Every right or interest held by a mortgagor in and to the mortgaged property, together with all subsequently acquired rights, easements, and privileges which are necessary and essential for the full enjoyment of the property, pass with the mortgage and that, too, though reference is not specifically made in the mortgage to anything further than the particular property conveyed."

Well, if the easements and the appurtenances go with the mortgage simply by reciting that they mortgaged the property, then they are unnecessary and again it seems to me that if the language has no purpose, if it is unnecessary, matters are complicated enough as they are with what is necessary, let's eliminate what isn't necessary.

One other matter which I would just like to briefly mention, and then I am through: It has been suggested that perhaps a mortgage should contain a convenant of warranty in order to take care of a situation of after-acquired interest and that in the absence of a covenant of warranty the mortgagor could set up superior rights to the mortgagee in regard to this after-acquired property.

In a rather extensive annotation in 58 ALR and the Nebraska

case cited therein, after discussing all of the cases, and concededly there is a difference of opinion and there are some jurisdictions which hold that in the absence of a covenant of warranty the after-acquired interest does not follow. The better-accepted rule, the more modern rule, and the rule which appears to be prevailing is that it is not necessary and the author points out, "It is well settled" —although I take it from what he cited that maybe it isn't well settled—"that in the case of mortgages, as in the case of absolute conveyances, convenants of warranty of title are not essential to create an estoppel on the part of the mortgagor to assert an after-acquired title or interest." And the reason is obvious. It would be to permit the mortgagor to create a fraud upon the mortgagee if, in the first instance when he signs the mortgage, he purports and his intention is to convey all of the interest, all of the property, and then subsequently acquire an interest which he could hold superior to the mortgagee. This obviously would be a fraud upon the mortgagee and therefore it would be my feeling that the better rule, and the rule which is recognized, is that a covenant of warranty is not necessary and therefore should be omitted from the mortgage.

I hope that during the coming year you gentlemen will examine this proposed mortgage. I am the first to admit that this probably is not perfect, and probably my ideas differ from those of you here. I would be most happy, I invite you to write and tell us about your feelings and your authority for your position, so that next year when we do meet we can perhaps adopt a mortgage form which will be correct and which will simplify our conveyancing procedures.

PURCHASE AGREEMENTS AND INSTALLMENT CONTRACTS FOR SALE OF REAL ESTATE

Robert H. Petersen

I would like to take just a minute or two to tell you what our purpose is, what the purpose is of our committee, and as chairman of the Committee on the Improvement of Conveyancing Practices what we have tried to do.

Norman and I both mentioned this, that we feel rather presumptuous, men of our age, to stand up here and try to tell you people (some of whom were drawing instruments long before we even knew there was such an animal) how to draw a mortgage or a purchase agreement, etc. Of course that is not the purpose of our committee. The purpose of this committee is to explore the instruments that we are now using, forms we are using, to see if

we can bring some questions, some suggestions to you to take home and study, to think about, and then later on come back and see if maybe we can adopt a standard form or something that is to your liking.

In other words, our work is really to merely raise some questions and I am sure we will do it.

After I had a rough draft of the purchase agreement and the installment contract, I sent out forms to the other committee members and some of the people who were to be on this program for suggestions and, boy, I got them! You sure get them, and you would expect that, I suppose, from a group of lawyers.

I think that the experience of this committee in the past has shown its value in the deed forms that were adopted. Now there has been a lot of favorable comment on the deed forms and I like them and it seems like most of the people that I talk to think that it is a step forward to simplify the forms. Of course it is difficult to ever come up with a standard form, especially for a group of lawyers. We are an individualistic lot, we all have our own ideas, and of course that is the way it should be. Of course there is another thing, that there is some danger in using a standard form because it is so easy to just go to the drawer and pull out a standard form and automatically use it. That is not the purpose of the form. It is not the purpose of our committee to come forward with some suggestions like that, that it is a cure-all, and that here is a form that you can use in every situation. It is certainly not intended to replace the lawyer's initiative when it comes to drawing instruments.

On the other hand if a reasonably standard form with normal wording can be used in even half the cases, if it will fill the bill, why not use something like that that will save us all time?

I think there is another value in it, too. If we have a form that is more or less a standard form that we all use and if I explain this form to my clients and it contains the same wording that you have in your form and you explain it to your clients, it seems to me it is going to be much easier for us to get across to the layman in words he can understand the thing that we are trying to do. After all, he is what we are working for, and if we can do that it seems to me it is a good thing for public relations.

This presentation that you have had here from Mr. Krivosha, from Norm, was very good and that mortgage form really makes sense to me. After you take it home with you, look it over, study it, and maybe use it a few times this coming year, if it meets with your approval and is adopted at a subsequent meeting of this Association

it seems to me that the committee will have accomplished something.

Now I am going to spend a little time on the other two forms. We have decided that at this meeting we could only present the three forms for your consideration. The forms that I am going to talk about will be the purchase agreement and the installment contract for sale of real estate. I want to take up the installment contract for the sale of real estate before the purchase agreement. I believe that is probably in the last part of the outline that you picked up. That will probably create a little more interest and I believe will give us a little more trouble so let's talk about that one first.

In the first place I am not sure that I even like the name of it, now that it is drawn. I don't know that we should use the term "conditional" sale of real estate. That is something for us to think about. You think of a conditional sale normally applying more to personal property, and actually it isn't a conditional sale, it is an outright sale. So probably a better title can be devised for the form.

I suppose this is probably one of the forms that will give us more difficulty than any of the others and it may be impossible to come up with a standard form for installment sales of real estate, but at least let's explore the possibilities.

You will notice there are two forms in your outline. One is a straight form and the other is a survivorship form, and that is the only difference between the two forms, so we will talk about the survivorship form. The other one is just like it except it doesn't have the survivorship feature.

We start out and we call these people "sellers and buyers." Normally when we are talking among ourselves we call them vendors and vendees. Some people think of sellers and buyers as a layman's language, and you think of it sometimes as dealing with personal property. On the other hand that is what they are; they are sellers, they are buyers, and I don't see that it affects the legal consequence of our using those names. I believe it will be easier to explain to our clients when we talk about the "seller" than talking about you, you are selling the place, and you are buying the place, and I know of no particular reason why those terms should not be used. However, that would be something for you to think about.

As we get into the actual contract, I am not going to give you citations or anything like that because they are all contained in your outline and we can examine that for citations.

The first part of the contract provides for your joint tenancy feature in that particular form. That provides for the joint tenancy

feature for the seller and the joint tenancy feature for the buyer, the survivorship feature. It isn't the purpose of our committee to go into the substantive law of real estate, but I suppose it is impossible to talk about a form like this and the survivorship feature without mentioning the case of *Buford v. Dahlke.* I had a lawyer tell me that he thought I was very brave to stand before this organization and admit the fact that the *Buford v. Dahlke* case was mine. I did take the case to the Supreme Court. I am not making any apologies for it, and in the course of the case it has had a great deal of discussion. It has been cussed and discussed at great length.

I think maybe I would like to take just a few minutes to explain the facts behind the case of *Buford v. Dahlke.* This might be getting a little bit away but you might find it of interest. Mr. and Mrs. Dahlke had sold their property on a so-called land contract, a little piece of property here in Omaha. They had owned it in joint tenancy before they sold the property. The land contract was drawn by a very reputable real estate broker here in Omaha — thank God, it wasn't drawn by a lawyer (laughter)—he was one of the most respected real estate brokers in the City of Omaha. He was concerned about the survivorship feature for the buyer, and he took care of that, but it never entered his mind about the survivorship feature for the seller, the vendor, the Dahlkes. So that is the way the contract was drawn.

Mr. and Mrs. Dahlke were designated as husband and wife — period. The people who bought it, people by the name of Chadwell, were designated as John and Mary Chadwell, whatever it was, husband and wife as joint tenants with right of survivorship.

Payments were made on the contract and after a while Mr. Dahlke died. He died owing a dental bill to a dentist in Omaha and an effort was made to collect the dental bill from Mrs. Dahlke. Mrs. Dahlke refused to pay it and then it was proposed to her, well, there was a matter of probating Mr. Dahlke's estate because this contract had not been fully paid and half the money that was yet due under the contract belonged to Mr. Dahlke individually as a tenant in common and not as a joint tenant, and therefore it might be that his estate would have to be probated. The dental bill was still refused and that is exactly what happened.

An administrator was appointed, the creditor petitioned and had an administrator appointed. The administrator filed an inventory of the estate showing an asset in the estate was one-half of the balance due under the contract.

The case went then to the District Court for a declaratory judgment as to whether or not there was in fact any property in Ernest Dahlke's estate. In other words, the argument on behalf of

Mrs. Dahlke was that they owned this property in joint tenancy before the sale and the mere death of Mr. Dahlke didn't change that, or that the contract didn't change that form of ownership. They owned it in joint tenancy before the contract; they owned what was left after the contract in joint tenancy. Therefore all of the property went to Mrs. Dahlke as a surviving joint tenant; therefore there was nothing to probate in Ernest Dahlke's estate.

That is what the argument behind the demurrer was in the District Court and the demurrer was sustained in the District Court. I went up on the demurrer. We had an extremely intelligent Supreme Court that year and the Supreme Court reversed the District Court and held that this was a tenant in common situation, that at the time the Dahlkes entered into the contract the property that they acquired by entering into this contract was taken as tenants in common and not as joint tenants, and that therefore when one of the tenants is common died obviously his estate had to be probated and the property distributed.

Now there is an interesting thing in all of the discussion and the cussing of the *Buford v. Dahlke* case. Actually there wasn't, if you stop to think about it, really any new law in that case. I will admit the Supreme Court went further even than I intended them to in the case, but here was my argument in the case: There was no question about the theory of equitable conversion. This was nothing new. We've had the theory of equitable conversion here in Nebraska since 1896; that when you own real estate and enter into a contract to sell, there has been an equitable conversion. The thing that you owned is converted from real to personal property. The mere entering into a contract makes this conversion. Now that is nothing new; that wasn't a new theory.

There is another theory that had been hanging around for many years that wasn't new, and that was the theory that the court frowns on joint tenancy, that the court favors tenants in common, and unless there is a clear expression in the contract that creates the property, that sets up the property, unless there is a clear expression of an intention to hold the property as joint tenants, the courts will hold that it was a tenant in common.

We have all seen situations where there have been some horrible injustices in a joint tenancy situation, and that is why the court has always followed that theory and I don't believe we argue too much with that theory. The court says it is a very simple thing, if you want to own property in joint tenancy all you have to do is say so, and if you don't say so we will go on the assumption that nobody purposely intends to disinherit his heirs at law, and that is what you do whenever you set up a joint tenancy. So those two theories

had been hanging around for years; there wasn't anything new there. And of course then the court went further. As a matter of fact I didn't argue the question about the destruction of the unities, etc. The court went further than I had intended there, and they did come up with that feature. However, that part is not particularly new either.

So in spite of these things, and in spite of the controversy over the case of *Buford v. Dahlke* there really wasn't any new law established by it.

When the Dahlkes sold this property there was an equitable conversion. They no longer owned real estate; they owned personal property. Now when they set up the instrument creating the personal property they had a choice. They could have said, "We intend to hold it as joint tenants," and that is all it would have taken. But they didn't. They were silent on that. Well then, what else could the court do?

So these are basically some of the facts and some of the theory behind the *Buford v. Dahlke* case. If you stop to think about it there isn't any more reason why you should assume that the joint tenancy feature followed the land into the personal property than you would if you sold the land and put the money in the bank. If you put the money in the bank and you didn't set it up as a joint tenancy feature you never would think, "Well, it was joint. That money came from land that was owned in joint tenancy, therefore it is intended that this bank account should be as joint tenants," because when you change the form of ownership you create the new type of property; that is your opportunity to set it up the way you want to hold it.

This form I believe does that. It says the parties of the first part "as joint tenants with right of survivorship, and not as tenants in common." Now there is a clear expression from the people who are giving this contract, who are creating this new type of property by their act, there is a clear expression on their part to hold the chosen action, the money that is due under the contract as joint tenants, and I would think that that would be all that would be required. So if you later on had a situation where one of the vendors dies, you have created the joint tenancy situation and would get around this situation that you had in the *Dahlke* case.

Then of course the sellers, and the usual laws of joint tenancy would apply to the way that the buyers' interest is set up in the contract. This is the instrument that creates the real property interest in the buyer. This is the instrument that creates the personal property interest in the seller after it is entered into. So now if you

designate how they are both to hold these various interests it seems to me that you have covered the situation in all its aspects.

As I have mentioned before, the other form is for a straight transaction where you don't care to designate either of them as joint tenants or tenants in common. I am not going to read the form verbatim. We don't have time for that, and I don't see any necessity for it, but you can follow it. It is all there for you.

Then the next thing we do is set up the purchase price and the manner of payment, and that naturally starts out with the purchase price — what they intend to pay and the manner of payment. The manner of payment should be specified in detail, like under paragraph 2 (a) you put what the down payment is and you give him a receipt for that much money at the time the contract is executed by the parties.

Then you go into the balance and you spell out how the balance is to be paid; this one happens to be set up on a monthly payment schedule. Obviously you would have to consider how your payments are made. That is another value, I believe, to some kind of a standard form. If you don't want to use the standard form at least you can pick out paragraphs that are all right and work them into your own ideas.

Then in paragraph 2 (c) is your prepayment privilege. As you all know, unless the privilege is given there is no right to prepay a sum of money due on a contract like this or on a mortgage. This does take care of a situation that is probably very seldom thought of, and it would come about in this way: Suppose you enter into a contract to sell the land under one of these installment contracts and it has the prepayment privilege. Now assume further that the property, real estate, had a mortgage on it at the time this contract was entered into, which is a very normal situation, and the seller is going to make the payments on the mortgage out of the payments that he receives from the buyer on this contract.

Now suppose his mortgage does not have the prepayment privilege, which is a very common thing in a lot of these long-term mortgages. If you give the buyer the right to prepay the thing, at that time he is entitled to his deed and he is entitled to his deed free and clear of any encumbrance, this mortgage. The seller would be forced to pay off the mortgage and if there were any penalties attached to his paying off his mortgage he would have to pay them. We tried to cover that situation in this contract by providing that if that is the case, if there is a penalty in paying off the mortgage, then that should be added to the balance due under this contract at the time of the prepayment. So in other words it places a condition on the prepayment privilege. He has the right of prepay-

ment provided he pays any penalty that there might be for the prepayment of a mortgage that was on this property ahead of his contract.

And of course the contract has the usual acceleration clause for the same reasons that Norm mentioned to you in the mortgage.

Under paragraph II, we get into taxes, assessments, and insurance. You will notice that the wording here says "Buyer agrees to pay the general taxes on the Real Estate beginning with the taxes due ....."

As most of you know, we have some unusual situations about the due dates of taxes here in the State. In Omaha we have a problem that is peculiar to us that most of you people out-state don't have. Here we pay some of our taxes in arrears and some of them in advance. We pay our state and county taxes in arrears and our city and school tax is paid in advance. So we have a devil of a time whenever we try to explain the prorating of taxes to someone who comes into Omaha from out-state and has never been faced with this thing. As a custom—and it has developed just by custom here in Omaha—from a practical point we always—I say always, practically always—pro rate the taxes due on January 1 of the year in which the sale is made regardless of what year taxes they are for, because from a practical standpoint it is about the only way it could be done.

So in this form (and this is for the benefit of Omaha and I don't see why it wouldn't work out-state just as well) we refer to the taxes as the "taxes due" not the taxes for a certain year. In other words, "Buyer agrees to pay the general taxes on the Real Estate beginning with the taxes due....." If your sale was made this year, it would be the taxes due January 1, 1961, without regard to what year they are for—in Omaha at least.

So we have used in this form "when the taxes are due" rather than to say he is going to pay all the taxes from a certain time. Now as for prorating the taxes for the year in which the sale is made, that is a matter to be cleared up in the purchase agreement, not in this contract. This contract assumes that there has been a purchase agreement, that you have settled all of the details of the sale, the prorating, etc., ahead of that, which should be done before this contract is entered into.

Then the assessments: We have a bad situation in Omaha—you may have it out-state—that often our special assessments for paving, sewers, etc., don't show up in the abstract for sometimes six or nine months after they are completed, and that can cause you no end of trouble. To protect ourselves here in Omaha we put a standard paragraph in all of our opinions setting out this fact, that

if there have been any new public improvements, they should call our attention to it so we can go further to see if they might have been completed a month or two before the deal was closed but yet not be on the rolls in the Treasurer's office and thus not appear in the abstract. So we clear up any difficulty there by talking about who is going to pay the assessments completed after a certain date.

Then insurance: Again, as in the form that Norm mentioned, this form will provide that the insurance to be carried is in the amount due on the contract. The seller has no right to force the buyer to carry additional insurance.

Then paragraph 3, dealing with the title: We clear up the question of title at the time this contract is entered into, which obviously should be done. I have heard, and I suppose we all have, of situations where they talk about examining the abstract just before the delivery of the deed, after the buyer has paid on this contract for ten years. Now is the time to clear up any questions of title, and by entering into this contract the buyer accepts the real estate and accepts the fact that there is a marketable title at this time. He has had every opportunity to determine that question and he has determined it when he enters into this contract. We merely provide that he agrees that it has marketable title and he is accepting it as that.

Then we get into the question of the sellers' remedies, and of course there is a provision in there that if there is failure to pay the taxes or keep the building insured (the usual paragraph), the seller can pay these items and obviously add them onto the balance due under the contract. There isn't anything unusual about that paragraph.

Then the next paragraph gives the facts. If he fails to pay these amounts or if he fails to keep the other terms of the contract, of course the seller can take his remedy.

Now we come to another problem. This standard form mentions the fact that the "seller may proceed to foreclose this contract in the manner provided by law." Those words were intentionally used because of the fact that there are several remedies, several different methods of foreclosing this contract, and we felt that in a standard form it would be better for us to merely set out the fact that he should foreclose the contract in the manner provided by law; in other words, the seller would have a choice of the various methods.

Now of course there are, as you know, many methods, and unfortunately some of the methods used in foreclosing on these contracts are not uniform, even in the State here. They are not uni-

form in our District Courts. There is a great discrepancy between the courts of the various counties as to how some of these foreclosures are handled, mainly dealing with the strict foreclosure type of action.

Of course the first remedy is your regular foreclosure, as in a mortgage, and that is the way most of them are handled, unless of course you could qualify it for the strict foreclosure. On the other hand, I have heard of situations over the State, in other parts of the State, where they allow a strict foreclosure on all of them. Well, we don't do it here in Douglas County, and I believe rightly so, because you are not entitled to a strict foreclosure in all of them.

In the regular foreclosure procedure it is just exactly like it would be with a mortgage. There is even some indication—and this was a novel thing, a new thing that I heard about in doing my research for this paper—there is some indication that you might even be able to get a deficiency if you went the regular foreclosure route and you turned up short. There was a case I cited in the outline, *Hendrix v. Barker,* a very old case, but it has never been overruled, which indicated that if you were short in the first kind of foreclosure you could come in later on and get your deficiency, which would be a very novel idea. I have never heard of it's being done.

Under your regular foreclosure procedure there isn't any question but what the vendee is entitled to his nine months' stay if he asks for it, so that is just one of the rights granted to the vendee, to the buyer, in a regular foreclosure procedure.

There is a rather novel thing, I believe, that has come forward just recently here in Douglas County in a foreclosure of this type of thing—I have happened to have had two of them myself in the past month—where we find an encumbrance on the vendee's interest.

We have a building and loan association here in Nebraska that is making improvement loans, the usual combination window and door, roofing, that type of loan, which is normally an unsecured loan. But when they make a loan like that to the vendee in one of these situations where the borrower doesn't have title, they take a mortgage on his interest, which is a perfectly valid thing and I think a good step for them to take; in other words, they do have some security. Obviously they know it is questionable as to the value of their security, but at least it is some security and something they didn't have on just a straight home improvement loan. So they take a mortgage on the vendee's interest. He can give them a mortgage, of course, because he owns real estate, the thing

that he owns is real estate and it is subject to a mortgage, a perfectly valid mortgage. Obviously it is subject to the rights of the vendor, assuming, of course, the contract is recorded.

Well, in these foreclosures that have come up, (and it has happened in two cases I had and I have heard some other comment from it) the vendee's interest was mortgaged, and in one there was also a mechanic's lien filed against the property for improvements that the vendee had had put on the property.

I decided in one of my cases that I would certainly have been entitled to a strict foreclosure on it because of the fact that there was more due than the property was worth and the title had not passed to the one who owed the money. There are two true tests for a strict foreclosure in Nebraska. Does the person who owes the money have the title to the property? If not, and if the amount due on the contract is more than the property is worth, then you are entitled to a strict foreclosure because, obviously, why have a sheriff's sale if he owes more than the property is worth, and that is just a question of proof, so if he owes more than the property is worth, why have a sale on it? So that is a true test for a strict foreclosure.

Now I realize that that test is not always followed in some of our District Courts. Some of our courts start talking about rental value, etc. Has he really lived up his equity in the house? And instead of giving him a normal stay they will say "Well, we will give you a strict foreclosure, but we will let him live in there, oh, let's say, twelve months. He has about $1,200 in the property and it ought to be worth $100 a month. Twelve times 100 is $1,200, so we will let him stay in there for twelve months and then you can quiet your title against it." Well, that is not the true test according to our Supreme Court decision.

In this one case I had, as an example, I would have been entitled to a strict foreclosure but I was a little afraid of the fact of the title, so I went the regular foreclosure route and foreclosed it in the regular method and had a sheriff's sale because of the fact that I wanted to extinguish the rights of this mortgagee, the mortgage that the vendee had placed on the property and this mechanic's lien holder. As it turned out, I bid the property in for my client, the vendor, because there was more due on the house than it was worth, and there wasn't anyone else there to bid. But I wanted to be sure that when I finally got all through with this thing that there wouldn't be a question as to the title, and I felt that it was safer to go the regular foreclosure route, set it up, have your sheriff's sale, and have your sheriff's deed, and in your decree set out the priorities between the vendor, the mortgagee, and the lien

holder. Obviously they were both inferior to the rights of the seller and I felt that was the better way.

I heard of another interesting situation where one of these things came up for foreclosure and the vendee, wanting to be a real nice fellow, told the vendor, "Well, I won't make you go to the expense of foreclosing on this property, I'll just give you a quit claim deed for my interest," and the vendor jumped at the chance to get the quit claim deed and was very happy about the fact that he had saved an attorney's fee and all the court costs, etc., and then he discovered that the vendee had placed a mortgage on the property before the quit claim deed.

Well, maybe it served him right for not going to a lawyer. I don't know; it is a new thing; it is the first time I have heard of it; but I am wondering what the status is now of the vendor's title? He took a quit claim deed from the vendee, when obviously all the vendee could give him was whatever interest he had in the property; and his interest was encumbered by a mortgage.

It seems to me that it raises a little flag for us, that whenever we get a chance to get a quit claim deed from one of these buyers that is in default, maybe we had better take a look at the abstract, have the abstract brought down to date and check it to see if there is any encumbrance. It is a case where you ought to look the gift horse in the mouth, I think, because you might not be getting what you think you are getting.

So the regular foreclosure route I believe is a method of extinguishing any of these junior liens that might be placed on the property after this contract is entered into.

I have mentioned that one of the other methods is that of strict foreclosure and I have given you the test on that. Does the vendor have the title? Is the amount due on the contract more than the property is worth? If it is, in all cases the vendor is entitled to a strict foreclosure. Then for the reasons I have stated, there is no reason to have a sale; there is no equitable redemption in the property; why have the sheriff's sale?

Then there is another remedy, and you will see why we use these words "remedy" and "may proceed to foreclose it" or "may proceed to recover the property in the manner provided by law," because of all these different methods. There is the way of getting it back by ejectment, and I was surprised when I ran across this. I hadn't thought you could actually extinguish the rights of a buyer under one of these contracts by ejectment, but it was done down in Sarpy County. That is the case of *Abbass v. Demont,* a new case, a 1949 case, where the court allowed an ejectment act. As I recall the facts in that case, I believe it was an action in ejectment and

the court there held that the action would lie *unless* the vendee came up with enough to pay the contract off within a certain length of time; and I believe it was something like two or three months, or something like that, that they gave the vendee the right to raise the money and come in and pay the balance; otherwise the ejectment should lie. The Supreme Court in that case reversed it and said that the court was wrong in giving them the right to raise the money and pay if off, that the seller was entitled to ejectment and he should have had a decree of ejectment.

That is something that is a pretty drastic thing and I have never heard of it in any other case, but it appears that it might be one of the remedies. Now the contract probably contained a different wording than this particular type of contract. It probably had your forfeiture features and all of that in the contract, but nevertheless it is one of the remedies, one of the ways of getting property back after you have entered into a contract and there has been a default.

Then, of course, a point has been raised in this thing about the waiver of the rights of the seller. Maybe this contract shouldn't give the seller the right to exercise this right. The way this contract is worded it gives him the right to exercise this waiver, but just because he waives it on one default doesn't mean that he is going to waive it at a later date for the same default or later default. "Failure of Seller to exercise any optional remedy hereby specified at the time of any default shall not operate as a waiver of the right of Seller to exercise such optional remedy for the same or any subsequent default at any time thereafter." I believe that it probably would be better to take out the word "same" so that it would read "to exercise such optional remedy for any subsequent default." If he has waived this default, he shouldn't have the right to come back later on upon a subsequent default and claim that he has had this default and one that he had back here six months ago. So it probably would be better to take that word out of it.

Then, of course there is your general agreement of the parties and the execution of the contract by the seller and the buyer and your acknowledgment. There isn't anything we particularly have to discuss there.

The other form for this contract is just like this one except for the fact that it doesn't have your survivorship feature.

Now I would like to spend just a little time on this purchase agreement. This real estate purchase agreement form is intended to be used where there is a direct deal between the buyer and the seller, where there is no real estate company involved. Obviously it should be another form where there is a real estate company and

the realtors have their own forms that they follow on these purchase agreements, and that is probably as it should be because of the fact that they are actually not a party to the contract of sale, but they act as a stakeholder or rather as an escrow agent in holding the earnest deposit. So that takes a different type of form than we should use if two people come to us and say that they want us to handle their real estate sale.

I am selling it to my neighbor here and we want you to draw up the contract for us and handle the sale. We shouldn't, but unfortunately there are lawyers who sometimes drag out a real estate form, one that a real estate broker uses, and try to doctor it up and use that as the contract between the buyer and the seller. That isn't the purpose of the form, and I don't believe it should be used where there is a direct deal.

This contract, this form here, is devised to be used where there is a direct transaction between the buyer and the seller with no real estate company involved. This is where we would come in, this is the type of form that we will be called upon to draw up. I am not sure that there is a standard form or a printed form for this type of thing. There may be. I just haven't happened to have seen one. I have always had to draw my own and I often thought I would like to have a standard form that I could use for this type of a transaction.

Another thing I want to mention, and I was surprised to hear, that in some sections of the State people are using purchase agreements for the long term contract. They are using it as a land contract or as an installment contract and it never goes beyond the purchase agreement stage.

That, of course, is not the purpose of the purchase agreement. The purchase agreement is merely an interim contract to set out the terms of the sale and to give the seller time to get his abstract brought down to date, to give the buyer a chance to examine it, etc., and then they contemplate at a later time some other instrument will be entered into. But there are sections in the State where they write up the deal on a purchase agreement and they set out how it is going to be paid, they set it up on a monthly payment basis, and that is it for the next ten years until you have it all paid off and get your deed back. Well, the purchase agreement is not intended for that purpose. It is an interim contract and should be used only to put the deal in writing and to bind the parties to their bargain with the idea that at some later date a formal instrument will be entered into; not that this isn't a formal instrument, this is oftentimes the most important instrument in the whole real estate transaction.

Here again in this case we use "seller" and "buyer"; maybe it should be "vendor," "vendee," but this is the common term that your client will be thinking of. He thinks of himself as a seller or a buyer so why not use those terms in the contract?

You set out your consideration and the method of payment. Now of course the method of payment could be varied, I don't have to tell you all the different methods that could be used, but of course it should be set out in here as to what method you are going to use. Is he going to pay for it in cash? Is he going to obtain a new loan, and is it a condition to this offer that a new loan be obtained? Is he going to assume a loan? If he is, all the details of the loan should be set out. Does he contemplate entering into a land contract or an installment contract at some future date, and if so, what are the terms of it going to be? Is he going to give back a purchase money mortgage to the seller, or is he going to obtain a new loan for part of it and have the seller carry back a second mortgage for part of it?

Those are the things that you work with every day and they would normally go in that next space, but in full detail of course.

Wait a minute, I am mixed up. First you have your legal description and then you come down to the terms of the method of payment. There is no use talking about the legal description, there is no problem there. Then set out the terms of the payment. Then the possession date—when possession is going to be—and the date that the buyer agrees to close the sale, etc.

Next, the type of deed or the type of instrument to be given—a warranty deed or quit claim deed or installment contract for sale, etc. There isn't any particular problem there and I don't believe there is any use to spend very much time on those provisions.

An agreement to deliver an abstract, of course—and we use the term "marketable title" here because that is the term that is used in our statutes, and it would seem better to use a standard word rather than "merchantable title" or "good title" or something. "Marketable title" is defined by statute; we all know what it means; and it seems like that is the word that should be used; and it conforms to the statutes.

Then paragraph 7 provides for what is to happen upon default of this contract. It provides that the earnest money "shall be refunded to the Buyer and all other obligations of either party hereto shall cease." Now there is some question on that. I received some correspondence on this form about whether or not that was good, that it does foreclose any other remedies that the buyer might have, and it is true that it does. Maybe it should provide that the buyer would have the right to sue the seller for any

damages that he sustained because the contract was not carried out. I don't know. I know from a practical standpoint that in 99 out of 100 deals the earnest money is given back and that is the end of it. We want to keep in mind that this is a standard form, this isn't a device to cover all situations. If you have something like that in mind, if you feel that you represent the buyer and you feel that he would be interested not only in getting his deposit back, but that he would want damages, etc., then of course you should draw the agreement to suit your own needs. But in the standard, normal situation if they can't deliver good title, the buyer is willing to accept back his deposit and that is the end of it. So keeping in mind that this is a standard form maybe it should be left this way. That is something for you to think about.

Then of course it tells what encumbrances there might be that the buyer is going to assume.

Then there is a paragraph on taxes. Now we are in the purchase agreement and we have to settle the question of what taxes, etc., are going to be prorated and how you are going to handle those. Many of you might want to use your own wording there. This is just set up here as to what we might come up with in a standard form.

We think paragraph 10 settles a lot of difficulties. There is the question of the risk of loss. What if the property burns down after the purchase agreement is entered into and before the deal is closed? Well, the seller is going to live in the property; he is going to have the use of it; so they contract as to what is to happen in that event by setting up the risk of loss on the seller.

Then paragraph 11 provides for the retaining of the earnest deposit in case the buyer defaults. "Time is of the essence" might be a little dangerous to use, I don't know, but that is in the form.

Paragraph 12 was put in here to cover the situation of *Buford v. Dahlke*, the joint tenancy thing. In other words, has there been a destruction of the joint tenancy when they entered into this purchase agreement? I am not sure anybody knows about that, but in any event we tried to cover that here in this form by providing what their intention is when they enter into this contract.

Of course there is the acknowledgment for the seller. As you all know, any contract for the sale of a homestead must be signed by both the husband and wife and acknowledged.

Here in these two forms that I have presented and in the form that Norm presented to you are some things for us to take back to our practices, to think about, to try to use, and to see if they are the sort of thing we might want to adopt in some future

year. We hope that if they do meet with your approval, after some of your suggestions have come in, some changes might be made in them. We hope they can be submitted to this Association next year, maybe for adoption.

ASSOCIATION DINNER FOR MEMBERS AND THEIR LADIES

Presiding.....Flavel A. Wright, Esq.
President of the Nebraska State Bar Association
Introduction of Guests
"Some Bits of History from Early Supreme Court Records".....James R. Browning, Esq.
Washington, D. C.
Clerk, United States Supreme Court
"Horizons of the Bar".....Hon. Whitney North Seymour, Esq.
New York City
President of the American Bar Association

PRESIDENT WRIGHT: We have been fortunate this year in having with us a man who is from the State of Montana. He was a graduate of the University of Montana Law School in the year 1941, believe it or not.

He worked with the Anti-Trust Division in Denver for two years, where he was associated with a classmate of mine and a member of the Nebraska Bar, Harry Foster. He spent time with the Department of Justice in Washington and engaged in private practice in Washington. He is presently the Clerk of the Supreme Court of the United States. I think you have seen some of the exhibits that he brought with him.

He will speak to us tonight on the subject of "Some Bits of History from Early Supreme Court Records." It is my pleasure to present to you James R. Browning, Clerk of the United States Supreme Court.

SOME BITS OF HISTORY FROM EARLY SUPREME COURT RECORDS

James R. Browning

Mr. President, Friends, Guests and Members of the Nebraska Bar Association: I accept with great appreciation that ovation on behalf of the Court of which I am the Clerk.

You know, when I was flying down to Nebraska from Washington I found myself running over in my mind the remarkable group of men that the Nebraska bar has sent to Washington in the last eight years: Herbert Brownell, Attorney General of the United States, under whom I had the privilege of working for a bit; Lee Rankin, our present Solicitor General, and in my opinion a man who will rank among our best Solicitors General; Clarence Davis; Laurens Williams; Perry Morton. It is truly a remarkable thing that a state which after all, like my own, is not at the top

of the list of fifty in terms of population, should have contributed so much to the legal leadership of America in these days. And it would please me greatly if you would sort of look upon, not just my visit here, but upon the documents that I brought to you from the archives of the Supreme Court of the United States, as a sort of recognition, from one at least, of the great contributions the Nebraska Bar has made to our legal system in the very recent past. It seems to me something that you ought to be very proud of.

I hope that you have enjoyed the collection of documents I brought with me. I hope most of you have seen them. If you have missed them and if, after I have told you about them, you are interested in seeing them, I would like now, if I may, to extend to you a most cordial invitation the next time you are in Washington to come to my office and look at these documents, pick them up, read them, enjoy them, because I hope very much that you will come to feel, as I have come to feel, that these old records of the Supreme Court of the United States are *your* documents, relating to the history of *your* Court and the part that it has played in the history of *your* country.

A little over two years ago now I was happily engaged in the private practice of the law in Washington, D. C., and I was as innocent of any interest in the old records of the Supreme Court of the United States as any of you in this room are tonight. In fact, the only record of the Supreme Court of the United States that I had any real interest in at that time was the record which the Court was then making in connection with the disposition of certain petitions for certiorari which I had filed in some obviously meritorious cases. I regret to say, with all due respect to the Court, that its record in that particular connection left a good deal to be desired. I think in the last year of my private practice I filed three and came out with a 100 per cent batting average. Of course that has to happen to all of us.

Two years have passed and I hope that I have learned a certain amount about the Court and about its practices and about its old records. Regarding its old records I have come to know that they are really a priceless source of information, of inspiration, and even of amusement. I hope I can demonstrate that to you at least in part tonight. I have come also in these two years to have a little different point of view about that certiorari question, too, because in my two years of service as Clerk of our Court I have seen very nearly 4,000 applications for certiorari submitted to the Court when the Court could hear only about 300 on the merits in the two years; and I have gotten to be a little bit ashamed of some

of the cases that I have asked the Court to review, I'll have to confess.

In a very real sense all of the records of the Supreme Court of the United States are historical documents. Attorney General Wickersham put it this way, and I think very truly. He said: "In the largest proportion of cases which are submitted to its judgment, *every* decision becomes a page of history."

With respect to the history that the Court has been making in the recent past, of course, we have a great deal of documentary material. All the lawyers in the room know that if you file a petition for certiorari or a brief or a motion in the Supreme Court of the United States you have to print it, and you have to file 40 printed copies of your document. And all the lawyers in the room also know that if your case gets heard on the merits the record in the case is printed in 40 printed copies. And after the case is disposed of, sets of those briefs and records are sent all over the United States to between 20 and 25 depositories, law school libraries, and other institutions which keep them where they will be available to lawyers throughout the country.

And what is true of briefs and records is equally true of the opinions of the Court. We not only have the official *United States Reports,* we have the *Supreme Court Reporter,* we have the law editions, and in each of those sets we have preliminary prints and advance sheets and the final print. Innumerable copies of documentary materials are available to all of us on every move that the Court makes these days.

But it was quite the contrary in the early years, and I think you might be interested to know, for example, that no briefs at all were filed in the Supreme Court of the United States in the first 30-odd years of its existence. They finally required briefs in 1821, but for the next 30 years the Clerk, or whoever was in charge of such things, apparently didn't think that the lawyers' printed arguments were worth preserving because we haven't one left.

After that first 30 years, from 1854 to 1870, we have about half of the briefs that were filed by lawyers in cases in the Supreme Court.

With respect to printed records the situation is about the same. We had no printed records at all until 1832. And with respect to the opinions of the Court for the first ten years of its existence, the Supreme Court of the United States had no official reporter at all.

Now the lawyers know that a gentleman by the name of Dallas did report a good many of the early decisions of the Court, but he

did it as a private commercial enterprise. He was not an official reporter of the Court. It was not only a private enterprise but his reports, while you couldn't say they were fragmentary, were certainly partial. In the period that he covered, the Court decided 115 cases. He reported 65 of them, and in the 17-year period from 1790 to 1807, fully a third of the 300 cases, in other words 100 of them that were decided by the Court, are not to be found in the *United States Reports.*

Incidentally, if you go to a set of the *United States Reports* and take down the first volume, which is Mr. Dallas' first volume, you will go through the entire volume without finding a single opinion of the Supreme Court of the United States. And if you pull down the second volume of the Dallas reports you will turn through 398 pages without finding a single opinion of the Supreme Court of the United States. The first volume and a great bulk of the second volume contain opinions of the Supreme Court of Pennsylvania and certain opinions of the lower federal courts.

As I say, it was a commercial enterprise and apparently Mr. Dallas found a greater demand for opinions of the Supreme Court of Pennsylvania at the time than he did for the Supreme Court of the United States. Whatever the reason, if you get down to page 398 of Volume II and find the first opinion of the Supreme Court of the United States you will find that it is a dissent, so you see nothing is changed after all.

Now this happens because in those days the junior associate justice not only read his opinion first but it was printed first, and it happened that the junior in terms of the date of his commission was dissenting in the first case reported in the Dallas reports.

Well, you gather from what I have said that the volume of materials that we have relating to this early period of the Court's history is very small. In one briefcase—it is a fairly good sized briefcase—but in a single briefcase I brought down to this meeting last night, the case files in *Chisholm v. Georgia,* 1793; *Marbury v. Madison,* 1803; *McCullough v. Maryland,* 1819; *Gibbons v. Ogden,* 1824; a very large volume of the Minutes of the Court from 1790 to 1805; a number of opinions of the Court; some dockets of Chief Justice John Marshall; and a good deal of other material.

The fact is that all of the documentary material we have, all of it, covering the period from 1790 to 1832, a critical period in the Court's history, could be put comfortably in a few small cardboard boxes. One of the reasons I have already indicated to you. The individual case files were not as voluminous in those days—no printed briefs, no printed records. The lawyers were not as verbose either, I may add, possibly because everything had to be

written out in long hand. Each case file is smaller. But in addition to that there just weren't as many cases in the early history of the Court. The Court had no cases at all to decide in the first two years of its existence, 1790 to 1792.

The Supreme Court is in large measure an appellate court, and an appellate court of course has to await the lower courts to create a little air before it has any business to do. And in the first forty-two years of the Supreme Court's existence it decided 1,700 cases. I have already indicated to you that in a single year our Court now decides very nearly 2,000 cases.

But in addition to these factors there was a great deal of loss and destruction with respect to the early records of the Court, most of it as a result of fires. If you observed the documents that I have exhibited here during the course of this day you saw that many of them were burned on the edges. There were recorded fires in the Clerk's office in 1814, 1851, 1885, 1887, and 1898, all subsequent to 1812.

It sounds as if the Clerk's office was staffed by arsonists, but that wasn't the situation. The situation was that the Clerk's office, like all public buildings and private buildings at that time, was lighted at best by illuminating gas and it was inflammable.

The last of those fires, in 1898, was by far the worst, and I have read the contemporary accounts in the Washington *Post* telling about that fire in the Clerk's office. It appeared that all of the old records of the Court from 1790 to 1832 were stored in the subbasement in the Capitol Building, a little vaulted room. The Court then sat, of course, in the Capitol Building. And opposite this little low-vaulted room there was a gas meter. They were then turning off the gas and installing electricity. They had disconnected the gas but they hadn't firmly closed off this little meter. There was an explosion and a fire and a great deal of damage and destruction resulted.

The consequence of all of these factors is that every scrap of paper we have left from this early period of our Court's history is of vital importance to us.

About four years ago the Court established the policy of transferring these old records to the National Archives, and now all records are transferred to the National Archives as they become fifty years old. The reason for it is very simple, and that is to make them more accessible, more accessible to the Court and everybody else who may have an interest in them. That may seem a little peculiar since all of these records were in the vaults in the Supreme Court building, but physical possession, which we

most certainly had, and accessibility are two entirely different things. Let me illustrate.

When I came to the Clerk's office a little over two years ago I had to poke around in my new domain and I went down into the vaults in the Supreme Court Building and there I came across a great, large manila package, heavily wrapped in manila paper with wax seals and tapes, and on the outside of this package there was a note in a hand that perhaps many of the older lawyers in the room would recognize, the wide beautiful hand of Charles Elmore Cropley who served as Clerk of the Supreme Court for so many years. This note said, "Do not open this package," and it went on to explain that within this package there were some original documents from the case file of *Oswald v. New York,* decided by the Court in 1791, the earlies papers that were still in existence in a case that had been decided by the Supreme Court. The note went on to say that these old manuscripts were so brittle with age, so dried by fire that if they were exposed to light and handled it would lead to their destruction; hence, "Do not open."

It reminded me of the war story of the document that was so highly classified that nobody could read it. That essentially was the position we were in with respect to these old documents.

Let me give you one other illustration. I had on exhibit this afternoon, and I have here in this folder, a case file in *Kelly v. Johnson,* a case decided by the Supreme Court of the United States in 1832. This is an envelope file. This is the kind of file they used to file everything in. In this envelope file is this case file, *Kelly v. Johnson.* If you looked this afternoon you could see that it is just a wad, really, of matted papers. It has been burned off on the edges and then when they put the fire out, as firemen do, they got a good deal of water around apparently, and *Kelly v. Johnson* is just a wad of matted papers. Although I hold it in my hand it is as completely inaccessible as if it had no existence at all.

And here is one other illustration. When I was poking through the files shortly after I arrived at the Court I came upon a receipt dated April 23, 1958. It reads as follows: "This is to acknowledge receipt from the Clerk of the Supreme Court of the United States for the National Archives of six bundles of miscellaneous records to be examined to determine whether they are suitable for transfer to the National Archives."

Now I don't know whether you have ever had an archivist as a friend. An archivist is a very careful individual. He does not write receipts that acknowledge the receipt of six bundles of miscellaneous records. He particularizes everything. He couldn't in this case. He had to write this kind of receipt because those bundles

of papers couldn't be opened. They were in the same condition as the case file in *Kelly v. Johnson.* And after I had been in the Clerk's office for a bit I received a memorandum from the archivist of the United States in which, among other things, he set out the contents of those six bundles of miscellaneous records. I won't read it all to you because it is lengthy, but among the documents included in it were the following:

Cases of original jurisdiction: seven cases dated in the period 1793 to 1806, including *Chisholm v. Georgia,* 1793; *South Carolina v. Cutting,* 1797; *Marbury v. Madison,* 1803; twenty-eight other case files, chiefly ex parte cases dated in the period 1863-1897; many additional manuscript opinions mostly in the period 1828-1830, including many in the hand of Chief Justice Marshall, and so on and so forth.

But nonetheless, before those documents were transferred they were nothing but six bundles of miscellaneous records.

Well, I hope that I have established to your satisfaction that though we had physical possession of these materials they were not accessible to us in any real sense, and the Supreme Court of course was not in a position to repair these documents and take proper care of them. They didn't have the facilities; they didn't have the personnel. What the Supreme Court lacked in these respects the National Archives possessed to a superb degree, and hence the transfer of the documents to the National Archives.

Let me tell you very briefly what the National Archives is now doing with respect to these materials. The archivists first repair the documents, and they have a little formula that they use to describe the work they do when they repair a document. They say that they humidify, de-acidify, flatten and laminate the documents—humidify, de-acidify, flatten and laminate. And if you will excuse me, Whitney, I never hear that expression without thinking of it as the name of a prominent New York law firm, but the fact of the matter is that while there is a certain similarity in sound there is a considerable difference in substance. "Humidify" is not the name of the partner who is the most proficient in producing business. In this case humidify is a process by which they take these old case files like the file I showed you and put it in a room where the air is supersaturated with moisture until the paper takes on the moisture and then the pieces can be separated without crumbling.

They then de-acidify it. The ink, and especially old ink, contains an acid which will eat the paper away, especially where there are blots, and I am sure all of you have seen this; the document will destroy itself from the acid in the ink eventually, and archivists think in terms of eternity. It isn't just 300 years

but forever. But in any event in order to prevent this process from going on to the destruction of the document they neutralize the acid in the ink.

Then they flatten the document using an iron or a press depending on the size of the document. Finally they laminate it. They take the document and put it between two pieces of a very fine plastic with a very thin piece of gauze. They subject the whole to pressure at high temperatures and a new document is formed which is flexible and you can handle it without any real danger of damage to it.

This is such a document. It is one that I had on exhibit here this afternoon and some of you may have looked at it. This happens to be an affidavit from a case file and although you perhaps can't tell it from here it is perfectly readable. It says: "Joseph Watts, being a Quaker, affirms and solemnly declares that he did on the—" and the date is burned out "day of November personally appear," etc. This is dated in 1792.

You will notice that perhaps 25 per cent of that document is gone. That is where the edges have been burned away when the document was folded up to put in this envelope file. When I first saw one of these repaired documents I said to the archivist that surely the loss of 25 to 30 per cent of these documents must destroy their usefulness as a matter of substance. He assured me that that wasn't true at all, that lawyers were so verbose you could lose fully a quarter of the documents and lose nothing of the substance. When I first encountered this attitude I laid it to professional jealousy, but now I have spent about a year pawing through these old papers and, you know, it is perfectly true.

Well, having repaired the documents, they then identify them, index them, shelve them. They will be microfilmed ultimately and made available to law schools and others who are interested throughout the country. The result of this whole program is that these materials are once again available to us. They are available to the Court, we can get anything we wish in a very few minutes; they are available to scholars, to the Oliver Wendell Holmes devise. Authors who are writing the definitive history of the Court are discovering a lot of new material in these old records and they are available to the lawyers and to the public generally. If you are interested in any of these documents or any of the other documents of the Court you can come to Washington, go to the little study room in the National Archives, call for them, and they will bring them out to you for your inspection. If you want a copy of any of these documents, any that I have referred to tonight, any that are in the court records, the National Archives will provide it for you and will certify it for you if you wish.

Finally, we hope to set up an exhibit program, the Congress permitting by providing the necessary funds, within the Supreme Court building which will bring these papers and papers of the executive and legislative branches of the government relating to the Court to the public.

In that connection we were thinking about having an exhibit program on Lincoln the lawyer, or Lincoln and the Supreme Court, and we called together some materials to see what we might have. We called, for one thing, for two case files in which Abraham Lincoln appeared in the Supreme Court of the United States. One of those case files was *Forsythe v. Reynolds,* and in that case file I found a document which was on exhibit here this afternoon which I have now in my hand. This is an assignment of errors. It is written entirely in Abraham Lincoln's hand. His secretary was either off or he couldn't afford one at the time, but the title of the case, the designation of the document, the whole thing is written by him. This is, as I say, his assignment of errors. He won this case, and this is the way it reads:

"And now comes the said appellant by his solicitors and says that in the said record and decree of the Circuit Court of the United States of the District of Illinois there is manifest error in this, to-wit: in that said decree was in favor of the complainant in said Circuit Court perpetually enjoining the said defendant in said Court from prosecuting the said action of ejectment, whereas said decree should have been in favor of said defendant and against said complainants, and should have been a decree dismissing their said bill with costs. Abraham Lincoln, Counsel for the Appellant."

In about half the words in the Gettysburg Address counsel for the appellant manages to say that the court below committed error and decided the case for the wrong party. I suppose on appeal that is what the lawyer is always complaining about. If he weren't, the Court would probably end up by telling him it was a harmless error anyway.

Well, Abraham Lincoln appeared in one other case in our Court, *Lewis v. Lewis.* That case he argued; that case he lost. The opinion of the Court, and it was a divided Court, was written by Chief Justice Taney and thus it seems to me coming events cast their long shadow.

One of the documents that was exhibited here this afternoon was some papers from our appellate case No. 3230, which you may know better by the title of *Scott v. Sandford,* or better still by the title "Dred Scott;" and the papers that were there were two revisions of the opinion of Chief Justice Taney which contained very substantial interlineations and deletions in his own hand as he

developed the opinion from its first rudimentary form to its final form. So far as I know those drafts have never been examined by a scholar and I am sure when they eventually are and those changes are examined and analyzed it will throw a great deal of light on the mind of the justice who wrote the opinion and upon the meaning of the opinion itself.

The same is true of the Marshall opinions that were there. In the days when Marshall was writing an opinion they didn't erase. They would either cross out if they wanted to make a change or if they had a large change to make they would take another piece of paper, write the new material on the new piece of paper and then affix with wax the insertion over the part that it was to replace. When they repaired these documents, as you may have noticed this afternoon in looking at these opinions, they melted the wax and hinged the insertion at the side, so you may now first read Chief Justice John Marshall's first thought in the original version of the opinion and then, by putting the flap back, see how he thought he improved it.

I think there is a great deal that can be learned from these old materials, but of course for all of the information in them it isn't for the facts that they contain that they are priceless to us; they are priceless to us, at least it seems to me, because they are symbols of our national history and our national growth.

If you have been to Washington, or the next time you go, if you will go to the National Archives, in the rotunda of that magnificent building you will find on display the original draft of the Constitution of the United States of America, the original draft of the Declaration of Independence, the original draft of the Bill of Rights, and you will see there all day long from early morning until the building closes in the evening a constant stream of Americans, young and old, passing before these great documents and drawing inspiration from them.

Now, the National Archives building is on Pennsylvania Avenue. You can cross Pennsylvania Avenue and there are at least six souvenier shops where for fifty cents you can get a much more readable copy of any one of those documents, not only much more readable but it *looks* older because you know they have a process now by which you can make new paper look like old parchment. The point of the matter is that if these great documents in our national history were suddenly to be destroyed we would lose nothing at all either in terms of factual material or even in terms of appearances and yet of course the loss to our country would be beyond calculation.

When I first got together the group of papers that I brought

here about a year ago, it was a quick and almost random selection from what is really a great treasury of material, even though the volume of it is small. So as I said, I think it is inspiring and some, I think, are even amusing. The earliest of these materials was that large "Minute Book" because it goes back to the days *before* the Court was organized. It opens on February 1, 1790. Now, when the Court convened on February 1, 1790, as it was required to do by statute, it didn't have a quorum. Travel was a little difficult in those days and enough of the judges hadn't come in to organize the Court, so they recessed. They met the next day, February 2, 1790, and they organized the Court. Then the record goes on from there in that one volume from February 2, 1790, through the term of 1805.

That is not only the oldest of the documents, it is the most comforting, at least to a clerk. Let me tell you what happened to me when I became Clerk of the Supreme Court. The first day that I came to the office, the Deputy Clerk—there are two of them in the office, this one was Ed Cullinan, Whitney, and I know you have known him for many years; he has been there about 30 years I think—in any event my first day Ed Cullinan took me down into the vault where this "Minute Book" that I brought here today was stored. He took the "Minute Book" down and he opened it to the first page and he showed me that in the first entry on the first page, in the first line of that entry there was a mistake. The first Clerk of the Court was a Massachusetts man so the first line reads, "In the Supreme *Judicial* Court of the United States" and I thought that was a pretty nice thing for Ed to do—at least I would say it was comforting.

Later I leafed on through and I found a mistake in the third entry, and this is one of those errors, one of those human errors that reaches across the years, 170 of them after all, to tell you that the human beings who lived and worked then were just the same as you, just as fallible, just as human.

The Court, you will recall, first met February 1, 1790, and except for that mistake in the first line of the entry the Clerk did fine, the entry reads as it should.

February 2, 1790, there are no errors in the entry at all. But on February 3 habit was just too much for the Clerk. The entry reads: "February 3, *1789.*" He couldn't get used to the new-fangled year, you see; 1790 was something he hadn't learned yet.

There was an undated table of fees. I brought that here, too, and it was on exhibit. The interesting thing about this to me is that it has two columns opposite what the Clerk is going to do for you. For instance, "Entering an award of execution." The first column gives the fee in pounds of tobacco, and the second column in dollars

and cents. In other words, you apparently could pay in cash or in kind in those days, and a pound of tobacco I can tell you was worth one and three-quarters cents.

Chisholm v. Georgia, 1793, is an old record. There was an assignment order there dated August 6, 1796, which revealed, incidentally, that on that date we had three circuits: The Eastern Circuit, the Middle Circuit, and the Southern Circuit. There was no Western Circuit and no Northern Circuit, you see. Apparently they recognized that those areas had to be reserved for the future.

Then there is a "Minute" entry February, 1798, which was not on exhibit but which I do have with me here. It is the "Minute" entry in the case of *Jones v. Letone,* French Consul General, and it is reported in 3 Dallas 384. Now this is one of the few actions brought under that provision of our Constitution which provides for original suits in the Supreme Court against consuls and ambassadors of a foreign nation.

I would like to read you just the formal part of this minute entry, and before I do I tell you that there is nothing in it. It doesn't say anything really. It is just a formal entry, but this is the way it reads: "At a session of the Supreme Court of the United States begun and holden at the City Hall in the City of Philadelphia, being the present seat of the national government, on the first Monday in February, A. D., 1798, and in the twenty-second year of the Independence of the said United States, before the Honorable William Cushing, James Ira Dell, William Patterson, and Samuel Chase, Associate Justices of the said Supreme Court were the following proceedings, to wit:"

It seems to me that the way they wrote in those days there was music in it even though they weren't saying anything, not just because I came (and you will recognize what I mean I think) from a small community in Montana where anything that was dated beyond 1900 was an antique. Somehow these things that go 'way back have a special meaning for me.

To me the most impressive documents, the ones that make me feel as if I am walking on hallowed ground, are those personal bench dockets maintained by Chief Justice John Marshall in the February 1815 and 1820 terms of the Court.

Finally there is a group of human interest documents that I didn't have on exhibit but that I would like to mention to you briefly.

These documents reflect the flesh and the blood and the humor and the sadness that after all are *the* essential part of every human institution, and I would like to mention some of these in no order

except chronological. In every case these are the original documents. This, for instance, dated May 23, 1825, which I found in the old files of the Clerk's office, is a letter from E. B. Caldwell, who was a Clerk of the Court at that time, and the purport of the letter is that it announces to the Court Mr. Caldwell's own imminent death. It begins this way: "Washington, May 23, 1825, to the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States: When this shall be handed you I shall be in the eternal world. I thank you for all your kindness to me personally and officially." Then he goes on and asks the Court if they will appoint his son as Clerk because his large family would otherwise be impoverished.

I checked the records of the marshal and Mr. Caldwell did die ten days after the date of this letter on June 2, 1825. You may be wondering whether his son was appointed Clerk. He was not. The Court will not be pressured. However, he was appointed Deputy Clerk.

On July 18, 1829, the next document is a letter written by the Clerk of the District Court in Frankfort, Kentucky, to Mr. Carroll who had succeeded Mr. Caldwell as Clerk, and I bring it to you just to indicate to you that there are some problems that haven't changed, even after all these years. I read you just the first line: "I have not been able to collect one cent for you since I made the last remittance." And then he goes on for two pages explaining why.

Here is a resolution adopted by the Supreme Court in the January term, 1838, 120 years ago. It is addressed by the Supreme Court to the House of Representatives. This resolution acknowledges the fact that the Supreme Court has received from the Congress an invitation to attend the funeral of one, Congressman Jonathan Sillick. The resolution attests to the high regard in which the Court held Congressman Sillick but then it concludes with these words of resolution: "The Justices of the Supreme Court cannot consistently with the duties they owe to the public attend, in their official character, the funeral of one who has fallen in a duel."

The next letter, dated December 1, 1847, by Chief Justice Taney is again to the Clerk, and in this letter Chief Justice Taney advises the Clerk that he is about to return to Washington for the next session of the Court and he asks the Clerk if he will get in touch with Chief Justice Taney's landlord and give the landlord certain instructions. I will read you just one sentence: "To have a fire in my room to warm the walls a little and take off the dampness, as I am very liable to take cold upon a change in my sleeping room if it is at first damp and cold."

A letter dated May 5, 1849, from Justice Catron to the Clerk

in which he tells about the ravishes of cholera along the Mississippi River, particularly New Orleans and Mobile, which had interrupted the holding of Circuit Court in those cities.

Then a document that I read with a good deal of hesitation. I hope that I will not offend you. If I do, I apologize in advance, but I think that this is a fact that ought to go into the record. This is a document dated January 26, 1853, and it demonstrates beyond any argument that at that time, unlike today, the Clerk's office was not too busy a place because this is an eight-page burlesque of a day's proceedings in the Supreme Court written by some idle assistant clerk in what he thought was a humorous style. You get the tone of it when I read you the opening formal statement: "Present, as yesterday. Additional attendance: The crier, oppressed by a relapse into sobriety, a status inconsistent with his wont." Then he goes on and tells about the admission of lawyers to the bar of the Court and discloses the fact, incidentally, that the admission fee at that time was $5.00. It is now $25.00. Let those of you who are not yet admitted take warning from that fact and get down and get the thing done before the price goes up again.

Then, having admitted those available men to the bar, the writer of this tome proceeds to describe an argument in the Supreme Court. He recites the argument, and I am going to read just the first paragraph of that recitation, and what I read will indicate to you why I do not read the balance of the argument: "Counsel for the appellant opened the contestation by saying 'May it please the Court', etc. 'The present Napoleon, Emperor of France, in a missive which he sent to a princess of the House of Hapsburg whose hand and heart he sought, enclosed a pair of garters whereon, under the eagles of his country, he had inscribed these words: 'My thoughts are fixed upon things above.' No Frenchman can doubt the sincerity of his declaration, although it might and would be doubted by a cold icebound Yankee."

Then a letter dated March 31, 1862, from Robert Greer, Justice of the Court to Middleton, who was then the Clerk, the substance of which is: "Deposit my pay voucher at once or some drafts that I have written to pay my bills are going to bounce."

And the second letter dated September 8, 1863, again from Mr. Justice Greer to the Clerk. I want to read the first paragraph to you. He was on circuit when he wrote this letter from Philadelphia back to the Clerk in Washington. "Dear Sir: I have just received a letter from Mr. Morrison informing me that I have been ejected from my rooms in his house. I was one of the first that took rooms in his house, and I did not expect to be turned out first to accommodate a speculating, greedy Yankee woman, but such appears to be

the fact. As I must stay somewhere, I wish you would do me a favor to make the best arrangement for me that you can. I am very weak in the legs and I do not like the notion of getting up to the third story, if possible to avoid it. If I cannot do better, I suppose I must climb." And he goes on in the same vein.

My thought on finding that letter was that I would certainly not have wanted to appear before Mr. Justice Greer on circuit *that day*.

A letter dated October 27, 1864, from John M. Wallace of the Philadelphia bar to the Clerk of the Court, at that time still Mr. D. W. Middleton. By this time Chief Justice Taney had died, and I read you just a closing paragraph of this letter.

"The poor old Chief! He has gone at last. I saw by the papers that you adjourned to do honor to his memory. The last time I saw him was after the final adjournment when somebody was administering whisky and water to him in the judge's room to keep him up after his efforts at presiding. I then thought it probable that it was the last time I should look upon him, and so it has proved."

Then the epilogue to that letter, a letter dated May 1, 1873, written by David W. Field, the author of that Field Code that the Attorney General of India was saying was adopted in India, and I might also say in Montana, even though not in New York. David W. Field wrote this letter to the Clerk, Middleton. This is nearly ten years after Chief Justice Taney's death, and as a prelude to reading you this letter, let me remind you that Chief Justice Taney, before he became Chief Justice, was a leader of the Maryland bar; he had been Secretary-Treasurer of the United States; he had been Attorney General of the United States; and he had been Chief Justice for twenty-eight years at the time of his death, and yet as this letter demonstrates he left insufficient funds to care for his daughter.

David W. Field writes to the Clerk of the Court: "Will you allow me to make, through you,"—and this, to me, is the most moving of these documents—"as a special friend of the late Chief Justice Taney and of his family, the provision mentioned in the enclosed paper for that one of his daughters who, I am told, is in need of assistance. As his daughter she has claims upon every lawyer in the country who values judicial independence and who remembers not only the pittance with which his long and faithful public services were supposed to be rewarded, but the slanders with which his great name was assailed. For one, I would offer my humble protest against that cruel and wasteful parsimony which refuses adequate salaries to our judges and that wicked spirit of calumny

which strikes at the eminent who will not bend to hasty and fickle public opinion. Faithfully yours, David W. Field." And enclosed is a draft upon Mr. Field in the sum of $500 a year for the support of the Chief Justice's daughter.

A note dated January 29, 1887. We have a very fine Clerk's office in the Supreme Court but apparently it has not always or invariably been thus. Occasionally some lawyer irritates the Clerk—no doubt there is a good reason for this—and the lawyer and the Clerk have a falling out. This happened between a lawyer called T. Hill and a Clerk of the Supreme Court by the name of McKenney, and it got to the point where the lawyer wrote the following plaintive note to the Chief Justice, who was Chief Justice Waite, at the time and here is the way it reads:

"Dear Sir: I would respectfully request permission to examine in the presence of your Clerk the Court record produced in the telephone cases by Mr. Stetson, Clerk of the Massachusetts Circuit Court. I do not desire even to touch the paper but merely to look at it as Mr. McKenney turns the pages over for me. Very truly yours, T. Hill."

And on the back of the letter penned in a weary hand: "The Clerk will comply with the request of Mr. Hill as expressed within. M. R. Waite, C. J."

Finally, I brought two little items for the ladies, one for the ladies generally, and I am cheating a little on this because this is not a record of the Court; this is a document that belongs to William and Mary College. It dates from 1788. It precedes the Court, in other words; but it is legitimate I think because it is all in the hand of the man who was later to be Chief Justice, John Marshall. These are the law notes that he took while he was attending a series of lectures as a young lawyer. Simultaneously with the preparation of these notes—the reason I say this is for the ladies, and the reason I brought them—he was courting. He was courting a young lady by the name of Polly Ambler. He met her when she was thirteen; he married her when she was sixteen; and they lived together then until their death just a year or so apart, many, many years later. But on this page which has to do with the lecture on assumpsit, it goes along, "The plaintiff must set forth everything essential to the gist of the action with such certainty that it may appear," and so on—lawyer talk. But up here in the right, "Polly Ambler." Down here in this margin with all sorts of curlicues and hearts, "Polly Ambler." And down here, "Polly." He didn't have his mind entirely on the law that day.

For the ladies again, but for the lady lawyers, if I may, this is the certificate dated September 24, 1879, that was filed by Mrs.

Belva A. Lockwood in the Supreme Court of the United States in support of her application for admission to the Bar of the Supreme Court. She was the first lady to be admitted to the Bar of the Supreme Court. It didn't come easily. She applied first in 1877 and the Court refused to admit her, announcing in the words of the "minutes" that "none but men are admitted to practice in the Supreme Court." Now the French have a little saying, "Man proposes, but the good Lord disposes," and in this case the Supreme Court "proposed" to exclude Belva, but Belva "disposed" of the matter in another fashion; she went to Congress and she had them pass a statute, which they did in 1879, that provided that women were too eligible to admission to the Bar of the Supreme Court and Belva came back and filed this certificate and in 1879 she was duly admitted.

Now I am not one of those men who believe that women are irresponsible drivers. I don't believe they do any more than men to contribute to the chaos and confusion of our world, but it is nonetheless a fact that this certificate filed in behalf of Mrs. Lockwood's admission bears two dates, September 24, 1879, and September 24, 1873, six years earlier. Now from the facts that surround it we know that September 24, 1879, is the correct date, but on the other hand the date of the filing which also appears is March 3, 1879. So the certificate was filed six months before it was prepared.

Well, let me conclude if I may with a brief commercial. All of the lawyers in the room at least certainly know that there are two kinds of clerk's offices. There is that kind where, when a lawyer walks in the door, the clerk and the deputy and his assistants make him feel as if he came in there just to harass the clerk, and for no other purpose. There is another kind of clerk's office where, when a lawyer comes in that door, the clerk and his assistants make the lawyer feel, as is the fact, that he is there because he feels that the interest of his client requires that litigation be filed and properly carried forth to an expeditious and just conclusion.

I know that in your Supreme Court here, having met George, you have the latter kind of clerk's office; and I am a part of such an office, too. I can say it without bragging because I had nothing to do with creating it.

As I have told you, the Court met on February 1, 1790, and adjourned; they met on February 2, 1790, and organized, adjourned again; they met on February 3, 1790, and on that date they appointed a Clerk. I don't know how they got by the first two days, but from that time to this, for the last 170 years, the Clerk's office has built up a tradition of service, first and primary to the Court,

of course—that is the way it should be—but secondarily and very really, to the public and to the lawyers. It is a tradition of service of which the office is very proud and justly proud. It is a tradition that they are determined to continue. I hope if we ever fail you in any way you will let me know. Thank you for having me.

PRESIDENT WRIGHT: We have been fortunate this year in having with us during our entire session the President of the American Bar Association. I think we are the first state Bar that he has visited since taking the office as President of the American Bar Association. We are also fortunate in having the President of the American Bar Association be Whitney North Seymour.

Mr. Seymour is a graduate of the University of Wisconsin; he is a graduate of Columbia Law School; he is one of the leading lawyers of the United States, a senior member of the firm of Simpson, Thatcher & Bartlett, New York City; he has been an instructor of law at New York University; he has been an Assistant Solicitor General of the United States, a lecturer of law at Yale Law School; he was Special Assistant to the Attorney General in 1954 on the Waterfront Controversy; he is a trial lawyer, a member of the American College of Trial Lawyers; he is a Republican—I know there are some Democrats here—but there are some good Republicans and he is one of them. He is an Episcopalian; and he is a fine gentleman. I am pleased to present to you Mr. Whitney North Seymour who will discuss "Horizons of the Bar."

HORIZONS OF THE BAR

Whitney North Seymour

Chief Justice, Ladies and Gentlemen: I would ordinarily break the ice by describing myself as Wendell Willkie was once described—"a simple, barefoot Wall Street lawyer," but I think it would be more proper to say that I am a Middlewestern boy back, happily, in the United States, visiting this great Bar.

At one time time I spent a summer as a ranger in Yellowstone Park and at one stage I was grizzly bear guard at Old Faithful Inn. They fed the grizzly bears out back of the inn then, and I was the young man who stood around with a gun on his hip, and when the tourists asked me what I was going to do I would always tell them that I would lead the way back to their hotel if the grizzly bears stopped eating.

I think it is great fun to hear about these records from the very well-preserved Clerk of the Supreme Court. I think he sets a standard that we might consider copying elsewhere.

I am very sure that every court in this country has some records

that would be of great interest if they could be displayed in the courthouse. I hope that this enterprise that he has embarked on so happily may lead the federal courts and the state courts to have the clerks interested in historical matters go through the records and see if they can't provide at least one display case in every courthouse in this country, because it is out of that sense of history that a good deal of the stability of our life comes.

I think I ought to say also that I think one of the great experiences in Washington is to go to the Supreme Court and watch it in session. I don't know any more moving institution than the simplicity and dignity of that courtroom. I don't know how many of you went up there this summer to see that great mass admission ceremony, but I had the pleasure of going up because my son was in the delegation from New York who was admitted and I never saw a more efficient enterprise, and I know that Jim Browning had a very large responsibility for it. They moved 1,900 lawyers through there and had them admitted in something over three hours. Their wives and their mothers and their daughters and other members of the family, one each, were allowed to come in when they were admitted. I sat there for an hour fascinated by the way that great group moved through that courtroom—the people in front of the bench with their movements and those in the public seats without any disturbance and with a full maintenance of the dignity of the Court. It was a wonderful achievement, and I think all of us are terribly grateful not only to the Court but to Jim and his colleagues for what they did.

It reminded me of the fact that on February 5, 1937, when the Roosevelt Court packing plan was introduced in Congress, I was in the courtroom and a paper was distributed by the Clerk to every justice on the Court and there wasn't a ripple in the courtroom, and yet here was the plan being distributed, just coming over from Congress, which would have made a fundamental change in the Court if it hadn't been blocked largely through the effort of the organized Bar. That was another occasion when the dignity of the Court stood up to a great challenge, as it did at this mass admission ceremony.

I would like to say first for my wife and myself that this is our first enterprise in visiting a state bar association after I became President of the American Bar Association, and it has been a most happy one for us. Yesterday Laurens Williams and his nice wife took us around and showed us some of the sights of Omaha. We got museum feet in the Joslyn Museum, which is certainly one of the finest small museums we had ever seen, and so we got a fine introduction to this community. Today we have attended the meetings with fair regularity and we expect to stay through the meeting

tomorrow. I hope that we will have a chance to meet some of you that we have not met, because it is my view that it would be a good idea when the President of the American Bar Association visits a state bar association to get to know the members, get to know what they are thinking about, and what they are concerned about.

When you look at Omaha today it is hard to remember that it was only in 1874 that an observer here saw a wagon with a sign on it which read: "Eaten out by grasshoppers, going east to live with wife's folks." I didn't even see a wagon in Omaha yesterday.

Then there was an enterprise here which I think you have given up on. In 1870 the Congressional delegation was instructed not to appropriate any more money for improvements in Washington because the National Capitol ought to be moved out to Lincoln or Kearney. I think you have given up on that because it is really getting pretty crowded here without that and I doubt very much whether it would be feasible today, but it was an ambitious notion. Maybe it would have been a very good thing, I don't know.

One of the reasons I am so glad to be here is because we have worked with representatives of your Bar in the American Bar Association. George Turner has been a very old and dear friend and is one of the stalwarts of the American Bar Association.

One of the important committees of the Association is the Committee on Resolutions. That is the committee which is supposed to take care of all the screwballs and impractical notions that are submitted in the assembly of the American Bar Association. Therefore, having a committee with good sense is important. You can't have a committee with good sense without a chairman with good sense, and George has been good enough to undertake the chairmanship.

Hale McCown was chairman a couple of years ago, so Nebraska has done very well in providing good sense at a critical point in the American Bar Association structure.

Mention has been made by Jim Browning of the fact that your Bar gave to public office important lawyers, such as Attorney General Herbert Brownell and Lee Rankin, the Solicitor General. Herbert Brownell certainly learned a good deal of prudence in Nebraska because when I was nominated President-Elect of the American Bar Association he was good enough to say to me, as an old, old friend of mine, "Whitney, I'll do anything for you that doesn't take time or money."

I had a very interesting time before I came here reading some of the records of your meetings, and listening to the reports at

your meetings today. In the American Bar Association we are all aware of your extraordinarily fine program on Continuing Legal Education, a fine pioneer effort. I went to a meeting of the Continuing Legal Education Committee in New York last week. I know you are considering the possibility of having a permanent director, and I wish you well with it.

I think also one of the pioneer efforts that is being made—I am terribly sorry; if we can gradually adjust this [microphone] to the electronic age, and if you will just tell me whether you want to hear or not to hear, I'll try to suit your wishes.

One of the pioneering efforts so far as I know is the one that you are making in trying to make sure there is adequate prelegal advice through the colleges and high schools of the state. I really regard that as as important a program as one can have, because we are all terribly concerned about the recruitment for the profession. Are the young people who would come to the bar getting adequate advice about what the bar is today and what the opportunities are today? If your program works out I would expect that the American Bar generally would follow your lead in that regard. It is a fine thing.

Now it is not for me to comment on the efforts you are making about reforming judicial selection, but it is evident that you may not always be as fortunate as you have been in your courts in the past. Therefore, it is not unreasonable that you should give some attention to the future, and of course the American Bar Association has long favored the change in the method of selection everywhere to what is called the American Bar Association Plan, which is really a sort of a variation of the Missouri Plan.

We in New York are talking about it. It probably won't take us over one hundred years to make a change; Illinois has been trying; Pennsylvania is trying; other states are trying. There is a great movement in the Bar about this. I heard President Wright's report and observations about it today and I must say I agree with this. It is by these small reforms which are possible—these are things we can do something about—that the structure of the administration of justice gets improved and that basically the strength of the republic gets increased. There are lots of things that are very difficult for the lawyers to do things about—I am going to come to a couple of them a little later on—but here is something lawyers *can* do something about, and there are other reforms in other areas that lawyers can do something about, and we ought to continue even though it does take a lot of long-windedness, to use Justice Vanderbilt's phrase in reverse.

I don't need to tell you about the importance of bar associa-

tions and I am not going to labor the point. You know the definition of the function of the lawyer which was used by Lord Green, former Master of the Rolls, "The lawyer's duty is to protect his clients from being persuaded by persons whom they do not know to enter into contracts which they do not understand, to purchase goods which they do not want, with money which they have not got." Well, that is a kind of a narrow definition of the profession.

We all recognize that today the profession has broad demands, perhaps the broadest of any profession, and that therefore strengthening the profession through the organized bar is a terribly important thing. Fortunately the organized bar—and when I use that phrase I mean the local bar, the state bar, and the national bar—fortunately the organized bar returns great rewards for participation: The spirit of brotherhood, the sense of responsibility for the good name of the profession, the opportunity through organization and through linking of arms to make improvements and changes in connection with the administration of justice and other related problems.

I think none of us would for a moment give up the great pleasure we have had in our relations with our brother lawyers and our relations with the judges, many of which have come through the bar associations. I can't speak too highly of the judges who have lent their full support to the work of the organized bar, and I know many of those judges are here tonight.

Just to tell, if I may, two stories about Supreme Court justices who were great heroes of mine. First about Chief Justice Hughes, who was Chief Justice when I was Assistant Solicitor General, and who, as you remember, was one of the great figures, not only as a Chief Justice but he *looked* like a great judge. And I must say that when one had a case in which he was against you, you felt that was a sort of Jovian quality at work on that bench.

After he retired from the bench he went up to Cape Cod one summer to visit his daughter and son-in-law and their granddaughter and he was left to babysit one afternoon. His daughter is Mrs. William Gossett, and her husband is one of the leaders of the American Bar and a great friend of ours. They came home and they found the former Chief Justice sitting on the floor with a towel wrapped around his head, and you can imagine that great beard with a towel wrapped around his head. The little girl was sitting on the floor with him. They were going to ask what was the matter when he said, "Sh-h-h, I'm a nun!"

The other story is a story about Mr. Justice Stone, who was my dean at Columbia Law School and a great friend of ours, who was on the court when we were in Washington and always was a

very dear friend. We had an evening at our house one night when we told Coolidge stories. There were various friends of Coolidge there and Stone was one of them. Let me just give you two of them because the Coolidge stories are dying out and it is too bad that they should.

When Stone was first approached to be Attorney General by Coolidge he couldn't take it because he had just joined a new law firm and he thought he ought not to do it. A year later, one afternoon, the telephone rang in his office; he picked up the receiver and this voice said, "Stone, this is the President. What are you doing tonight?"

And Stone said, "Well, Mrs. Stone and I are going to the opera."

The voice said, "Well, get on the midnight train and come on up to the house for breakfast."

So the next day he went to Washington and went to the White House for breakfast. They sat around and had breakfast and after breakfast they sat around until about ten-thirty with no indication of what the President had in mind. And finally he said, "Well, I sent your name to the Senate," and this was all that Stone knew about his appointment as Attorney General.

Then a story which I have told in Washington to some of our English friends because on the first day of the English visit the Virginia Bar provided a trip on the Potomac to Mount Vernon on the hottest and most humid day of the year. It was really terribly hot, and I think the English will never forget the trip to Mount Vernon.

Coolidge used to take that trip on the Potomac on the Mayflower regularly. He would stand by the rail with his yachting cap on, and his binoculars searching the shore. One day a friend of his said to him, "Mr. President, you know 150 years ago someone said that if the citizens of Alexandria were not careful New York would surpass it as a port."

They went on down by the Alexandria waterfront, which is not a very busy commercial waterfront, mostly motorboats and rowboats, and when they got down by the last pier the President turned to his friend and said, "Sound prediction!"

I would like to talk about the organized bar generally but I am going to limit myself to simply one aspect of it. It is my view that we ought to strive to reach the time when every young lawyer, when he is admitted to the bar, immediately becomes a member of his local, his state, and his national bar association as a matter of course. That can be brought about if the law schools adequately inform the young men as to the importance of partici-

pation in all levels of the organized bar, and if the judges share our view about it and will help in that regard and through admission ceremonies and otherwise they can be encouraged to do that. It would be a very important thing because it is through the local bar that local improvements can be made and that local developments in the profession can be brought about, and through the state bar, integrated or not, that developments at the state level can be most effectively done. But it is only through the American Bar Association that some of the things on the national scale can be done, and they are important, I submit.

First such legislative measures as the Keogh Bill which the American Bar took the lead in trying to get through, and we are very hopeful that we may get it through next year. I know many of you have participated in this effort but it is terribly important that the injustice which is now done to the self-employed by our tax laws should be removed to some extent so that the lawyers and the doctors and the dentists and the actors and the other self-employed may have some of the advantages which are given to corporate employees.

Then the improvement of administrative procedure under the federal system can only be accomplished by the efforts of the national bar association. Difficult as they may be, they are needed and further pressure in that direction is needed.

I am sure that we all recognize that it is important not only to maintain the standing of the bar in our own communities, but quite as important to make sure that the standing of the bar is maintained in other communities, because when a lawyer *anywhere* violates his trust or gets into difficulty it affects the lawyers everywhere, because the public does not distinguish between a lawyer in one state and another. They treat them all as part of the same profession and subject to the same temptations, and it is only through the national organization that something of that kind can be done.

Now there are many other things but I won't take time to mention them, but it is through the activities of the national bar that the standing of the bar, its economic development, its sense of mutual responsibility, and its influence on the national scene can be felt. Therefore, it is right that we should encourage the young men, and not necessarily *only* the young men, to support the profession at all levels.

Now on the subject of public relations I will not expatiate at length. We all know how important they are, but the secret of them is basically that when the bar lives up to its great traditions and is loyal to its trust its public relations problems are rela-

tively minor. Then it is only a problem of explaining those traditions and making them clear. When the bar doesn't live up to its traditions, that is when the difficulty arises and it is terribly hard to make up for that failure. Therefore, it is terribly important that we should try to see that the bar does live up to its traditions. I would like to spend some time on those but there isn't time.

I would like to just change pace on this for a moment. It is consistent with a belief in good public relations that we shouldn't be too sensitive about jokes about the profession. I think we have gotten a little overly self-conscious about that. In fact, I rather enjoy good jokes about lawyers and I think we ought to make it clear that we don't consider ourselves so self-righteous that we can't stand a good-natured joke.

I found one recently which you may or may not be familiar with. It comes from a period just after the Revolution. It is a quotation from the Grafton County *Gazetteer* which was published in Hanover, New Hampshire. This comes home to me because I have a son in Hanover now who is Dean of Dartmouth College, so I am interested in Hanover. I have some grandchildren up there, too.

Right after the Revolution the Grafton County *Gazetteer* made this publication about conditions in that area: "We have a county of over 3,000 square miles, a population of 6,549 souls, of which 90 are students at Dartmouth College and 20 are slaves. We have 20 incorporated towns, all in a thriving condition, including 14 grist mills, 5 saddler shops, 7 millwrights, 8 physicians, 17 clergymen, and not a single lawyer. For this happy state of affairs we take no credit unto ourselves but render all the glory to God."

Now I would like to emphasize one other aspect of this problem. It is terribly important, of course, in the public relations field from what point of view you approach a problem, and I want to give you an example of the importance of the point of view.

You know that a year or two ago the Postmaster General tried to bar *Lady Chatterly's Lover* from the mails. That was a book written by a distinguished outdoorsman in England called D. H. Lawrence. Our Federal Court in New York took a different view than the Postmaster General and decided against him, and the case is now through the courts. But there was a point of view about the book rather different from either that of the Postmaster General or the Court, and that was the view taken of the book by *Field and Stream.* If you are unfamiliar with it I think you ought to know about it because if you haven't read it, this may induce you to read it, and if you have read it it will give you a rather different slant on the book than you now have.

This is what *Field and Stream* says about *Lady Chatterly's Lover*—and in case any of you have it at home it is in the November, 1959, issue: "Although written many years ago, 'Lady Chatterly's Lover' has just been reissued by Grove Press and this fictional account of the day-by-day life of an English gamekeeper is still of considerable interest to outdoor-minded readers, at it contains many passages on pheasant raising, the apprehending of poachers, ways to control vermin, and other chores and duties of the professional gamekeeper. Unfortunately, one is obliged to wade through many pages of extraneous material in order to discover and savor these highlights on the management of a midland shooting estate, and in this reviewer's opinion this book cannot take the place of J. R. Miller's 'Practical Gamekeeping.' "

Well, I see there are a lot of readers of *Lady Chatterly's Lover* here. I think that is very nice.

Now I want to talk seriously about one problem, and I am approaching the end. I think we all as lawyers feel that we wish there was something more we could do in these trying times. When Mr. Khrushchev comes to this country and Mr. Castro comes to this country and they attack everything we believe in, and they lie in a most outrageous fashion, we wish the lawyers could find something to do to help in the kind of leadership against the Communists that we all want our country to be taking. I submit there are some things that we can do. We can't do very much about insuring the strengthening of our country's defenses, although we all believe in that. We can't do very much about protecting against internal subversion, although we all believe in that. But we can give some critical attention to the claims of the Communists and some warning of the emptiness of those claims and then we can advance an alternative because in the rule of law we have the greatest alternative to tyranny known to the mind of man, and instead of retreating in our own minds when the Communists seem to be taking the affirmative, the lawyers ought to encourage the rest of us to go on the affirmative against the Communists.

Now in terms of warning, when the Communists overran Hungary and Tibet and eastern Europe, they left a record which has been examined by the lawyers of the world. The International Commission of Jurists, which is an organization in which Americans and other free world lawyers participate, has made a close study of what happened in Hungary and Tibet and has published great reports on that subject. There it is clear that the rule of law was flouted, the peoples were enslaved, the dissenters were executed, often with the aid of controlled courts and without anything in the nature of an independent bar. I submit that supporting

their work is something that we can do; and when Khrushchev and Castro say that the new countries in the UN ought to be concerned about the colonialism of the colonial powers, it would be laughable if it were not such an indication of the contempt that they have for their listeners; because the fact is, as we all know—although it is much too little emphasized—the English and the French and the other so-called colonial powers have been freeing over 500,000,000 people during the time that the Communists have extended their colonialism and have freed no one. No freedom from communism has been achieved except by escape or death. I submit that this point ought to be constantly made, and constantly made in refutation.

In addition to that there are efforts that we could make in our communities and among our people. I personally believe that strong support for the independent role of the UN is indicated. There is, of course, debate about aspects of the UN, whether it is as effective as it ought to be, but it is perfectly clear that it is the avenue through which there is some chance to bring home the rule of law in the world, and the events of the last couple of weeks I think have demonstrated that.

I personally believe that strong support for the World Court and for all the agencies of peaceful settlement of disputes is worthwhile. You can have strong support for the World Court even if you have a different point of view about the Connolly Reservation, because it is perfectly clear that the World Court is the only judicial agency now available for settling disputes and the only question is: Should it be stronger than it now is?

There is a thing called the Permanent Court of Arbitration, which was originally set up to provide a method of arbitrating disputes. It is now a pale shadow of what it might be. This should be strengthened.

Then there are all the efforts that could be made to teach people and explain our system of law and our belief in the rule of law. One of the great efforts of the American Bar Association is through the Committee on World Peace Through Law, headed by Charlie Rhyne, and that committee is about to start holding conferences around the world among the lawyers, and out of that should emerge some general support for the world rule of law and the lawyers ought to continue to give that every support.

Then there are such individual, though not precisely individual, efforts such as your own great Chief Justice has made in connection with his efforts in this field. The book distribution program in which he—with the aid of some others but largely under his leadership—has sent, according to figures I got today, 23,500 volumes of American law books to forty countries, books gathered

from a good many donors in this country; but just think what that effort alone involves in the way of education about our concept of the rule of law and justice, a program which we greatly honor and which ought to be forwarded.

Then there is the whole problem of making sure that judges and lawyers who visit our country get an adequate opportunity to be exposed to our bar associations, our courts, our law schools, and our culture. Having the Chief Justice of India here today, which was a tribute to the Chief Justice because they got to be friends during the Chief Justice's mission to India, is an example of what can be accomplished. But I submit that this ought to be organized by the bar on a broad plane so that any judge or lawyer who comes to this country is taken in hand at some stage under the auspices of the American Bar Association and with full cooperation of local and state bar associations. One worries a little bit about whether any of these visitors are going to find anything to criticize. I don't think we ought to worry about that. I think if we explain that we all are on the march, we are all trying to achieve the rule of law, we can stand a little friendly criticism and we don't need to be self-righteous about anything because we don't have to be. We are struggling and striving to conform our life to our ideals. We hope they will do the same, and perhaps a little mutual interchange of criticism may not be a bad thing. I think that program ought to be forwarded.

What I say is this: The lawyers have things they can do. Some of them are great things and some of them are small things but we do not need to feel that there is nothing we can do, and I submit that there is no antidote for communism and tyranny like liberty and the rule of law. And if we press that home we will be handling a weapon which we know how to handle and which will be in the great interest of the United States.

I wish there were time to talk about another topic that I like to talk about but there isn't. It seems to me that in the course of community leadership which lawyers everywhere know they ought to exercise, it is well to bear in mind the great dictum of Lord Moulton that "the measure of a civilization is the degree of its obedience to the unenforceable," so that along with our concern with positive law, along with our concern about continuing legal education is a concern for the basic tone and responsibility of American life, making sure that the young people understand that with the rights that they enjoy and want to enjoy go responsibilities, that neighborliness and fairness and honor are a basic part of American life and of our traditions. These are things that the lawyers ought to constantly take the lead in and can do.

Rather than labor that point which I know is sufficiently clear I would like to burden you with my favorite quotation about a lawyer because I think it says all these things better than I can say them. Perhaps you know it, I hope some of you may not. J. L. Pettigrew was a lawyer in Charleston, South Carolina, at the time of the Civil War. He died in 1863. He opposed secession. In 1861, when the group considering secession was meeting in the capital of South Carolina, in Columbia, somebody said to Pettigrew, "Where is the insane asylum?" and he pointed to the place where the secession convention was meeting.

Despite this difference in point of view from his fellow citizens he was a greatly respected lawyer, and after he died in 1863 they had a great memorial service. I have read the proceedings and it is evident that though he differed from them on great issues they still admired his courage and independence. After the war this epitaph was erected. If I may read it to you I think it puts, as well as can be put, the qualities about a lawyer which we would like to see generally recognized; and when I heard that reading of the obituary list today I realized of how many of those fine people these things would be said, if we only had the gift of saying them, and perhaps all we can do is to remember this epitaph and say, "That is a fine thing for a lawyer to have done. Let's all try to be like that if we can."

> "Future times will hardly know how great a life this simple stone commemorates. The tradition of his eloquence, his wisdom, and wit may fade, but he lived for ends more durable than fame. His eloquence was the protection of the poor and wronged; his learning illuminated the principles of law. In the admiration of his peers, in the respect of his people, in the affection of his family, his was the highest place. The just mead of his kindness and forbearance, his dignity and simplicity, his brilliant genius and his unwearied industry, unawed by opinion, unseduced by flattery, undismayed by disaster, he confronted life with Antaean courage, and death with Christian hope. In the great Civil War he withstood his people for his country, but his people did homage to the man who held his conscience higher than their praise, and his country heaped honors upon the grave of the patriot to whom living, his own righteous self-respect sufficed alike for motive and reward."

PRESIDENT WRIGHT: Thank you, Mr. Seymour, for that very inspiring address. I am sure that the American Bar is going to have a great year during your administration.

I have one further responsibility. I have enjoyed acting as President of the Nebraska State Bar. It has been particularly en-

joyable, as I have mentioned, in that it has brought me in contact with many, many fine people that I never had the opportunity to meet before.

I have said many times that I was looking forward to this moment and yet I hate to say that I am going to be a "has-been;" but fortunately we have a very fine man to put this organization back where it belongs. I would like to present to you at this time Hale McCown who is now the President of the Nebraska State Bar Association.

Hale, I present you with the gavel and wish you much success in your office.

PRESIDENT HALE McCOWN: Thank you very much, Flav. I only hope that a year from now I will have as many friends and as generous ones as you have been tonight.

There being nothing further so far as I am concerned, the meeting is adjourned. Thank you all very much. We have enjoyed having you.

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INSTITUTE ON REAL ESTATE TRANSACTIONS

FRIDAY MORNING SESSION

October 7, 1960

LAND DEVELOPMENT PROBLEMS

THE DILEMMA FACED BY MUNICIPALITIES IN CONTROLLING NEARBY LAND DEVELOPMENTS

Allan F. Smith

I once heard it said that no one ever came quite so close to perfection as when he was filling out an application form for a job. I think perhaps you come next closest to perfection when you are being introduced and the speaker is trying to make the audience feel that someone of some importance is about to appear. At any rate, I appreciate the kind introduction.

There are many reasons why I find it a pleasure as well as a privilege to appear here at the Nebraska Bar Association meeting. As Mr. Mason has indicated, I am a native Nebraskan. It was in this State and from this State that I received my education, both undergraduate and legal, and I welcome this opportunity to renew my acquaintances among the Nebraska bar.

In the second place, and perhaps this should be first, it was in this State that I acquired my wife, and she is here with me. I have always had the feeling that if Nebraska could produce one such charming person it probably would produce a good many, and I felt further that if it did produce such people, the lawyers of the State would probably have picked up a majority of them for their wives, so I looked forward to the opportunity of looking over the crop, and in this respect have not been disappointed with the number of fine wives I saw yesterday.

In the third place, again as Mr. Mason has mentioned, this State has furnished to the University of Michigan Law School with which I am now associated a substantial number of very fine students who have contributed much to the educational program of that School, and the opportunity to renew my acquaintance with the alumni is a very welcome one.

I should add that you need not fear any migration from the State. Most of the young men who have come to Michigan from this State return here to join in the professional activities of the Nebraska Bar. Moreover you get some of our students who did not originate in this State that we hope will provide a good quality lawyer for your Association. You have, as Mr. Mason said, one of our good ones now serving as Dean of your Law School.

Finally, I was attracted by the subject matter of this conference. For more than a dozen years I have taught the subject of real property in the Law School. Many of my colleagues have insisted that the law of real property was a very dull subject. They insist that it is perhaps 75 per cent history, 25 per cent mechanical, and that all the important problems dealing with real property have been settled for 200 years, and that we should have something of more lively interest.

I am glad to observe, therefore, that your Bar Association has chosen this subject as one which has substantial current interest and has made it the theme for this annual meeting. I am fully aware that such subjects as labor law, taxation, antitrust, civil liberties, etc., occupy a good deal of space in the newspapers, perhaps occupy a large amount of time in the practitioner's office, but it is still true that land transactions play an important role in the life of the lawyer and an equally important role in the development of our society.

I have but four propositions to lay before you today. One is, I think, hardly contestable. One is, I believe, sustainable although it may be contested. Two will, I hope, challenge your attention to a professional responsibility which I think rests upon the shoulders of lawyers and governmental authorities, judges and legislators who deal with the problems of land development.

The first proposition is the one which I think is incontestable. It may be stated very simply: The development of urban land and land on the urban fringe is no longer controlled by the developer's own sweet will. Organized society, in the form of municipal and county governments, has armed itself with a formidable battery of powers and is now asserting controls over the use to which land may be put, the manner in which roads and transportation facilities shall be arranged, the size and kind of sewage facilities, and other public utilities that shall be installed, the location of such utilities, the size of lots, and so on.

This sort of thing is not a part of our English common law tradition. There was a time when Mr. Blackstone could write quite truthfully:

> "So great moreover is the regard of the law for private property that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land. In vain it may be urged that the good of the individual ought to yield

> to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it would be expedient or no. Besides, the public good is in nothing more essentially interested than in the protection of every individual's private rights, as modeled by the municipal law."

Those were the days when "property" and "ownership" were words which carried the weight and the meaning with which even a teacher of real property law could not object. But the plain fact is that "property" rights just aren't what they used to be. There may be those who will decry the fact that this is a fact. Indeed, I gather from the outline of Mr. Delehant's forthcoming speech that perhaps he may long for the days of Blackstone, but I doubt that he will insist that those days still exist.

One may compare with Blackstone's comment some of the judicial utterances in recent decisions where beleaguered property owners have sought the aid of courts for redress against claimed invasion of property rights. For example, in *Mansfield & Swett v. Town of West Orange,* the Supreme Court of New Jersey was asked to review a resolution of the town's planning board. The owner of a four and a half acre tract proposed to subdivide it into 19 lots and two streets. Objections were filed, and the board had disapproved the plan, largely because the land was in an area where lot sizes were much larger than those contemplated in the new development.

In the course of his opinion, Mr. Justice Hehr said: "The genius of organized government is the subordination of individual personal and property rights to the collective interest." This is a far cry from Mr. Blackstone's allegations. Not only does the judge assert that the individual property rights *are* subject to control for the common good; he ascribes the quality of genius to that governmental organization which achieves that subordination. Let me emphasize that the justice spoke for a full court, a unanimous court, and a court not noted for any extreme liberalism toward governmental controls.

Or, for another example, one may move across the country to California where in 1949 the Supreme Court was faced with objections to a planning commission's decision that it would approve the plat for developing certain land only on four conditions: (1) that the owner dedicate 10 feet of land to widen an adjoining street; (2) that he dedicate a strip 80 feet wide to permit extension of an intersecting street; (3) that he restrict another 10 feet of the entire tract for planting trees and shrubbery; and (4) that he

dedicate another small triangle of land which would be isolated by an intersecting street.

The court, sustaining the power of the commission to impose the conditions, remarked: "In a growing metropolitan area each additional subdivision adds to the traffic burden. It is no defense to the conditions imposed in a subdivision map proceeding that their fulfillment will incidentally also benefit the city as a whole. Nor is it a valid objection to say that the conditions contemplate future as well as more immediate needs. Potential as well as present population factors affecting the subdivision and the neighborhood generally are appropriate for consideration."

Observe that the court denied that a benefit to the public is a valid ground for necessarily requiring any compensation to the land owner who supplies the public benefit.

Back in the Midwest the Supreme Court of Michigan found nothing wrong with allowing a city to require dedication of a 17-foot strip of land for street widening purposes as a condition precedent to the filing of a subdivision plat. (*Ridgefield Land Co. v. City of Detroit*, 241 Mich. 468, 1928.)

In the District of Columbia the Supreme Court of the United States, sustaining the validity of the District's Redevelopment Act, remarked: "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled."

And here in Nebraska your Legislature last year, I believe, passed legislation which empowers primary cities to require land developers to donate land for public parks, schools, and other public purposes.

And, of course, a multitude of zoning cases can be found where use restrictions have been imposed by governmental agencies and have frustrated the desires of the landowner in the kind of development he proposed to undertake.

But I don't want to belabor the point which I regard as incontestable: That public control of land use and land development is one of the facts of life.

Let me proceed with the second proposition. This is the proposition which I referred to as being sustainable though perhaps contestable. It is this: That the powers now held by governmental units to control and regulate land use are desirable and are adequate, if wisely used, to achieve a rational allocation of the great land resources we have to the variety of demands made upon those resources.

I don't want to dwell on the adequacy of the existing powers

of control. I do not mean to imply, for example, that every community or every county in the United States has a charter or a legislative set of powers that it will feel is entirely adequate. I mean merely to suggest that if we look broadly through the United States you will find that a battery of devices has been developed which, if applied to any particular community, can provide legislative and charter powers which will do a very excellent job of controlling land development.

The real point that is probably contestable is whether or not these controls are desirable. I have a very strong and very firm belief that any legal system operates best when it provides the widest possible private volitional control over the affairs of society. To this extent Mr. Blackstone and I are in complete agreement. But when these private volitional controls produce consequences which are injurious to the health of citizens, or consequences which contribute heavily to criminal conduct on the part of citizens, and consequences which are too costly for our society to bear, then I know of no alternative but the establishment of controls which reduce the potential freedom of private persons to do with their land as they see fit. Perhaps we can put the matter in perspective by asking the question: What have been the effects of uncontrolled, unplanned land development?

The consequences are not difficult to observe. We have slums; we have inadequate traffic systems which are not only dangerous to human life but wasteful of time and energy; we have core cities which have filled with blight and which no longer perform adequately the functions they are intended to perform; we have inadequate sewage facilities with resultant health problems. In my own community of Ann Arbor, which is fairly enlightened in most matters, we observed the unpleasant phenomenon this spring of raw sewage draining within 60 feet of a new elementary school building. This was occasioned by private land development, outside the boundaries of the municipality, which had exploited the development of the land without adequate attention to the health needs of the entire community. To correct this dangerous condition is vastly more expensive than it would have been to provide adequately in the first instance at the time of original development.

What it boils down to in the final analysis, or so it seems to me at least, is this: Raw land is basically a national resource which is to be exploited to provide various kinds of values for our society. It must provide locations for residences; it must provide locations for industry and commerce; it must provide food for our society; it must provide mineral exploitation; it must provide recreational areas; and it must provide areas for the variety of public uses of

land which we now deem essential to our society—roads, city halls, school buildings, and various other community facilities.

The question is: How is the land to be allocated to insure the maximum exploitation to meet those needs? Shall it be done exclusively at the will of the owner, or shall organized society play a part, with resultant restrictions upon the freedom of choice which the landowner may assert? The fact is, of course, that particular development of any piece of land has an impact upon society as a whole, and the interests of society are entitled to at least minimum recognition.

Abraham Lincoln once said in talking about elections and whether or not people were going to take an active part: "Well, it is the people's business. If they choose to turn their backs on the fire and get scorched in the rear, they are going to have to sit on the blisters."

Now the fact is that if municipalities in organized society continue to turn their backs on the fires that are generated by land development in urban areas, they are going to get scorched in the rear and they are going to sit on the blisters for a long, long time.

The impact of land development is felt in many ways. It affects the transportation system. The past thirty years have provided us with countless examples in which uncontrolled land development outside the boundaries of cities has stultified proper street development when population finally reached the place where integration with the nearby community was required. Is it unreasonable to say that the city planners, looking forward to the day of nearly inevitable integration, should be entitled to lay out an adequate street system and require that land development take cognizance of the foreseeable needs? Land development necessarily affects the population density of the region. Must a city, already groaning under the tax load made necessary by supplying the schools and parks which were forgotten in the past, stand idly by while nearby land is developed so intensively that the problems of providing education and recreation facilities will be magnified when the region becomes politically integrated?

Lest there be skeptics present who doubt that density of population affects the cost of maintaining society and the cost of providing necessary services, may I refer to a study of some ten years ago conducted in Newark, New Jersey, of the costs of various municipal operations in a densely populated area as compared with the same costs in an area controlled as to population density. Actually these studies took place at two ends of the same street in the city; one a slum, the other a controlled development.

Police costs averaged 25 per cent higher *per capita* in the slum

area; police courts nearly 50 per cent higher *per capita;* hospital costs 300 per cent higher *per capita;* fire protection, almost 30 per cent higher; general health expenditures 500 per cent higher *per capita;* and educational costs almost 100 per cent higher in the congested area. These figures can be duplicated in many regions. They raise questions which compel attention and which force one to weigh the values of the alternatives which are open.

Perhaps even more important in the long run is the effect which land development has upon the over-all allocation of our land resources. We in America are blessed with an abundance of land. Here in the Middle West we produce agricultural products in such abundance that they are running out our ears and create even political problems as to what to do with them. The entire United States eats magnificently. Here you have room for industry, room for commercial development, and room for public facilities. But it does not require much foresight nor much imagination to realize that sooner or later the demands for residence land, the demand for commercial land, the demand for industrial land will outstrip the supply. Just when this will occur is, of course, a matter of speculation. But there are already areas in the United States where the competing demands can no longer all be met.

You have perhaps witnessed the spectacle of having the very best farm land near a community transformed into a housing development because of the immediate monetary rewards which such development afforded, while other available land which is either of marginal value for agricultural purposes or completely unusable for that purpose was left idle, although it would have been entirely useful for housing development. The question is whether we can continue this kind of wasteful allocation of this great resource.

Or perhaps you have observed instances where the best possible industrial sites have been consumed by premature residential development. And I am sure you have seen instances where magnificent potential recreational areas otherwise unavailable, have been destroyed by an alternative development. Is it not time, perhaps, that we extend our sights a bit more into the future and provide the means by which we can insure that our great land resources will be fully exploited in the production of goods and services for the people of the nation?

Now I realize that talk of this kind sounds suspiciously like that of the most ardent planner in the United States. I hasten to disavow any such title. I fully appreciate the fact that restrictions upon the use of land are tremendously important economic decisions. I have no objection to people's making money. When a governmental body decides that the land to the northwest of a city is to be used solely

for industrial and commercial use, whereas the land southeast is to be developed exclusively for residential purposes, it has made a decision which has tremendous, serious financial repercussions. The landowner on the southeast who is restricted to residential development may have a potential buyer who wants to develop an industrial site. The price for industrial purposes may far exceed the price which he can obtain from one who wants to develop residential lots. Is it proper for a small group of officials sitting in the city hall to decide that Mr. A shall be able to realize a profit of $100,000 on the sale of his land, whereas Mr. B will be restricted to a profit of $10,000, even though, if the law of supply and demand were allowed to operate uncontrolled, the two pieces of land are of equal value?

Or to put the same kind of problem in a different context, one may consider the effect of a zoning law which provides for minimum lot sizes, or minimum floor space for residential development. It may be admitted that the establishment of minimum lot size operates to control directly the population density of the area. It thus has a direct relation to public health and public safety. But it is also true that it is a form of economic segregation because such restrictions inevitably foreclose occupancy by persons whose income does not reach a particular level. Mr. Delehant in his outline observes that not everyone can live in a castle, and when a governmental body passes a restriction which purports to establish a minimum lot size of four and a half acres (as was done recently in an eastern community) it becomes a rather clear case of governmental power's being exercised for purposes other than those related to health, safety, and general welfare.

Despite these obvious dangers, it may still be asserted that the results of reliance upon total volitional allocation do not justify a hands-off policy from our governments, but rather they indicate the need for the imposition of developmental controls.

This brings me to the third point which I would like to make and which accounts for the title which was chosen, "The Dilemma Faced by Municipalities in Controlling Nearby Land Developments." As is so often the case, the dilemma is easy to state and extremely difficult to resolve satisfactorily. Perhaps it may be best stated in this way: How can the city—and I use the impersonal term "city" to mean the city planners and those who are concerned with land development—how can the city achieve its goals of rational allocation of land resources and the protection of the health, safety, and welfare of its citizens to the maximum extent, while at the same time preserving to the fullest extent possible the values which we know flow from private initiative and private volitional

exercise of the rights of property. This dilemma of having the best of both worlds is a difficult one. It is a problem of drawing the line between those matters which are so important that society must act, and those matters which, although they might be controlled by government, are not sufficiently significant to warrant the accompanying encroachment upon individual liberties.

I have heard the problem phrased in more philosophical terms, something like this: Civilization is acquired only at great expense—expenditure of time, effort, capital, and labor. And, unfortunately, a part of the cost of civilization can be measured in terms of the loss of human liberties. The imposition of governmental controls over land use is necessarily balanced by a diminution of the individual liberties of choice in land development. We must, therefore, ask ourselves whether the particular aspect of civilization which the planner seeks to achieve is worth the cost of the reduction of individual property rights.

We in America are fortunate in that we may observe, if we will, the future in which we are likely to find ourselves in a country which operates under a substantially similar legal system. Our mother country of England, from which we inherited much of our legal tradition, has already reached the point where the law of supply and demand has completely broken down so far as land resources are concerned. With the amount of land so strictly limited, and with the pressing demands of an increasing population and increasing industrialization, there resulted an imbalance which proved intolerable. Parliament was forced through sheer necessity to face the unhappy choice between continued chaotic land development, preserving Blackstone's premise, and the adoption of substantial governmental control over the planning of land development. The remarkable piece of legislation, the Town and Country Planning Act, was the result, and we have now observed more than ten years of its operation. The planning powers which have been bestowed upon local planning boards and ultimately upon the Minister of Housing are considerably broader than those customarily granted here, and the actions which have been taken under those powers would strike some of us as extreme interferences with the liberty of property owners.

The point I would make, however, is that it may be possible for us in the United States to avoid such extremes in the future if we will move now to achieve the minimum objectives. If we will accept enough control to permit a rational allocation of land now we may avoid the extremes of governmental or near socialization of land resources when the law of supply and demand breaks down.

Put it another way: We may be able to avoid excessive loss of

human liberty by giving up a small segment of that liberty today to encourage a wise use of land resources.

I want to return, however, to the dilemma faced here in the United States and to get somewhat more specific. One of the questions now in the forefront of the planning activities relates specifically to the requirement that a land developer must donate land for parks and schools or other purposes before being allowed to develop residential property in the area. I notice that Mr. Delehant classifies the Nebraska legislation which grants this power as a "legislative abuse." I assume, therefore, that he would not grant such power were he voting in the Legislature. Indeed, he suggests that it is probably unconstitutional. This may be true. I would assert that his assertion that the Michigan Supreme Court has ruled it unconstitutional to require dedication of land for park purposes is at least open to question.

I read the case to mean that the decision was based solely on a lack of power, the lack of the granting of legislative authority, and that the court did not really reach the constitutional question.

Now the fact is that many courts have long since approved, so far as constitutionality is concerned, the requirement that the land developer must provide free of charge and dedicate land for streets as a condition precedent to the privilege of developing his land. Commonly, he must even make those streets conform to the general plan laid out by the community, and he is not the sole judge of whether the street shall be 60 or 80 feet in width. Is there any real difference, constitutionally speaking, between requiring the land developer to provide without cost to the public the land for streets, and requiring him without cost to the public to provide the land for necessary recreational parks to serve the needs of the occupants of the area?

I would merely suggest that this problem is typical of those faced by planning authorities which bring them squarely before the obnoxious dilemma: Will the gain to society which will result from the exercise of this governmental power be greater than the loss to society which will inevitably follow the diminution of private rights of property that are involved?

Or to take another example, the extent to which planning authorities should prescribe minimum lot size in a particular development. In a great majority of cases which arise for contest the land developer will seek to keep lot sizes as small as possible, since the probable return on his investment will be correspondingly greater. Not all of them arise this way, but a good many do. In a sense, this attitude is one which can be defended as being consistent with the principle of maximum exploitation of land. After all, it

will make more homes bloom on the same land than would be possible if the lot size were increased. The planners, however, sometimes take a different view. They may be subjected to pressure from adjoining landowners who foresee a diminution of the value of their own land; they may see an excessive flow of traffic; they may see an excessive demand for new schools and resulting higher taxes. Or these planners may be motivated simply by their own knowledge of the dangers of too dense a population. Or they may be motivated by the fact that they are going to have to supply services to the area and they feel they can do it in a more orderly fashion with a less dense population. Whatever their motivation and whyever they tend to ask for a minimum lot size, they frequently seek to establish a minimum lot size which is larger than the developer would choose. Here again when the planner starts to act he is presented with the inevitable conflict between preserving a wide range of choice to individuals, and restricting that choice for what is deemed to be the common good.

As I indicated earlier, the dilemma is easy to state and hard to resolve. I would not be so bold as to attempt to say I have any resolution. I would make two suggestions as to how at least we might approach the resolution: First, that the professional planner, the attorneys who advise them, and the legislative bodies which implement the plans, would I think do well to pay greater heed to the liberty which is lost in their efforts to advance civilization. The immediate results of planned development are very appealing. The desirability of having a healthful, beautiful, and properly functioning environment is easy to defend. Indeed, I have already committed myself to the proposition that governmental controls are desirable. But what is weighed against the governmental action is far more subtle and less obvious, and is therefore easily overlooked. It is this diminution of human liberty; it is the devaluing of the whole concept of private property and the rights which flow therefrom. It is the loss of individual choice which we prize so highly and which is so important to our nation. And I would only urge that a more systematic recognition of this cost become a part of the planner's way of thinking.

The second thing I would suggest is somewhat more concrete. The police power of a state, from which springs the power to control land development, has traditionally been exercised to protect the health, the safety, and the morals of the community. Where these are the objectives and the results of restrictions, it may well be that private volition must yield. But the police power has been expanded in recent years to embrace economic and aesthetic objectives. It is at this point it seems to me that the intangible values of the liberty of individual choice become more meaningful.

I would simply suggest, then, that when the planner faces his dilemma he take careful note of the purpose of his regulation or restriction. If it smacks merely of improving the economic status of the occupants of a given area, or if it smacks purely of aesthetic value alone, surely then it is time to ask the basic question: Is this objective worth the price it will cost in terms of downgrading the individual rights of property? He may decide that it is, but at least it will be a conscious choice and not an unreasoned desire to impose his own whim upon the landowners in the vicinity.

Having preached at those who plan and those who support them, I should like to turn briefly to another proposition which concerns the practicing lawyer in his relation to the development of planning legislation and procedures. Perhaps I make a mistake in leaving this until last, because I run the risk that the effects of the morning coffee will have worn off and I may have lost all of you, I don't know. This proposition is a bit more complex than the others. It is this: The lawyer faces a dilemma in connection with governmental efforts to achieve rational control over land development because his obligation to a particular client conflicts with his professional obligation as one of the principal architects of society. This kind of conflict is not unique to the particular field which we are discussing. On the contrary, it pervades the operations of the private practitioner in almost every field. The lawyer owes a peculiar professional obligation to provide the framework within which our society operates, to provide the legal structure within which we work. It is his job as a lawyer to bring order into human relations and to provide the framework within which humanity can flourish. Inevitably there will be occasions when his own professional judgment as to the needs of society will conflict with the position and the interests of a particular client.

To take an example, he may be persuaded after careful study that his state requires an income tax in order to provide a sound fiscal structure for the necessary governmental operations. Yet his principal clients may be persons or corporations whose official position is opposed to the establishment of such a structure. Is it possible for him to reconcile this conflict?

In just the same way the lawyer is often called upon to represent a land developer who is opposed to or is contesting the validity of a particular restriction imposed by governmental authority. The lawyer as a citizen and as an architect of our society may feel that the restriction is both wise and valid. What does he do? Of course, he may advise the client not to contest the restriction; he may advise him that a contest will be futile, but we all know that some clients are not amenable to such suggestions and the problem remains. Nevertheless, what I would urge in this connection is that

as lawyers you exercise restraint in the selection of matters about which you fight concerning land controls. You as a lawyer are also the guardian of the property rights of individual landowners, and where the restrictions imposed become such as infringe upon these rights without an overriding benefit to society as a whole, then the fight must be pursued with all the vigor you have. But let the lawyer also remember in his counseling of clients and in his presentation of cases to court, that the record of volitional controls has not been outstanding, that there are some public merit and some long range value in achieving a rational allocation of land resources, a merit and a value which may help us avoid substantial socialization at a later date. If we can meet this dilemma we will indeed be wiser than our predecessors.

REPRESENTING THE LAND DEVELOPER: STEP BY STEP TECHNIQUES

John W. Delehant, Jr.

I do not intend to compete here with Dean Smith. His paper was scholarly and eloquently delivered, incontestable, he says, even in part, and it was well buttressed with legal precedents and legal philosophy.

My remarks will be informal, they will be easily and readily contested, later, by you. In effect, they will be the ramblings of a lawyer without precedence. I will assume the usual posture, I might say, of the practicing lawyer, full of ideas and theories but utterly devoid of authority to back him up.

On this question of the debate, I'll tell you how clever this Dean Smith is: I didn't know it was going to be a debate—it really won't be—but he waited until my outline was prepared, submitted, and *printed,* if you will; then he submitted his! However, being on the local scene I have arranged one important detail: I have arranged that he will have no rebuttal time whatever, so it will be even.

The origin of the law business and land development, as with many areas, lies in governmental regulation and in legislation. Years ago, as the outline indicates and as I know only from reading, not from experience, there were no land development problems here in Nebraska, I am sure. The farmer or rancher went out, picked a suitable parcel, cleared it, built a cabin or home, dug his well, fenced his land, and then he had everything. He had his home, he had his lot, he had his park—it was the great outdoors—he had his own approved water supply system, his own sanitary system—it might not have been much but it worked—and he had no development or land problems.

But now the same man in Nebraska can't go out and pick a lot to build his home on until he goes to a nearby zoning or planning board and finds out if they will let him do it. He can't provide his water supply until he checks with the local or state health department. He can't even build a privy without the same checking. He can't build his house without getting his permit from a governmental body, and then he finds he is not competent to design or construct it because of conflicting codes much too complicated to even discuss here. And all of this governmental regulation lies in legislation, basically.

You might be surprised to learn how much legislation we have on the subject in a farm state like Nebraska. In the outline you will see five different categories of governmental regulations authorized by the Legislature, the first being for villages and second class cities.

Now a village, gentlemen, is defined as a municipality with 100 inhabitants at least, and I think you would be interested in knowing that an 80-acre village in Nebraska of 100 people or 200 people has authority over 1,000 acres of surrounding land because they have one-half mile jurisdiction. I think that is quite ample regulatory authority; in fact, I think it borders on the absurd that an 80-acre village of 100 people or so would have life and death regulatory power over 1,000 surrounding acres.

Going up into the first class cities, 5,000 or so, let's assume that a two-square mile city, which would be fair size, exercises its jurisdiction over the one mile area that the Legislature gives it. That two-square-mile city controls ten square miles of land, or 6,400 acres of adjoining land, a tremendous regulatory control that has been authorized by our Legislature.

A metropolitan city, Omaha, namely, has a three-mile jurisdiction, and suggested now is a ten-mile jurisdiction. I haven't had the time to try to square out to see how many tens of thousands of acres that would encompass.

In addition to this, all counties in Nebraska have the same type of zoning, platting, and construction authority over the entire county, except where municipalities have jurisdiction. So, in a nutshell, Nebraska, a farm state, is one hundred per cent regulated. There isn't an area in Nebraska today where you can plat your homestead out and build a house without going in for governmental approval, if the governmental body wishes to exercise its authority.

I remarked in my outline that there have been legislative abuses. I pointed out one in the outline. That is the approval in 1959 by the Legislature giving primary cities the authority to require donations of land by developers for public purposes. The statutory

authority is not limited just to parks and schools; the statutory language is "require dedication of land for public purposes," which is as broad as it could be.

States other than Nebraska have had the opportunity to declare such legislative abuses unconstitutional. I have cited the Illinois cases. I did not mean to imply that the Michigan case was upon the same ground; the Illinois cases, however, were.

Dean Smith suggests, I believe, that a *little* taking of land for public authority and use without compensation might be all right. Well, I think that that is like saying a little bit of unconstitutionality might be all right; or the old famous saying that a party is a little bit pregnant. It just can't happen. It is a fine line; in fact a distinction without a difference, in my opinion. When you read the Constitution which says that private property cannot be taken for public use without just compensation, and then see that the statute says that a city may require the dedication of land for public purposes, I cannot see anything but an irreconcilable conflict.

At any rate the answer is fair legislation and then fair exercise of that legislative power by the cities and the planning boards throughout the state and by the county boards and counties.

Dean Smith asked, on this question of the requirement of dedication: What is the difference between the authority of a planning board or a city to require the dedication of a street, on the one hand, and the authority of a city or a planning board or a county board on the other hand to require the dedication of a site for a school or a site for a park—or you could go on and stretch it—a site for a swimming club, a site for a museum, a site for any public purpose, maybe a hydro-electric station, who knows?

Well, I think the difference lies in a practical view of the problem. In the first place, the developer asking for the approval of a plat is asking to dedicate a street; it isn't a question of his being forced to dedicate a street, it is a question of his asking approval of the street that he proposes to dedicate. Now, why does he do that? He does that because the street is an essential element of a building lot. You can't get to your home on a building lot unless you have a street, and in order to make one piece of ground into one hundred building lots he asks for *permission* to dedicate a public street, and the sovereign says "Yes, you may dedicate that to us and we will accept it if you will make it line up with the rest of our streets so we don't have to build interceptors and cloverleafs to get to you, and if you make it wide enough so it can be used for the public."

Those are items of legitimate police power control, I believe, because the street in front of this house bears a direct relation to the health and welfare of this lot. It must be open for travel, it must

be open for safety to this lot, for fire protection, ambulance to this lot that the developer is seeking to lay out.

Well, that is a considerable difference from the request as sometimes made for the developer to dedicate a school site or a public park or a museum site, none of which is essential, as such, to the lot, and all of which are generally used by the public at large and not by the owner of any specific lot.

Just as an example, who is to say that the owners of lots in a proposed subdivision are going to have children to go to the school or not. That is a problem for the entire taxing district, namely the city or the school board.

The basic problem that developers face is one of costs. If municipalities insist upon requiring more and more dedications and donations, they must pass this price increase on to the purchaser, and if the price of new housing becomes so high that the average man on the street can't buy any, he is going to have to crowd back into the slums and the old rental areas in the cities more and more and more, and your new housing must die. I think it is an unfair burden in these fringe areas to expect that the fringe area outside the city will donate land and pay the cost for public improvements, like schools, pay all that themselves, then be annexed tomorrow or the next year and be subjected once again to taxation for the benefit of the whole city for schools and parks. I say that the cities have power to condemn land for schools and parks, have power to spread the tax burden over their entire municipality, and that is what they should do.

Regulations must be realistic also as to lot size. The four and one-half acre case I am familiar with back East. I talked with the developer on it. That was merely a case where a town board back East decided that everybody in their area was going to live in a house of $35,000 or $40,000. There was going to be no room for average people in that area. So notwithstanding the fact that the land layout was ample, that the sanitary facilities were proper, that the traffic area was well laid out, they decided that this was no area for other than the elite, and of course they were unsuccessful.

As another element of undue regulation, improper regulation, we often run into the problem of other governmental bodies saying, "We do not want development because development will bring school problems, will bring traffic problems, will bring other governmental problems." My suggestion then is that if school boards actually feel that way they should resign because they aren't doing their duty. Their duty is to educate children within their district. I think the one thing we must keep in mind is that I don't know

of a developer yet who causes children. Children are caused by some other well known means. The developer only provides a home for them, that's all; he doesn't bring one child more into the world; all he does is provide a roof for him.

Now to the bread-and-butter of the law business aspect of this problem. The first step in land development, generally, if you are representing the developer, is to get the land bought from the farmer. Nine times out of ten it is the farmer who owns it and it's the developer who wants to buy it. In the first place the developer usually wants to buy on terms because he doesn't have enough cash to go out and pay cash to the farmer direct at the high price that is usually paid.

In Douglas County if you can find one farm land for less than $2,500 per acre in a near-in state—by near-in I mean five miles out—you are getting a good buy. So the cost of land has become very, very great. Generally installment terms must be arranged. From the farmer's standpoint he is usually confronted with a 95 per cent capital gains position; his cost is probably $100 an acre and he is selling for $2,500 an acre, so terms are good for him, too, under the income tax laws. So the general type of contract is an installment sale contract with no more than 30 per cent in the year of closing, and with restrictive prepayment rights in the year of closing.

The form that is attached to your outline provides for prepayment after January 1, 1959, I believe. That means that that contract was drawn for closing some time during the year 1958, because if you would permit prepayment during the year of closing, then one dollar over the 30 per cent would subject the farmer to a tax on maybe a quarter of a million dollars when he only had 31 per cent of the purchase price. He couldn't pay his tax. So if you are representing the farmer you have to take that into consideration.

From the developer's standpoint he generally wants a contract which provides for a deed upon payment of 30 per cent and then a mortgage back to the farmer. It is much less complicated on these contracts which are going to run three or four years, and when lot releases are needed, to procure a lot release from an executor in case the farmer should die rather than to go to his heirs for deeds. Also there is no problem on liens against the farmer in case he incurs some.

Perhaps the most important provision in a land purchase agreement from a farmer for development is the partial release clause. The developer desires upon payment of, say, $2,500 an acre, an equivalent sum per lot to secure from time to time a

release to this or that lot upon payment of that *pro rata* share. That enables the developer to pick up the land as he needs it.

Generally if you pay 30 per cent down on a $2,500 per acre parcel you usually leave the 30 per cent as permanent equity for the seller and then the partial release price is still $2,500 an acre so that the 30 per cent remains as permanent equity during the life of the contract.

It is essential in every contract to put in escape clauses for a reasonable period of time, three or four months, so the buyer will not have to go through with the contract in case he fails to get the necessary governmental approval of the land for platting, for FHA and VA approval, for zoning, and the necessary approval from public utilities for sewers, water, and usually gas. That is, of course, essential in any contract.

Now that the interstate is coming into so many areas, it is important to make certain in your contract that you have free and unlimited access to all of the ground because here is no way, without checking down at the State Highway Department, to find out whether an area actually has free access or has total limited access. The form attached to the outline does not have the free access clause because it was prepared some years ago, before we had too much activity on limited access.

Another important provision in the contract is to require the seller, as the holder of the mortgage, to execute any and all plats submitted by the buyer, the reason for that being that a plat will not be accepted by a municipality unless the dedication of streets is free and clear of liens. Therefore the mortgage must be released and it is, of course, to the advantage of the developer to provide for a gratuitous release of these streets rather than one for which he would have to pay consideration.

Of great importance dollar-wise, if you are buying on a per acre price, is to exclude abutting roads from the acreage computations. On an average $2,500 per acre purchase on a 160-acre parcel, if you exclude roads at that price you are saving your developer exactly $10,000, a little bit more $10,000, so just a few words will save your client $10,000.

In areas where you feel or know that condemnation is imminent for highway or other purposes, I think it is advisable to give to the developer the sole right to negotiate, because it is a proven fact that a developer can secure considerably higher damage awards for development land than the farmer can for mere farm land.

Then as one last type of contract, one that provides some interesting possibilities, the last form in your outline provides what

I call an option type contract for purchase of land. It is a continuing option usually for four or five years, based upon a dollar per acre per month. It also boils down eventually at closing into an installment sale. In a typical 160-acre parcel for $160.00 per month for five years, the developer can tie up a considerable amount of land if he can get the seller to go for it. It is something you might keep in mind.

Then after you have bought the land your next immediate problem is to get the land zoned and the plat approved. Primarily it is one for the engineers but the attorney enters into it, and should enter into it, to sell the objecting neighbors or the objecting businessmen on the desirability of a plat, and to sell the planning board and the city council on the desirability of the plat. There is no hard and fast rule on what to follow except that if you can anticipate the development of problems you can save yourself many hours of grief before an administrative board. If you can solve your problems with the State Highway Department on access, with the local school board on school sites, with the local park board on park sites by selling or optioning them sites, and the neighbors on objections, you can save yourself much trouble.

There is one thing to remember, that you almost have to win on the approval of a plat before the planning board and the city council. Court appeals from denials are almost impossible, because basically when a plat is denied with no grounds stated, you have to prove that the action of the board was arbitrary, and you would be surprised how many nonarbitrary reasons a board or a city can come up with between the time they denied the plat without approval and the time you get to court. So the only way to hope for a successful appeal, in my opinion, would be to nail the administrative body down by a court reporter and a record on the grounds of the denial; in other words, what are the grounds? "Because you won't dedicate parks." Fine! Then you can go to court.

All right. Now we have our plat approved, and we have closed now with the farmer because our plat has been approved and the conditions have all been fulfilled. We now have to finance the improvement costs; by that I mean sewer, water, gas, paving, street lights. The cost of improvements are most important. Just as a rule of thumb, a $3,000 per acre farm platted into lots will produce an average land cost of about $10.00 a running foot. For a 60-foot lot your raw land costs about $600. You can translate this on down to any price per acre. But the cost of improvements on that same lot are about two and one-half times that, about $25.00 a foot, actually. This may sound high but the actual rule of thumb

on development cost is that for every foot of paving, once you take into consideration side streets and intersection costs, that becomes really at least one and one-half feet to get it in front of a 60-foot lot. So if your costs are actually $15.00 per lineal foot, the front foot cost becomes $22.50. So the financing of lot improvements is a real problem.

The first, and many years ago the only, method was by private contract where the developer would go out, have the contractor put in sewer, water, gas, and paving; pay him cash; and then hope to get the money out of lot sales. The full cost is borne by the developer even though he has to construct facilities outside the subdivision under this plan, such as sewer plants, or boulevards outside the subdivision, or outfall sewers, or extra costs, say, for the running of utilities in, and he has no way of collecting those costs from future users of them.

Nebraska, however, has passed three separate improvement district acts for land outside villages and cities. One is the first one cited in the outline and is good only for sewer construction. That is what we call the election method, and under that where you have a large group of owners whom you can't hope to get to sign a petition, you can get a small percentage of them to petition the county board for the formation of one of these districts and the county board will order an election; then you have an election and the majority of those voting can create a district for you, and you are in business.

The next one is a road improvement district which is very similar to the sanitary district, with the election method. It has only road powers. It is not used too often now.

The last one, the third one, is the sanitary and improvement district under the court decree method. That has been used very much. It has all types of powers—power to install sanitary sewers, sanitary treatment plants, storm sewers, roads, street lights, water mains. About the only power it doesn't have is the authority to install a gas main. I have attached to this outline all the forms you need in order to form one of these districts. They are very simple. They are only six pages long: A petition of two pages to be signed by all the land owners—and generally you are dealing only with the developer so it is very simple to have him sign it; articles of association, which are just copied almost verbatim from the statute, also to be signed by all the land owners; and then a court decree.

All you have to do is have the petition and the articles signed by your developer and also by the five trustees whom you are going to nominate, take your petition and your articles down to the

clerk of the district court, ask him to file them, and then walk up to the judge and say, "Judge, please sign the decree."

It is a wholly ex parte matter; no summons need be issued because you have included the owners of all the real estate in the district and there is no one who can have an interest who needs to be brought before the court. So you can get all this done if you want to, I would say, in an hour or an hour and one-half. It is nothing complicated.

Once you have spent that hour or hour and one-half to two hours, you then have a vehicle which can put in all the improvements, issue tax-free bonds of all types, tax-free warrants, has the power of condemnation and has the power of taxation.

You oftentimes might run into the question in which a developer would like to develop an area but he can't get an easement across someone's land for sewer purposes, say. Form a district and condemn your way across. It is very simple.

You nominate the five trustees of your district and naturally you nominate your own group so that you won't have any outside interference during the period of development. You qualify them, since they must be land owners merely by deeding them a parcel of ground, and then you have to have them each file a $500 bond, and you are in business.

The only difficulty, if you would want to call it that, in the improvement district method is that you have to plan a little bit ahead of time. You can't just go out after you form a district and start putting paving in the next day. You must go through the legal machinery of advertising the resolution of necessity, then having your board pass it, then advertising for three weeks for bids, then letting the contract to the best bidder, and then you are in business, five or six weeks delay at the maximum. You keep minutes of these proceedings just like you do corporate minutes.

The improvement district offers these eight or nine advantages: You can't borrow money from a bank for land development for love nor money; however, improvement districts issue warrants and bonds which are tax free, and they draw generally the maximum rate of six per cent. Since they are income tax free you can secure money from investors. It is really quite simple to secure money from underwriters and brokers through the bond and warrant method, so rather than a developer having to come up with capital of $25.00 a foot he can in effect find that capital through the district method by having the district issue warrants and have them marketed.

Even if he cannot find an investor, the developer can buy

warrants himself, which is no worse than having to pay the contract price. Then when he has finished the development and the houses are built and the bonds are good, he can sell the bonds at a profit and obviously make a profit he never would have made in any other way.

The improvements are paid for by warrants which, in turn, are purchased, as I say, by either the developer or the underwriter. After the improvements are in, the warrants are cashed out by the issuance of bonds which are approved by the district court. In general your improvements in a district are apportioned about the same as in a city.

In a city, and in a district, about two-thirds to three-fourths of the improvements will go as special assessments, which means the developer has to pay them. About one-third or one-fourth will go as general obligation, which means that the district as a whole will be taxed over the next twenty or thirty years to pay those bonds, and that portion of general obligation is usually for such things of general benefit as disposal plants, outfall sewer lines, extra large boulevards, intersections, some side streets, etc.

What this means is that, as opposed to the private contract method where the developer can recover nothing, the developer will have an additional profit of from one-third to one-fourth of the total cost of improvements that he could get in no other way.

So if you learn nothing else from this discussion this morning, if you can go back to your developer clients, or to the clients who might like to be developers and tell them, "I've got a way where you can make twenty to thirty per cent more than you can any other way," I think your time will have been well spent.

Nebraska is fortunate, I think, in having this law. It is a very flexible law. Most states don't have them. I think you should use it and become familiar with it. Many lawyers shy away from the idea of getting entangled in municipal financing, and that is really what this is, but I know of no field where the law is more certain. Basically what you do is get the statute out and copy it word for word. If you follow it with proper research and proper attention to detail it is not a difficult thing. Certainly it is a lot less difficult and a lot more certain than having to advise someone on the contestability of a will or whether or not the other party was negligent in an accident case. You have no certainty whatever there.

In addition, within the cities themselves you have the vehicle of municipal improvement districts where the city can provide the funds for the development costs. The only objection there is that often cities are so underfinanced in their revolving funds

that you have to wait six months or a year for your improvements, where your developer needs them right away.

You have now got your area developed and you are ready to sell lots or houses. We have attached here two forms of agreement; one for lot sale and one for house purchase. That will be house purchase of new construction. I am not trying to encroach upon Bob Petersen's address yesterday. This is strictly for new construction. The only things to watch which are particularly different from other transactions are these points: For new construction of houses, every contract must have the FHA valuation clause if you are selling FHA, as contained in the form. You should have an assignment of mortgage funds clause in a new construction contract because your average buyer is only paying $1,000 or less of his own money down and the balance is to be paid from a mortgage lender. Rather than have to go back to the buyer every five minutes or every week for a pay-out order, you should have an assignment of mortgage fund clause.

If your property is being developed by the improvement district method you must be safe and put in a clause reciting that fact, so that the purchaser is not misled into thinking there will be no general obligation tax. You must tell him in the contract, and later in the deed, that the property will be subject to sanitary improvement district No. 10 subsequent levies and charges.

In addition, I have supplied here a deed form with only one purpose in mind, not to tell you how to draw a deed but to suggest the language for the reference to the sanitary and improvement district situation, and also perhaps suggest the idea that you could be rendering a real service to your developer to prepare for him a printed or mimeographed form of deed for each subdivision, where he can't make any mistakes. On this particular form all you have to fill in is the lot number, the name of the buyer, and you have to date it. It is pretty difficult for him to get the wrong buyer on the right lot on the wrong date. Some of them can do it, however.

Then we are ready for the last item in the lawyer's work on a subdivision. It is really done concurrently with the previous one, and that is the preparation of the restrictive covenants which are generally recorded just before you are beginning to open your selling program.

I suggest that you should make them for a specified period of years and then let them lapse. Many covenants provide that they will go on until 1985 and then they will be renewed from year to year until 80 per cent of the owners agree to a change. I think that is very unwise because times change very rapidly. After

25 years, land that you have restricted to be residential might necessarily be commercial in nature, and yet you have bound them up almost perpetually here because I don't think you could get 80 per cent of the people to agree on anything, let alone a change in zoning.

You should have the restrictive period of the covenant at least equal with prevalent mortgage terms. If the prevalent mortgage term is 25 years, you ought to have your covenant run, say, 27 or 28 years so that the last mortgage going on would be protected by the covenant, otherwise your lenders will require supplemental covenants before they will make their mortgage if the period isn't long enough.

Make certain that your uses are broad enough so that you won't want to later change them, because once your covenants are of record and you have sold 50 or 100 properties, it is impossible to change them unless you get the 50 or 100 people to agree on the change, and once again you know that would probably be impossible.

On side yard restrictions in lot areas I would generally recommend that you put in an escape clause to provide that the covenant shall be amended automatically if a local municipality or planning or field board permits a lesser side yard, a lesser lot area, or a lesser front yard. This I found to be a wise provision because it is almost impossible to plan every lot in a large subdivision perfectly, and many times you will find lots are unbuildable under the restrictions.

In the form attached, I attached this because it contains about every possible provision that I have run into, and that particular subdivision was quite highly restricted; however it does not have the clause on the appeal board or planning board escape route because that particular land was not within the jurisdiction of any municipality. Instead, in that particular one, there has been inserted a reservation to the developer of the right to waive the covenants in cases of unnecessary hardship.

Just one word of caution, as with all forms they are not much good except to give you some ideas. The sanitary district forms are excepted. Those I think you can rely upon to use word for word, just filling in the blanks.

In conclusion, I would want to get back to Dean Smith and agree that we should recognize our duty as citizens, as well as our duty as lawyers to our client, but it has been my experience that the main danger in this business of land development isn't that the public is going to be hurt, but the main danger has been one of over-regulation rather than under-regulation. You have got to remember that cities are quite well staffed. There is a natural

tendency in cities, villages, and all government forms, I believe, to grow rather than to get smaller. I think there is a natural tendency in all municipalities and governments to over-regulate rather than under-regulate.

The cost of all this regulation is not going to be borne by the developer. Some boards seem to think that all they have to do is require the developer to donate a park and that somehow that cost has been absorbed, that there is no cost. Well, that is a fantasy. That cost has to be paid by the consumer, by the homeowner.

Basically I think the law of supply and demand will determine whether a developer is doing a good job or a bad job. A developer who puts out an ill-conceived, ill-planned, improperly-engineered subdivision with poor houses is going to go broke. He is not going to sell the houses. A developer that does succeed is one who, without governmental regulations, must by reason of the law of supply and demand and competition put out a good house in a well-engineered subdivision with proper lot sizes as the market demands. I think we have to remember that there must be a market for every type of house. We can't all, as I said, live in castles.

One last thought: Over-regulation costs money, and there has been no legislature yet that has been able to devise a system whereby some fairy godmother or angel can pick up the tab for the cost of this over-regulation. The consumer has to pay it.

AN EXPLANATION OF TITLE INSURANCE

Frank K. Haley

Now, in the next 25 minutes or so, I would like to discuss some definitive aspects of title insurance with special emphasis on those matters which may be of interest to you as lawyers. I shall discuss also the growth and development of title insurance and the part which lawyers play in a developed title insurance market. All of you have some knowledge of it, I am sure, for it has been available in Nebraska for a number of years, even though it has not been extensively used here yet.

But the use of title insurance in Nebraska and in surrounding areas will increase greatly in the future. As population and business activity grow—as they surely will at a substantial rate—abstracts of title will become a part of the title insuring procedure and policies of title insurance will gradually become the dominant form of title evidence used in real estate transactions.

Because of its growing importance which might well lead to questions about it from your clients, I would like to acquaint you with the more important aspects of title insurance, with emphasis on the part that lawyers perform in the use of title insurance, and how it can fit into your practices. If I stimulate your interest to the point that you will want to know more about title insurance, then I shall have done this properly.

First, let's clarify a misunderstanding of title insurance. It is not casualty insurance.

By that I mean the title insurance business is not based solely on loss experience or calculations of risk as is fire or accident insurance. The best comparison of it I have ever heard is that it is like boiler insurance. As you will recall, companies that insure against loss from boiler explosion perform their greatest service to the insured by their strict periodic inspection of boilers. Any obvious or incipient defects found by the insurance inspector—and he is specially trained for the job—are called to the owner's attention. Repairs or replacements to reduce the danger must be made before the insurer assumes liability.

Title insurance companies likewise issue policies only after a highly qualified lawyer thoroughly reviews each title situation. So far as I know, no corporation has ever been reckless enough to try to go into the title insurance business on a casualty basis.

There are a number of sound reasons why this is so. In the first place it would be too hazardous. Secondly, the big life insurance companies and other volume mortgage lenders are among the principal customers of title insurance companies. And they would, I am sure, unanimously reject such an approach. So would most lawyers.

Mortgage lenders and purchasers of real estate are primarily interested in knowing that their titles are technically sound. The life insurance companies operate under domiciliary state statutes which make soundness of title a prerequisite to every mortgage loan. They maintain substantial staffs of lawyers who make certain that the evidences of title they get conform to their home-state statutes and demonstrate a title of satisfactory quality. Should any defect of title prime the first lien of their mortgage, they are in violation of their statutory powers. Consequently, the *loss payment aspects* of a title insurance contract are of *secondary importance* to prime investors. Provisions in a title policy for payment of money in event of a title loss offer a *safety factor* which is highly desirable, but which, at most, is definitely secondary to the quality of the title—and *secondary to the duty of the title insurer to defend* the title as insured.

Therefore, the emphasis in title insurance is placed upon the elimination of loss with previous careful examination of title by a skilled real estate lawyer to determine the curative measures as are necessary to prevent losses rather than upon the payment of losses after they have occurred.

Theoretically there ought not to be many record losses under title insurance policies. If the examination of the history of the title in each instance has been done by a lawyer skilled in real estate law—and if his examination was based on records accurately compiled—and if the defects he discovers have been cured before the policy issues—the major causes of record losses will have been eliminated.

But as a practical matter there are always losses—some of them very substantial in amount. They arise from a great many sources, and passage of time is often slight protection against their occurrence. Common ones arise from such things as human errors, errors and omissions in the public records. In addition, title insurance protects against off-record risks such as undisclosed heirs, fraud and forgery. These off-record risks are responsible for nearly 40 per cent of all losses to title insurance companies. Under the abstract system there is no protection for people in real estate transactions and their attorneys. To prevent losses, the title company with which I am associated has worked out a carefully planned system of title indexes and records. It employs well qualified lawyers to examine titles. Nevertheless, we must have several lawyers who are occupied in the investigation and defense of claims under the policies we or our agents have issued. In addition to them we retain outside counsel to assist in defending in court.

I do not recall any year in which we have not expended thousands of dollars in the disproving or payment of claims. And in our history there have been cases where we paid out hundreds of thousands of dollars to protect the insured's title. I am citing the experience of only one company. So you see, there are risks that remain, even after a careful title search.

As lawyers you will appreciate why title insurance companies defend with extra vigor claims that are fraudulent—even to the extent, sometimes, of spending more than the face amount of the policy. They do not wish that sort of claim to become a popular pastime in the community.

Now to another important distinction of title insurance from other forms of insurance. The payment of money to the insured by the company is rare—preservation of the insured's ownership comes first. This is so because those who get title insurance policies are interested primarily in three things: one, the undisturbed en-

joyment of their property; two, unquestioned ability to convey their interest in it; and three, having a prospective purchaser accept the evidence of title as entirely adequate.

Thus when a claim arises under the protection of a title insurance policy the insured looks to the title insurance company for the investigation, defense, and the settling or disproving of that claim. The insured is put to no expense. His possession of the property is not interrupted. The same benefits accrue to the mortgagee named in a mortgage title insurance policy.

Sometimes, in spite of the defense of title, a claimant establishes that he is the owner rather than the insured. If this claimant refuses the payment offered by the title company as consideration for a deed to the insured, then the company pays the amount due under the policy to the insured. But nearly always the title company and its lawyers work out some solution that leaves the insured in possession and with clear title.

Another feature of title insurance—distinctive but often overlooked—is that it is paid for by a single premium at time of issuance even though the protection continues as long as the insured has an interest in the property. In the St. Louis area, it is usual for the buyer to pay the costs of title evidence, but this is not the usual custom over the country. Because Chicago is much more representative, I shall use it as an example.

It is customary in the Chicago area for the seller of real estate to pay nearly all the cost of the title insurance in a transaction. The usual form of sales contract there provides that the seller will deliver to the buyer a title insurance policy of the Chicago Title and Trust Company, or its preliminary report on title, within 20 days from the date of the contract. It further provides that the seller will pay for this with coverage equal to the sale price, and that the report or policy will be subject only to those matters affecting title as are specifically agreed to in the sale contract.

The seller's attorney orders the title report from the title company and attends to any curative matters necessary. The deal is usually closed on the basis of the preliminary report because the title company is obligated to issue its policy under the terms of the report. After the deed is recorded, the buyer's attorney orders the company to continue its searches to cover the deed and to issue the policy insuring the buyer in his title. The buyer pays for this continuation—known in Chicago as a "laterdate." Typically this costs him about $15.

Because the title policy is dated on or after the day the deed to him was recorded, the policy protects the buyer against defects or adverse claims arising from the history of the title up to that

day. Of course, it does not protect him from actions he or those claiming under him may make to affect the title thereafter.

Perhaps this is a good time to mention two other things that title insurance does *not* do, and to explain why it does not.

Most owners' title insurance policies do not insure against rights of parties in possession and questions of survey. That is so because in most cases the buyer prefers to inspect the premises and satisfy himself as to such matters. The buyer often requires the seller to provide a survey of the property or to share the cost of a new survey.

If the title company were to insure the owner against loss from such matters, it would in each case have to send an employee to visit the premises to interview the occupants to see what interest they claim and to measure the boundaries of the land. This would increase the title charges to the owner.

Sometimes the mortgage lender wants the title insurance to cover such matters, so that inspection and measurement of the premises is made by the title company. The mortgagee pays extra for this service, although the cost is usually passed on to the borrower.

It is also universal for title insurance to except loss of title through the exercise of governmental powers such as police, bankruptcy or eminent domain powers. To insure against such matters would be in the nature of casualty insurance or worse. Who, for example, can look into the crystal ball and foresee that any particular parcel of property will never be condemned for use as a highway?

Turning now from the definitive aspects of title insurance to speak of the growth and development—title insurance has already become the predominant form of title evidence in some parts of the United States. It is used almost exclusively now in California, Oregon and Washington. Elsewhere it has developed to a high degree of use only in big cities and their metropolitan areas. Its growth since World War II has been phenomenal.

Because title evidencing in the St. Louis area embraces some unusual customers, I would like to use Cook County, Illinois, as a more representative area to illustrate the development of title insurance. About 40 years ago in the Chicago area, abstracts of title examined by individual lawyers were the usual mode of title evidence. A substantial part of many lawyers' earnings were from fees for examining abstracts. Many of them could see only the loss of this revenue if title insurance gained a foothold.

Other lawyers realized that title insurance was superior to

abstracts and individual opinions, but they resisted it because they thought it would eliminate lawyers from real estate transactions entirely.

None of these fears was ever realized to any appreciable degree. Today lawyers are the largest single customer group of the title company there and almost without exception they are thankful the services are available.

This change in attitude did not occur overnight. Title insurance was introduced in Illinois in 1888 by the Chicago Title and Trust Company. Yet at the turn of the century, abstracts were still used much more than title insurance. It was not until 1922 that orders for title policies equalled orders for abstracts.

Since then the use of title policies steadily increased until now abstracts of title are being used in only one or two percent of real estate transactions.

In downstate Illinois and in outstate Missouri, abstracts of title are still examined by individual lawyers. But the abstracts are steadily losing ground to title policies in these areas also.

Now the important question to you is, how have the lawyers fared where title insurance is used? Well, in Chicago and in St. Louis lawyers are still very much a part of real estate transactions, and they are paid better for it than are lawyers who still examine abstracts.

Of course legal fees in general are higher in a large city than in rural or small towns. But even allowing for that the lawyers using title insurance are better off.

Let me enumerate the duties of a St. Louis or Chicago lawyer representing the seller of real estate:

1. Drafting the sales contract and supervising its execution.
2. Preparing the deed of conveyance and advising the client about its execution and delivery.
3. Ordering and examining the preliminary report of the title insurance company.
4. Receiving the preliminary report of title and taking any needed steps to cure the disclosed defects or liens.
5. Advising his client as to:
    a. Status of title
    b. Zoning ordinances
    c. Restrictions
    d. Rights beyond property lines
    e. Encroachments
    f. Rights of parties

6. Attending the closing meeting with his client.

The lawyer for the buyer has the following duties:

1. Determining, before the purchase price is paid, that all the terms of the contract have been complied with.
2. Determining that no liens or other matters have affected the title between the date of the preliminary report of title and the day of the closing.
3. Figuring or checking the prorations between the seller and buyer.
4. Attending to the prompt recording of the deed.
5. Ordering the title insurance company to continue its searches to cover recording of the deed and to issue its policy in the name of the buyer.
6. Receiving the title policy from the title company and checking it for correctness in relation to his client's interests.

At this point you might ask, what prevents the sellers and buyers from dealing directly with the title company?

Well, from time to time some of them do. And we in the title insurance business don't like it and we always advise such persons to retain legal counsel. From our standpoint laymen are terrible time wasters. They don't understand real estate law. They expect some officer of the title company to devote a lot of time explaining things. Since we do not charge by the hour, it's a losing proposition.

Fortunately, most laymen who try this give up in the middle of their efforts and consult the lawyer they should have gone to in the first place. This almost inevitably happens when the layman discovers that the title company will not draft deeds or other legal documents for him.

Sometimes real estate brokers handle a real estate transaction without any lawyer taking part. If so, their dealing with the title company is the least offensive step from the lawyer's view. It is their drafting of contracts and deeds that is serious from your standpoint. We feel that this is something that bar associations and real estate boards must work out between themselves.

Now to consider your practice here in Nebraska: I do not see why title insurance should prove any less satisfactory to you than it has to lawyers in the Chicago and St. Louis metropolitan areas.

Another method of underwriting title risks which very much involves the lawyer, is the approved attorney system. The method begins with the appointment of competent examining attorneys in a given area. From the opinions of these lawyers, the title insurance company or its local agent writes its policy. Under this

widely used system, the lawyer remains an integral party to the transaction.

First, let me mangle an old Latin maxim to the point of saying: "Abstractus longus, vita brevis," or, "abstracts are long and life is short." It is inevitable, as time goes on, that the history of title to each parcel of land in Nebraska will get longer and more complicated. How profitable will it be for a lawyer to review completely the history of title each time a sale or mortgage transaction occurs?

By the way of contrast, a title insurer never reviews the chain of title any farther back than the date of the prior title insurance policy. So promptness of title service makes it appealing to all concerned.

The lawyer who recommends title insurance to his client does both the client and himself a favor. Suppose, for example, that the lawyer's personal opinion of title is used and later a loss develops from one of the hidden title risks such as from forgery or from a dower right undisclosed of record. Certainly no goodwill is gained by the lawyer's explaining that he is not responsible because he was not negligent, and that the buyer (or the seller, under his warranty) must bear the expense of defending the claim or of paying off the claimant.

These things do not happen often, but it is like fire insurance. We don't expect our buildings to burn, nor do we see it happen often to others, but nearly all of us carry adequate fire insurance. When the loss—fire or title—happens, it is best to have a financially sound corporation obligated to make good.

Personally, I think it is the duty of a lawyer to explain fairly the features of title insurance to a buyer or mortgage lender. Otherwise the lawyer could be said to be withholding knowledge of a possible form of protection—a protection greater than any individual could assure. In addition, policies covering mortgage leases are less expensive to store than abstracts.

My final point concerns the benefit to a community in general which use of title insurance affords.

Because it is rapidly becoming the universally acceptable form of title evidence, it makes real estate more marketable. It also makes mortgage financing more readily obtainable. Frequently these days local sources of mortgage money are not adequate for extensive homebuilding or commercial building projects. The best source of financing such improvements may be the life insurance companies or other large financial institutions in the East or West Coast areas. Whether they loan the funds directly, or agree to

purchase mortgages from a local bank or mortgage broker, they prefer mortgage title insurance. It helps to make the mortgages acceptable.

Similarly, chain stores and other nationwide owners of real estate more and more are insisting upon title insurance. Their help in the growth of the local communities, as you know, is an established thing.

Although much is left unsaid, I hope that you have a slightly better understanding of title insurance. It is indeed an honor to address your distinguished group.

TITLE EXAMINER'S CHECK LIST

Herman Ginsburg

I want to say that everything I know is in this printed outline so I won't blame any of you if you walk out now because I don't know anything more than is already written out here. Really, I feel very bad about it because I can't talk; I am exhausted. So I am going to skip around and just talk outside this outline because I have nothing to add to the outline itself.

I may say, parenthetically, that this outline is what I use with my boys in my law school class, and if it is too elementary for you gentlemen, you'll forgive me; I just didn't have time to do any better.

So I am going to ramble around pretty much, and those of you who are interested can look through this outline at your leisure and find out how many errors I've got in it; those of you who are not interested can simply throw it away.

I suppose it is foolish for me to talk about what an abstract is. You all know what this physical thing is, this abstract. It is just what the name implies, a synopsis of the title. It is to help us. Instead of going down to the records themselves, we have the abstracter, a skilled practitioner in his field, prepare the instrument for us.

The thing we oftentimes lose sight of and the thing that I want to call to your attention is the fact that the abstract is used for more than one purpose. It is not only the history of the title itself; it is not only the history of the chain of the title itself; but the physical abstract itself has a very important place, and that is something that we many times overlook. The abstract itself, as you know if you have checked into the statutes in the cases, can be used to prove your title—the very instrument itself if it complies with the statutory requirements. If the abstract has been com-

piled in all its parts by a bonded abstracter, you can use that abstract to prove your title instead of having to get the original records or calling the register of deeds to supply the records, or whatever the case may be. So it is of extreme importance.

I can only talk about my own experience. In Lincoln, Nebraska, we had in the early days a man by the name of T. H. Hatch who was a very good title man. He never bothered to get a bond. I don't know, maybe he wasn't financially able to get a bond. The fact nevertheless remains that in especially the older abstracts you will find numerous parts prepared by T. H. Hatch, and I have yet to find anything prepared by T. H. Hatch that wasn't correct. But the fact is nevertheless that here you have an abstract complete, certified by T. H. Hatch, but you can't use it because T. H. Hatch was not a bonded abstracter and therefore the abstract can't be usable as evidence of your title.

Also, interestingly enough, we had another very fine abstracter in Lincoln who furnished an abstract that had printed on it "Abstracter's bond in the sum of $10,000 on file with the county judge." Actually during the depressions of the '80s he didn't have such a bond on file for a period of years. The abstracts compiled by him and certified by him during the time that he was not a bonded abstracter are not usable.

So I want to point out to you that it is more than merely watching the chain of the title itself. You want to watch the abstracter; you want to see that the abstract will fulfill both purposes. It isn't going to take the place of title insurance by any manner of means. The purchaser when he buys that property, the man you are examining that abstract for, wants to know two things: He wants to know first, Is there a merchantable chain of title? and second, Can I prove it? And he can prove it if he has the proper abstract.

What is the liability of the attorney? I tell my boys in the law school class that you are not a guarantor of the title when you examine the title. You are simply to give your opinion. If there is anybody going to guarantee the title, that again will be a title insurance company. We can talk about that at a later time. But there are two things I want to call to your attention, and I am going to read from some other work because their language is always better than mine.

"The attorney's opinion is based first of all upon the presumption that the abstracter has performed his work faithfully and that the abstract is a true reflection of the records and of every matter and item shown thereby that apparently affects, impairs, or implicates the title under consideration."

If you have a bonded abstracter, if every part of it is by a bonded abstracter—and I assume it is needless for me to make the statement that it has to be by a bonded abstracter *currently* bonded; you can have a compilation by successive bonded abstracters as long as they were bonded at that particular time—you can presume that the abstract as he sets it forth there is correct.

Then what is the attorney's obligation? "If the attorney acts in good faith, possesses ordinary legal knowledge and skill common to members of the profession, and is reasonably diligent and prudent, he is not held responsible, for he is not a guarantor of the soundness of his opinions nor of the title. He is not liable for mere errors of judgment nor for mistakes of law in matters where the law is not well settled." Bear that in mind.

We stand in the same position as the medical men. When you go to a doctor and he tells you he is going to perform an operation—you need an operation—he gives you no guarantee and he cannot give you any guarantee that the operation is going to be successful. He gives you a guarantee however, that he will use due care, that he will use the skill commensurate with the practitioners in his community and that he will use the state of the knowledge that then exists; and that is the same obligation that we, as attorneys, owe to our clients and that we undertake, and the greatest of that is the duty of due care.

This examining of abstracts, checking on titles, if I were to be asked to summarize it in one word I would say "careful"—being careful. So many times the difficulty comes about because we simply overlook something. It is not a science, it is simply a case of watching, being careful, reading the instrument and knowing the law applicable to the transactions therein set forth.

Now I want to go back again to this abstracter business because there is an interesting thing there. I mentioned before that we can rely on the abstracter, but the abstracter has got an "out" too. He can let himself out by limiting his certificate, so you've got to watch that certificate. You have got to see that the certificate is broad enough to cover everything that it should, and, gentlemen, I will say this that it is amazing how many abstracters' certificates are not broad enough.

I cite here some Nebraska cases, and I think Frank Pierce is going to talk about them, too. I didn't know that I was infringing upon him, but the abstracter, by his certificate, can limit his engagement; he can limit the time that he is covering. He can say, "Well, I am certifying only from 9:00 A.M. of a certain date," and the last guy may have stopped at 8:00 A.M., so you have a hiatus of an hour that the abstract isn't liable for. It might be an hour,

it might be fifteen minutes, it might be days, it might be months, and it can be very, very significant.

Also he can say, "I am compiling this abstract based upon the records shown on the numerical index," and stop there, as he did in one case here. He wasn't liable for something that wasn't on the numerical index, and yet our court has held that the numerical index is not in and of itself sufficient.

Or he can leave out, and so many of them did until recent years when there has been some agitation by this Association, so that I think they are now covering the county courts. But for many, many years, you know, they didn't.

Suppose there was a guardianship or some estate or inheritance tax. As long as the abstracter's certificate didn't purport to cover the records in the county court, he's out. Outside of that if you get a proper certificate that covers everything, then under the statute the abstracter is responsible for every error, deficiency, or mistake. But he is only responsible for the errors, deficiencies, or mistakes if he doesn't leave himself an "out" by limiting his certificate. So watch it.

That leads me to this point, and I think I am talking practically because I have run into this so many times: Gaps in the chain, where one abstracter will run, as I said, to October 7 at 8:00 A.M. and the next one will pick up at 9:00 A.M. October 7. Many, many times you will find that.

Then, secondly, you will find instances where certain abstracters have made their certificates so limited that it doesn't cover anything. It may not cover anything at all.

And, thirdly, there is one thing that bothers me greatly. I don't want to tread on anyone's toes and I am not saying this, believe me, with any intent to castigate anyone, but abstracters are only human, and if they make a mistake and get caught at it there is a great temptation to try to cover up, and there have been pages substituted in abstracts; there have been entries made after you have examined the abstract. One of the things I would like to call your attention to now is that it is a very wise precaution in examining an abstract to see to it that in some way you make a record that they can't come back at you later on and say, "Why here was an entry. You must have missed it. Here was entry 75 that showed a mortgage; here it is; and you don't say anything about that mortgage in your opinion." I have actually seen that happen.

Many lawyers prevent that, and I have talked to lawyers who have had actual sheets of the abstract taken out, or where originally there were 99 entries now it turns out that there are 101 entries on it. Many lawyers try to prevent that, and I think very success-

fully, and it is the only method I know of offhand, by marking one of the entries. I don't believe in advertising; I don't believe in writing the name "Herman Ginsburg" on each one of those entries; I don't think that is right, but some kind of a mark—some of them just use an initial. I tell you it is a valuable thing because otherwise you have no proof when that thing comes back. If you just say that I have examined this abstract as of the date of October 7, 9:00 A.M. and find title to be in John Doe, free and clear, and then later on a judgment shows up—and I have actually had this happen—and the abstracter has gone back and put the judgment in where it should have been or added it into his certificate, you have no proof that it was not there at the time you examined it. Believe me, I don't want anyone in this room, and I assume there are some abstracters here, to go back and say that Herman Ginsburg said that abstracters would do this. I am not saying that they would do this; I am simply saying that it has been done.

How do you go about examining this abstract of title? Well, I imagine there may be 200 people here in the room and I imagine there are 200 different ways of doing it. It would be silly for me to stand up here and tell you that I know the way to do it. I don't. All I know is *my* way of doing it. I'll tell you about it; you can follow it if it is any use to you; or you can kick it over the fence if it is of no use to you; but here is what I have found.

John Mason said something about me and I am going to say this: It is true; I love to examine abstracts. I would rather take five or six or a dozen abstracts home with me at night and sit there and read the abstracts and watch television at the same time than read a book! So that's my hobby, and as was mentioned by the speaker here last night, one of the things you've got to have is an understanding wife, and I have that so I am all right.

Here is my way of doing it. First, I have found some short cuts. What are you interested in? You are interested in doing the job properly but you are also interested in legitimate short cuts. If you have an abstract, what you are interested in is Lot 4, for example, of Block 96, and your abstract starts out Lots 1, 2, 3, 4, and 5 of Block 96, why in God's name should you pay any attention to the other lots? So what I do, I start out first with what I call a preliminary check, a comprehensive view. I start out first with the caption of the abstract. What does it call for? I turn it over on the back and see what it calls for. Then I look at the last certificate and see what it calls for, and then I finally turn to my client's request and see what my client is interested in. I just flip on through to see if there are any things in this abstract that don't affect me. If, as I mentioned, it is a case where the abstract starts out Lots 1 to 5 inclusive, and I am interested only in Lot 4, I will

flip it over and make check marks on the parts that don't affect Lot 4 and many times I can get rid of as much as half or maybe two-thirds of what I am interested in. I just don't have to pay any attention to that.

Then also I like to get a chronological view of the thing. I like to see just generally what happens.

Thirdly, I like to see where the property is located. I want to see, for instance, if it started out as a quarter section somewhere and then came down to a plat and then maybe a replat or a subplat or whatever it is. I like to follow that through.

Then, fourthly and lastly, I follow through those abstracter's certificates. That is the time that I can follow the abstracter's certificates. It makes me mad when I am following the chain of title to have to flip over and check the certificates again, so I do that first. I follow those certificates on first to see that the numbers jibe, the dates jibe, that the abstracters were certified at the time. I get that done and then I go into the title itself.

Now just because I say that is the way I do it, as I said before—I'll tell you right now it may be absolutely wrong for you people in the room. You may not agree with that at all. But if I have what looks to me like a toughie, I love to go through it first rather quickly, rather cursorily, watching these details, and then make a second search. I find it is so much easier then when you get down to the meat of the thing. You have no extraneous things to get you off the track and you can follow through and make a much better report. Actually going through it the two times, as I have mentioned, is easier and quicker than going through it just once and trying to do all of those things all at the same time.

All right, so much for that. Now we have gone through it once and we know what we are looking for. We have found our property —and there is another thing that is important. So many times you find errors and discrepancies in the location of the property. I had one the other day, and those Lincoln lawyers here will know about this, but just to show you what you can run up against, the abstract of title went along for some forty or fifty entries: Lot 8, Block 20, Woods Brothers' First Addition to Havelock. That went through a tax foreclosure, but actually I found that what my client was buying and what he was interested in and what the parties intended was Lot 8, Block 20 of the Replat of Woods Brothers' First Addition. Now Lot 8 of Block 20, and Lot 8 of Block 20 of the Replat are not the same property, and you could tell that only by checking the plats that were attached to the abstract.

I caught that through this preliminary search and knew what I was looking for. I saved myself a lot of time and was immediately

alerted to the fact that there might be a problem in here to see whether there is a proper chain, and it so developed there wasn't.

Now you have an abstract and you find out whether it is admissible in evidence, whether it is complete, whether it is all right, whether it is legible, etc. Now you want to get into the chain of the title. Well, you have got to start with the origin. You have got to be sure that the title started either with the United States government or with the State, and you have got to know the laws relative to sale by or issuance of patents by the United States or by the State of Nebraska. I am not going to go into any detail about that. Anybody who doesn't know the laws of the United States and the laws of the State of Nebraska relating to the inception of the chain from those sovereignties had better not examine any abstracts. I would just throw out to you one word: The mineral reservations and patents that say "however there shall not be any mineral lands" or things of that kind; be that as it may, you are assumed to know all that.

You have the title then from the United States or the State of Nebraska down to John Doe. You know John Doe has got the title. Now the next thing you want to see is: Does John Doe convey? You look for an entry and you see that, yes, here is a conveyance by John Doe. Then you have to—and this is where I am strong in advocating title insurance—you have to be sure that the John Doe who conveys is the John Doe who got the title. Now you don't guarantee that; if the abstract shows that, that is all you can do. You are entitled to rely upon the presumption that the same name appearing here is the same party. You don't guarantee that at all; that is simply what the record shows.

I was very interested the other day—to put in a free plug for Mr. Haley—this was very interesting to me and maybe it will be to you. I had a party come to visit me and I took him down to the midnight Zephyr and put him on the train, and I met a retired University professor there with his little bag ready to get on the train to go to Chicago. I said, "Professor, where are you going?"

He said, "I'm going to Chicago."

I said, "Anything special?"

"Yes, I am going there to be a witness."

The minute he said "witness" I perked up my ears.

He said, "You know what happened? My sister and I own an apartment house in Chicago and unbeknown to us someone had forged the deed in our names and got it put on record, and lo and behold the title had been conveyed to somebody else, and it had gone on for a couple of owners."

He said that the title insurance company paid off the people who had bought on the basis of a forgery, but he said, "Now we're prosecuting them and I am to be a witness to prove that I never signed the deed."

I guess they were having some kind of a grand jury or a criminal session down there. That is something of course that you, as an examining attorney, can't tell about.

I remember one time I examined an abstract down in Oklahoma —this is my classic story because I got such a big kick out of it. It just read beautifully! It went along A to B, B to C, C to D, and so on down the line about forty entries, and then a lawsuit showed up down there where the court found that every entry I had previously read was a forgery.

So all I can do is tell you that it is our duty to watch the identification of the grantor to be sure that he, as far as appears of record, is the party who has conveyed.

I am going to read from a little pamphlet put out by Mr. Haley's firm because I think this is very interesting and very important:

"The examiner who compares the name of the grantor in a deed with the name of the grantee in a former deed, sometimes discovers matters of great importance." How true!

> "He may find that a grantor who describes himself as single may be shown in a previous deed to have been married, which may raise questions of dower, homestead, or divorce. Comparison with previous affidavits or court proceedings may disclose that the grantor is a minor or an insane person, or that the grantee is a fiduciary who cannot purchase. A deed by a person not shown on the abstract to have any interest calls for investigation as to what interest he may have had. The fact that the grantor is a corporation calls for certain inquiries," etc.

I won't go into all that. It is sufficient to call your attention to the fact that when you see that the grantee is the XYZ Corporation, you want to see that the grantee is a Nebraska corporation or that it has power to own and hold real estate, that it has power to convey.

I recently ran into one, and it is amazing. You know I hate to say this because you might think I am bragging—and to some extent I am. I don't know how many thousands of abstracts I have examined in Lincoln. I think I know all of the additions in Lincoln. I think I have run into everything that could possibly happen to me. Yet the other day I ran into this, which I just can't imagine,

and then when I raised the complaint they said, "Well, the lawyer did it!" I just can't imagine any lawyer doing a trick like this:

Here property goes into the name of XYZ Corporation, and the abstract shows the articles of incorporation of XYZ Corporation, and lo and behold the articles of incorporation, instead of saying that the business and affairs shall be managed by the Board of Directors, etc., said this: "The business and prudential affairs of this corporation and all conveyances shall be by X, Mr. X."

Now along comes the deed by the corporation signed by Mr. A. Well, there you are. You have got a question that you've got to check on. I think it was the silliest, most asinine, thing, even if it was done by a lawyer, to put anything like that in the articles of incorporation, but since they are there it does limit the act to be examined.

There are many things in relation to the legal capacity of the parties. There is a very interesting recent Nebraska case. I hope you have all read *Simrad v. Simrad,* 170 Neb., dealing with aliens and the fact that the property escheated to the state because it was by will conveyed to an alien. You should be familiar with that situation.

We have that interesting Nebraska case where a man was insane and conveyed, and later on a bona fide holder lost his title because the grantor was proved to have been insane at the time.

The same checks that you make with reference to the grantor you make with reference to the grantee. Does the grantee have legal capacity to hold title? Is the grantee a legal entity? I have run into the fact that in a number of cases conveyances were made to XYZ Corporation before there was any such corporation. I remember one here in recent months where the title ran to XYZ Corporation and finally they showed that XYZ Corporation wasn't organized for a year thereafter. Now XYZ Corporation conveys. What is the status of that situation? Please don't ask me. I can't answer. But it still raises a question.

Then we run into many things that we have settled. In Nebraska we are a forward-looking state and every time we get into one of these problems we pass a bill and take care of it, so we have taken care of a lot of these defects. There is one thing we haven't taken care of, and I think you should all be very careful about it because this is not a theoretical thing; it happened.

The deed runs A to B, and down in the habendum they will say, "to have and to hold to C"—I am making it as strong as I can—or "a consideration furnished by C," etc. Our Supreme Court has

said that that is enough to create a cloud and it calls your attention to the fact that perhaps the deed had been altered or it is a forgery and therefore you are no longer a bona fide purchaser and you can't rely on the fact that there is conveyance from A to B. Again it is just simply a case of being careful.

The next thing is consideration. Now consideration is unnecessary for a deed. We all know that. A completed and delivered deed doesn't have to have consideration, but you have got to check the instrument because maybe it does have some recitation about consideration that may, in turn, be a cloud; for example, the *Pinkham* case where the deed recited that this deed was made in consideration of the payment of an annuity to the grantor; or the *Sampson* case where it says "the grantor retains a lien for so many thousands of dollars," etc. So there, of course, the fact that it does have a recitation about consideration which, in turn, imposes an obligation upon the real estate, creates a cloud. So you have to check it.

Then you want to be sure that the conveyance in question has words of conveyance. As liberal as we are in Nebraska—you don't have to go through that long harangue "grant, bargain, sell, convey, transfer and confirm" and so on, blah, blah, blah; that's a lot of baloney—but at least you have to say "I convey" or "I sell" or "I transfer" or something. You have to see that that is there.

Then you have to check the description of the property that is involved, and it is amazing how many times there will be difficulties over these descriptions, especially where the description has been prepared by a realtor or a banker. I will never forget—and I see Les Noble here who was in my class, and he will remember John Ledwith of sainted memory who used to tell us that the greatest boon to the legal profession was the banker who prepared deeds and wills. He said, "God bless them all! I hope they continue." Well, you run into that.

I again will read from this pamphlet: "The description of property in the deed should be studied to see that it is adequate. For example, the deed may describe only part of a tract without specifying which part is meant. Vacated streets, roads, etc. present a special problem"—how well we know that!—"It may be the owners on both sides of the street or the owner only on one side of the street depending upon who owned it at the time of the platting."

We have a special situation in Lincoln that has just arisen to plague us, just to show you how you've got to be on your toes. The Charter of the City of Lincoln provided that the City could vacate streets and alleys, etc., and reserve the title. So for a number of

past years the City of Lincoln has made a policy of vacating streets and reserving the title to the city and then selling it. And there have been some of these sixty or one hundred foot streets that give them extra lots. Along came the Supreme Court here very recently and said, "Uhuh, that's all unconstitutional. The city can't do that even though you put that in your charter. When that land was platted it was platted by those owners at that time and at that time the law provided that if the street was ever vacated it went back to them, so the city can't now come in at this later date and change that."

In the last number of weeks I have run into quite a number of abstracts, particularly out in Havelock, where the city got into one of these new developments there and vacated a bunch of streets and got a lot of pretty valuable lots and sold them. The people don't have anything because the city just didn't have title.

So I call it to your attention again that you have got to be on your toes. I don't think it would be an excuse for any lawyer to say, "Well, I didn't know about that Supreme Court opinion. I assumed if the city deeded it that was all right." That is a part of our obligation. We are obligated to know what the law is.

Then we have to check the habendum. You don't need a habendum. It is a relic from an ancient day. I am very pleased that our Bar is taking the position that we are modernizing these forms, and I hope we do get them modernized, but as long as it is there it can cause you trouble. The habendum can be—and again no lawyer would ever be guilty of this—but the habendum can be repugnant to the grant, cause you difficulty, or it can add enough so that you have the problem of construction. In other words, A conveys to B, then let's say in the habendum it says "to have and to hold unto B for life." Well, you know that B doesn't have fee simple title because the habendum makes it clear that it was intended only as a life estate. You know in Nebraska you don't have to have the word "heir" so that A to B ordinarily conveys the fee, even if it doesn't say to B and his heirs. But it is down in the habendum. You've got this addition. You have got to watch out and check yourself.

One of these days when we get around to having these modern forms with all these old relics of the feudal ages out, we will eliminate a lot of these problems but so far they are there.

Then this matter of dates. I tell my boys in law school, "You don't have to worry about dates." I don't care whether an instrument is dated or isn't dated. It doesn't make a bit of difference, but again let me read to you from Mr. Haley's pamphlet:

"The date of the deed and the date of the acknowledgement

and recording may disclose certain defects. If the recording is after the death of the grantor there may have been a failure to deliver the deed during his lifetime," which of course would invalidate the instrument; "or the deed may have been testamentary in character. The dates may show that a deed was executed after the grantor had already sold the property, or may establish the priority or lack of priority between two different instruments. If the deed is a quitclaim deed and was executed before the grantor acquired title, it may not"—in Nebraska it will not—"convey the after-acquired interest. The date of the deed may indicate that the grantor was a minor, or was married instead of single." All those matters. Now while you can get along in these instruments without the date, since the date is there you had better check it, and it will lead you to a lot of knowledge.

Attestation, as you all know, used to be necessary in Nebraska; it isn't any more. A seal by an individual is unnecessary in Nebraska; by a corporation it is necessary. I'll say no further about that.

Signature: That is something that is quite important. You've got to have a signature, but what constitutes a signature? It is amazing how many times there is lack of knowledge about what constitutes a signature. If I want to simply write down "X" instead of "Herman Ginsburg" that is my signature, provided it can be proved, of course. Ordinarily the signature becomes very valuable to us because by the signature we identify the party. But you could have a deed running to Herman Ginsburg and then just have the next deed run from "X" on and that "X" can be my signature, but there is going to be a problem about identifying me and showing that it is the same party.

Acknowledgement: Of course that is important, terrifically important in the case of homestead because if it is a homestead and it isn't acknowledged, you've got nothing at all. Even if it isn't a homestead and it isn't acknowledged of course you don't have any instrument that has a right to be recorded.

Now here is an interesting thing. I think you probably all are familiar with *Mulligan v. Snavely*, and it goes back to my original statement. You can have an instrument that shows up on the abstract of title and you get actual knowledge of that instrument, you're bound by it; but if that instrument wasn't acknowledged so that it wasn't entitled to record, the next person isn't going to be bound by that. In the *Mulligan v. Snavely* case there was a release of a mortgage, and the party being charged, having seen this release was not acknowledged but was filed by the register of deeds, physically took it and filed it; and the abstracter picked it

up, and then the fellow read the abstract and saw it; so the Supreme Court said, "Since you actually saw that instrument you're bound; you have notice of it and you are charged by it." But the fellow who hadn't seen it of course isn't bound by that instrument at all. So you want to be sure, even though in reading the abstract you may run into instruments which aren't lawfully entitled to be recorded but which give you actual notice because you actually see them, that isn't sufficient; you want to be sure that that instrument is an instrument which will bind, which will be constructive notice to the next man who may not see it. So that is just a caution.

The matter of recording: You will run into some interesting questions. The only thing I want to mention about that is that in Nebraska we have a rather peculair system. Just because an instrument is not recorded until after a later instrument is recorded, that is not conclusive, as you all know. The fact is that the man with the later instrument who records first has to prove that he was a bona fide purchaser without notice, etc. So you may have an instrument made by A to B on October 6 and another instrument by A to C on October 7 which was filed October 7, and the first instrument was filed October 8; and where are you in examining the abstract? You can't tell from the abstract. You can't say, "Well, the instrument that was first recorded has priority." No, because you have to show that that man who got the instrument first recorded had no notice, was a bona fide purchaser without knowledge. So actually you've got—and I would treat it as a cloud on the title. It is up to somebody to straighten out, because of the fact that you cannot tell from the abstract whether the man who got the instrument that was first recorded was a bona fide purchaser.

I'll just slip over the matter of revenue stamps. My boys always ask me this: "Do you need revenue stamps? Do they have anything to do with validity?"

Well, of course you all know that the absence of the revenue stamps doesn't affect the validity of the instrument. We have considerable question at times about deeds which are executed in foreign states. Each state can specify the requirements for the conveyance of property in its own state. In Nebraska we have by statute the rule that the instrument is good if it is executed in accordance with the laws of this state or in accordance with the laws of a foreign state.

The problem is this: You get a deed, for example, and shown on the abstract it is quite evident it was executed in Illinois and filed here. It doesn't comply with the Nebraska statutes. Let's say

it doesn't have the words "his voluntary act and deed." Nebraska is a little bit unusual. Most states merely require they acknowledge it to be his instrument or his act or something, but in Nebraska you have got to have that "voluntary act and deed" or it isn't any good. That means you have got to, in turn, go to the law of Illinois to see if that instrument complies with the laws of that State, because if it does comply with the laws of the state where it was executed it will be good in Nebraska even though it doesn't comply with the laws of our State.

Then it is amazing how many times you'll run into this testamentary business. There is the famous *Pinkham* case, which I get a great kick out of because it reminds me of a certain pill that was sold, well advertised, for many years. In *Pinkham v. Pinkham* the deed says, "this deed is not to become effective until after my death", and the Supreme Court promptly said, "Well, you are trying to make a will; this is not a deed." So you want to watch that.

Then in addition to these various items that I have mentioned which affect your chain of title, you want of course to check judgments. You have got to check your judgments, and the type of judgments that have caused us the most trouble here in Nebraska are the alimony judgments.

How much time do I have? I had better stop and just tell you that you had better check the judgments. I could talk for half an hour on these alimony judgments and I hope you will give me the opportunity to do that sometime because that is a phobia that I have.

On this matter of priority of mechanics' liens that Mr. Haley mentioned, let me tell you a classic story that happened to a client of mine. Not only are you worried about the fact that the mechanic's lien may be prior to you, but Mr. Uncle Sam can come in and really put the skids on you if you should let a mechanic's lien get in ahead of you, because if Uncle Sam files a tax lien against the owner of the property here is what Uncle Sam says: "The mechanic's lien is ahead of you, Mr. Mortgage-holder." Right? Yes, he goes back to the time he furnishes labor. Our taxes are ahead of the mechanic's lien. Now while it is true that the statute says that our tax lien is subsequent to your mortgage, your mortgage in turn is subsequent to the mechanic's lien, so we are ahead of you. So you wind up with the short end of the stick thinking that you had the first lien all the time. That is another reason why you had better be careful about this matter of mechanics' liens.

The next thing you have to know is this, if you will forgive me: You have to be thoroughly familiar—it isn't sufficient to know all the defects, to know all the things that can happen, that

can be wrong. Sure you are supposed to know them but you are also supposed to know whether they have been modified, whether those defects are actually defects in the title. That means you have got to know all our curative statutes, you have got to know the statute of limitations, you have got to know our marketable title law, and be familiar with those things that clarify—in other words, this business of failure to have an acknowledgement on an instrument. We have in Nebraska a statute that says that if the instrument has been recorded for more than ten years, failure to have the acknowledgement is now no longer a defect. You have to know that.

And one of the things that gripes me is this—I am talking to my law class again—the thing I cannot stand for a moment is to have lawyers write opinions and say, "At entry 32 there appears a deed that wasn't acknowledged." You had better decide in effect whether or not that is a defect. You are hired to render the opinion. It is up to you to say so. If you think that is a defect, then you say that is a defect. But if it isn't a defect you can't hide behind the stand, "Well, I noticed 32 wasn't acknowledged. Now you decide." That isn't your client's business. Don't, for heaven's sake, point out every failure to cross a "t" or dot an "i". That isn't the problem at all. It is for you to decide whether or not the abstract shows a merchantable title, which is a title which is acceptable to a prudent man.

Now I am going to skip the rest of my analysis here but I want to give you one more thought. Mr. Haley indirectly mentioned it. Why in heaven's name do we have to re-examine an abstract from the beginning again every time it goes from one lawyer to another? If I know that Les Noble has examined that abstract a year ago and it comes to me, why should I have to start all over again and go on from the beginning instead of saying, "Well, Les Noble is a reputable member of the bar. I know him; I have confidence in him; I'll start in where Les Noble left off."

I know it isn't being done. I am now in the midst of a crusade. This is Herman Ginsburg's crusade. It will save us all a lot of work if we will have two things: First, a good title committee in each county in each district, etc., so if there are any problems or we want to know whether a man is a good title examiner or not we can go to the title committee and get an opinion; and, second, let's all get together. If I read a title and I see something that doesn't look quite right to me and I know that somebody else examined it before, let's talk to that fellow first. You know, it seems to me we go out of our way to try to find things wrong to put the other fellow in Dutch, instead of calling up the fellow before

and saying, "You passed so-and-so. What about this estate proceeding here where there wasn't a notice sent to creditors?" or something like that, and getting that fellow's story about it. Maybe, as it has happened, he pointed out the fact that in 1959 there was remedial legislation that took care of that defect. Instead of our treading on each other's toes, why can't we cooperate?

It is a pleasure to examine an abstract. It is interesting. It shows you life. Every facet of civilization flows through the pages of an abstract title, and the pleasure can be so much more intense if we will cooperate with each other, if we will call up the fellow who examined it before us and say, "Look, what about this? Then I'll go on from you." I would challenge anybody to sue me for an improper opinion if I relied upon the opinion of a reputable attorney who had examined it before and all I did was carry it on from there.

ARE NEBRASKA ABSTRACTS ADEQUATE?

Franklin L. Pierce

One of the telling points made in the pamphlet on "Lawyers' Economic Problems" distributed by the American Bar Association is: "The lawyers have slowly, but surely, been committing economic suicide as a profession."

If we expect as a profession to maintain a proper professional place in a continuously accelerating society, we must devise means of providing more effective service to our clients. Professional effectiveness has been said to be the cornerstone of successful practice.

A practical place for us to become more effective is the field of determination of title by means of abstracts of title and lawyers' opinions. The inevitable alternative, with apologies to our friend here, will be title insurance and concentration of the work of examining abstracts of title in the hands of a few lawyers.

Since very probably a perfect title does not exist and merchantable title does not just happen, we lawyers rightly advocate that a purchaser of real property needs a lawyer, at least to determine the contents of the title to the property being purchased. The prudent purchaser therefore employs a lawyer to advise him in that regard.

Usually the title examiner does not participate in the transaction until after the client has obligated himself to purchase. This discussion assumes that the purchaser-client is entitled to conveyance of a merchantable title to be established by an abstract of title provided by the vendor.

Upon accepting such employment the lawyer is immediately

under pressure: not to delay the closing of the transaction; not to cause the vendor any more abstracting expense; not to involve his client in a dispute, let alone litigation; and not to be under necessity of charging a consequential sum for his services.

The amount which the lawyer reasonably should charge depends primarily upon the amount of his time required to discharge his responsibility to the client. Time necessarily expended is the critical factor.

That time factor usually comprises: time spent in attempting to put together a chain of title; determining and evaluating only the significant breaks in the chain of title and irregularities or ambiguities; determining the scope of the coverage of the abstract; the limitations, if any, on the liability of the abstracters under the certificates attached to the abstract and with respect to segments (parts) of the abstract; time expended in preparing an opinion. And then there is last, but not least, the time expended in conferences with your client, the real estate broker, attorney for the vendors, and the abstracter, if you are so timorous as to make an objection or two or require further showing or showings.

Objections to the title of the vendor as shown by the abstract are generally unpopular and usually very unprofitable so far as the lawyer making the objection is concerned. The difficulty is that a meritorious objection to a title may delay or even prevent the transfer of the real property.

Our clients are entitled to adequate title protection at the lowest possible cost. Such costs can be reduced through perfecting the form and coverage of abstracts of title.

You are all too familiar with the so-called "abstract of title" which is a hodgepodge of script, legible and illegible; typewriting; one or more printed form pages extending horizontally 24 inches in width; partly numbered pages; unnumbered pages; repeated page numbers; inserts and interlineations—quite often of uncertain parentage; exhibits unidentified; exhibits identified partly by number and partly by letter—and most usually at the top of the page; segments of scotch tape strategically placed here and there like pieces of fly paper; recitals such as "see original proceedings for further details"; so-called caption pages one on top of the other and not vouched for by anyone; abstracters' certificates stating "see caption" for the description certified to; a series of abstracters' certificates and extension certificates and varying in coverage. Mr. Ginsburg emphasized that.

A further recurring and time-consuming problem is the matter of abstracting court proceedings. The abstracter usually goes to one of two extremes. Either the information furnished is too sketchy

or it is too voluminous, in that the abstracter copies the whole proceeding into the abstract.

Part of the inadequacy of the ordinary abstract of title is a matter of mechanics. All pages in an abstract of title should be of the same size and numbered at the bottom consecutively, including the pages of exhibits. Exhibits if identified otherwise than by means of consecutive page numbering should be identified systematically, that is either through consecutive numbering or by consecutive lettering and indexed on a separate index page.

Insofar as the minimum contents of the "entries" and "histories of proceedings" are concerned, it would seem inappropriate to blame the abstracters unless and until they are provided with at least minimum standards for deed and other entries, mortgage entries, histories of proceedings, inclusions of plats of surveys, and regarding use or nonuse of photostatic, photo copies, or typed or hand prepared copies.

The abstracter ordinarily is a layman. If he is a lawyer he still acts as a layman and is not paid for his services as a lawyer.

If we are going to concede that the abstracter is capable of, and has the responsibility for, determining what is essential to an abstract showing merchantable title to a particular property, we put ourselves out of employment. There is no justification for our charging for "rubber stamping" the abstracter's determinations.

Up to now the individual lawyer has been burdened with complications in the form and contents of abstracts of title, as well as with determining whether the record of the title as portrayed establishes a marketable title.

The time expended in wrestling with the inadequacies of form and content can be reduced to a minimum through the adoption and promulgation by group action—that is, State Bar Association action—of minimum and basic requirements.

Recitals of other than government subdivision descriptions (metes and bounds) is so-called caption pages should be prohibited. The description certified to should be required to be incorporated in full in the abstracter's certificate or on the back thereof so as to be readily readable without reversing or turning the abstract.

Full certification of the abstract by the abstracter making the last extension would further simplify and expedite the examination. It would serve to turn up such information as reservations in patents and deeds which, until very recent years, were considered by some abstracters to be of no consequence and therefore not necessary to be shown in the abstract.

Previous certificates would then be of no consequence except

in case of discovery of omission of an instrument or some other matter affecting the title.

In the event of promulgation of standards as to form and contents, the reorganization and recompilation of the abstract to conform to such standards would properly be part of the first recertification subsequent to the adoption of such standards. There is the possibility of requiring recertification for a period of only twenty-two years prior to the date of the recertification predicated upon the Marketable Title Act.

Recertification would not be an unreasonable requirement. In most instances the liability at least of the sureties on the bond of the abstracter or abstracters with respect to half or more of the entries and histories of proceedings appearing in an abstract will be barred by a statute of limitation.

I am not overlooking the provisions of Title Standard No. 22. That standard does not eliminate the necessity of determining the limits of coverage of the abstracter's certificate or certificates insofar as scope and coverage of the abstract of title is concerned.

If the examiner is looking to the protection of his client's interest to the fullest practicable extent, he could very properly require that the abstract of title be certified to date as a full and complete abstract of the record of the title from its inception by patent or other grant by the United States government.

We lawyers will have to prescribe the necessary standards.

This brings us to a consideration of the sufficiency of the abstracter's certificates. What is the Nebraska law?

Judge Sullivan in *Gate City Abstract Co. v. Post,* 55 Neb. 742, states that the function of an abstract of title "is to vouch for the title, to define its character, and afford a reliable basis on which to estimate marketable worth of the title."

Marley v. McCarthy, 129 Neb. 880, holds that "abstracters are required to show each link in the chain of title . . . ."

In Nebraska the acceptance of abstracts of title as showing title to real property depends upon the statutory provision requiring abstracters to be bonded. The bond is the guarantee of his skill and faithfulness according to *Thomas v. Carson,* 46 Neb. 765.

A purchaser of real property relies at his peril upon an abstract of title. As *Mulligan v. Snavely,* 117 Neb. 765, puts it, he "might rely upon a record regularly made, he is not entitled to rely to the same extent upon the same facts appearing of record and brought to his attention in some other manner."

The opinions of the Nebraska Supreme Court in *Peters v. Huff,*

as reported in 60 Neb. 625 and in 63 Neb. 99, are of particular significance. The opinion in 63 Neb. 99 expresses the Court's interpretation of its original opinion in 60 Neb. 625 that it might logically be deduced from the first opinion that in no instance may reliance be had on an abstract of title properly made and certified to by a competent and qualified abstracter, and holding that resort must be had in all cases to the official record showing the contents of the title. The opinion in 63 Neb. 99 states that: "From this position we wish to recede and thus leave the question an open one to be decided in a proper case when the question is fairly presented by the record."

The abstract of title was not introduced in evidence in the District Court in *Peters v. Huff* and there was no evidence showing the subjects covered by the abstract nor the certification of the abstracter, according to the second opinion. It was further pointed out in the second opinion that the Court was "entirely in the dark as to what the abstract contained and whether it was such, and contained all necessary information which would justify a reasonably prudent person in placing reliance on the instrument as containing all of the necessary information as to the state of the title, as the same might be affected by pending suits," and whether the abstracter was competent and qualified or whether he was bonded.

Insofar as I can find it is uncertain whether a purchaser relying upon an abstract of title certified by a bonded abstracter or abstracters may be a bona fide purchaser for value without notice if the abstract is in fact incomplete in any respect affecting the title to the real property.

The abstracter statute purports to provide indemnity for "any party or parties" to whom damages may accrue by reason of error, deficiency, or mistake in any abstract or certificate of title. The statute has its limits.

Since the abstracter's relation to a particular abstract is expressed through his certificate, such certificate is determinative of the extent to which the abstract is complete and fully vouches for the title and shows each link in the chain of title.

The abstracter's statutory liability on his bond, and on his sureties, is no broader than his certificate. *Thomas v. Carson,* 46 Neb. 765; and *Crook v. Chilvers,* 99 Neb. 684.

If you will refer to the memorandum supplied you, you will find excerpts from the abstracters' certificates heretofore used at various places in the State of Nebraska. The closest thing to uniformity is that, with one exception, they certify specifically as to the Office of the Register of Deeds.

The certificates of different abstracters in a county often vary in language and therefore in their effect and coverage.

None of the examples quoted is fully adequate to guarantee the search necessary to secure a complete and accurate summary of the title to the particular tract. They do not guarantee that the abstract contains "all necessary information which justifies a reasonably prudent person in placing reliance on the instrument as containing all necessary information as to the state of the title" so as to present a proper case for claim *(Peters v. Huff)* of right to rely upon the abstract of title (assuming there may be such right).

Instruments in the county court affecting the title should be shown in the abstract and the search of the records of such court must therefore be certified to. The appointment of a conservator or general guardian, or commencing of probate of the estate of the then owner of the tract, or part of it, affects the title to such tract. Ordinarily there will be no record in the office of the Register of Deeds of appointment of guardian, conservator, or administrator of the estate of the owner. The omission to file a copy of the will or decree of distribution in that office is not a title defect as such. See Title Standard No. 29.

As to condemnation proceedings in the County Court, no filing is required in the office of the Register of Deeds until deposit in the County Court of the condemnation award. See Sec. 76-712, R.R.S. 1943.

No doubt all forms of certificates contain some sort of recitals regarding "unsatisfied judgments" in the state District Court. But is that the extent of the "instruments" in the office of the Clerk of the District Court which can affect the title? What about a decree for specific performance not filed for record in the office of the Register of Deeds? What about a decree determining the title to real property through construing a will? Or a pending proceeding for such construction? What about determination by the County Board of Mental Health that the title owner is mentally ill? The records of such "inquests" and filings are required to be filed with the Clerk of the District Court. (Sec. 83-319, R.R.S. 1943) I am unable to discover any provision for a filing in the office of the Register of Deeds.

And last but not least, Sec. 25-533, R.R.S. 1943, provides that: "No levy of attachment or execution on real estate *issued from any other county* shall be notice to a subsequent vendee or encumbrancer in good faith, unless the sheriff shall have entered in a book, which shall be kept in the office of the Clerk of the District Court by such Clerk and called the "Encumbrance Book," a statement that the land, describing it, has been so attached or levied on,

the cause in which it was so attached, and when it was done, signed by such sheriff."

There are records of a County Clerk as distinguished from records as Ex-Officio Register of Deeds which can affect the title to real property.

Strangely enough, many abstracters do not show Articles of Incorporation unless required to. The practice produces delay.

As more and more titles are held by partnerships organized under The Uniform Partnership Act, proof of the existence of the "entity" and the extent, if any, of the limits on transfers of real estate in its Articles will be essential to determining the nature of the title.

Sec. 23-114, as amended in 1959, provides for the recording in the Office of the County Clerk of the published notice of zoning resolution by the County Board. I fail to find any statutory provision requiring a filing in the office of the Register of Deeds.

Sec. 39-1813, as enacted in 1959, provides for assessment of charges as liens on the land for the cost of trimming hedges, etc. and inclusion in the County Tax list. The statute does not state when the "lien" becomes effective.

Sec. 31-333 provides in substance that a County Board of Supervisors in the case of drainage district bonds shall certify to annual levy to pay bond installments and the certificate should be filed in the office of the County Clerk and that the tax shall be extended by the County Clerk in the tax books of the county against the real estate to be benefited in the same manner as other taxes are extended. There are analogous provisions in the statutes regarding school bonds and bonds of other governmental subdivisions.

The point is that a search in the office of the County Treasurer only for such assessment liens is in the same category as an abstracter searching the numerical indices but not searching the Grantor-Grantee indices. The effect on the title of failure and neglect to establish on the records of the County Treasurer assessment of liens will be considered in connection with zoning ordinances.

According to *Crook v. Chilvers,* 99 Neb. 684, the abstracter is obligated to exercise: "Ordinary care and diligence in performing the work for which he has been employed requiring him to avail himself of every facility at hand."

Contemplating that the regulation of the use of real property through municipal zoning ordinances can affect the title to such real property, it would appear that the preparation of an accurate and complete abstract of title should include a search for and

notation in the abstract as to any zoning ordinance which could affect the title.

As to zoning by cities and villages there is no uniformity of requirement for filing and recording zoning regulations in the office of the Register of Deeds. Assume the existence of a statute requiring the filing of a municipal zoning ordinance and the neglect of the proper municipal official to make such filing, does the neglect of the municipal official absolve the purchaser from checking the municipal records or having his abstracter search such records?

Omaha National Bank v. Jensen, 157 Neb. 22, holds that taxation and the collection of taxes are strictly governmental activities and as to such activities the public cannot be estopped. *State v. Mo. Pac. Railroad Co.,* 75 Neb. 4, holds that the lien of taxes is not lost through neglect of the County Clerk to also enter delinquent taxes in making up the list of taxes for the current year.

The case of *Belza et al v. Village of Emerson* is a case where special sewer assessments were purported to have been levied on *January 18, 1923.* The special assessments were part payment of the cost of a sanitary sewer and disposal plant. The complete records as to the proceedings creating the district and making the levy could not be located and were not produced at the trial. No effort was made to enforce the assessments as a lien until 1952.

The Nebraska Supreme Court in its first opinion May 7, 1954 (158 Neb. 641), affirmed a decree in favor of Plaintiff who had purchased the property in 1952 declaring such assessments null and void and not a lien upon his real estate upon the ground that the record of the special assessment was never properly certified to the County Clerk and the assessments were never placed on the tax list by the County Clerk or by anyone else.

In the second opinion filed January 28, 1955 (159 Neb. 651), the Supreme Court vacated and set aside its first opinion and reversed the decree of the District Court declaring the assessment null and void and not a lien. The reversal was predicated upon the provision of Sec. 4283, C.S. 1922, as carried forward into Sec. 17-514, R.R.S. 1943, that: "All assessments shall be a lien on the property on which levied from the date of levy and shall thereupon be certified by direction of the council or board of trustees to the treasurer of such city or village for assessment shall be due and payable to such treasurer until the first day of November thereafter, or until the delivery of the tax list for such year to the treasurer of the county in which such city or village may be situated, at and after which time the same shall be due and payable to such County Treasurer. The council or board of trustees of

such city or village shall, within the time provided by law, cause such assessments, or portion thereof then remaining unpaid, to be certified to the County Clerk of said county and entry upon the proper tax lists; . . ."

The fact was that a certificate and attached schedule of assessments reached the County Treasurer's office and were found by a County Treasurer who assumed office in 1927 in a separate bound book volume that bore no filing mark or stamp of any kind of either the Treasurer's office or of the County Clerk's office. The record disclosed that credits for payment of assessments were previously entered over a period from at least December 11, 1923, until July 5, 1952, from which it was inferred that the separate bound volume was in the County Treasurer's office during all that period.

The second opinion specifically states (p. 662) that: "We have found no statute of limitations barring the collection of special assessments and no authorities have been cited or found which could make them void by reason of laches or estoppel by the city or county."

To ignore the hazard of neglect or omission of officials to carry out the prescribed statutory duties is to "stick our heads in the sand."

As to federal judgment certificates, probably many lawyers in the state are unaware that in counties such as Hall County where a division of the Federal District Court was located previous to September 1, 1955, a certificate as to such division to October 1, 1951, and such division and the Omaha division since October 1, 1951, is necessary. In other words, in Hall County a certificate that no transcript of an unpaid federal judgment appears on file in the office of the Clerk of the District Court of the County is insufficient.

If you will observe the excerpts from abstracters' certificates in the memorandum supplied you, you will find that only part of such certificates specifically cover bankruptcy proceedings. Time does not permit a discussion of the technicalities relative to notice of adjudication in bankruptcy and subsequent proceedings. For the purpose of this discussion I will suggest that the only safe course to follow is to require a certificate by a qualified abstracter as to a search of the records of the Federal District Court here in Douglas County (and in Lancaster County, in a given instance, and possibly in Lincoln County in some instances).

If the forms of abstracts of title and abstracters' certificates currently examined by lawyers are wasteful of time and inadequate

to establish a purchase for value without notice, what can be done to remedy the situation?

I will venture to make some suggestions. The Association could act to create or authorize the organization of:

I. A committee to draft standards for contents of, and abstracters' certificates to, Abstracts of Title.

II. A co-ordinate committee to consider drafting appropriate legislative bills to:

1. Enable a purchaser to rely on an abstract of title certified to by a bonded abstracter upon a form of standard certificate and thereby becoming a bona fide purchaser.

2. Permit filing in office of Register of Deeds of a Claim of Merchantable Title in reliance upon a duly certified abstract of title, and, limiting, to a period less than the period of limitation of liability on the abstracter's bond, the time for commencement of action at law or in equity for recovery of the lands or assertion of any right, lien, or demand.

3. Fix a specific period of time for commencement of action on an abstracter's bond consistent with the limitation regarding Claim of Merchantable Title.

4. Establish a single, uniform system for making one record in a particular county of any and all liens for taxes and assessments by the state and its subdivisions and municipal or other taxing bodies.

5. Establish a similar single, uniform system for making one record of all zoning ordinances.

HOUSE OF DELEGATES

FRIDAY AFTERNOON SESSION

October 7, 1960

The Third Session of the House of Delegates was called to order at four-twenty o'clock by Chairman Ginsburg.

CHAIRMAN GINSBURG: May I have the attention of the members of the House of Delegates. We have some business to be attended to, primarily reports of the various sections. I will call for a brief report from each of the sections.

First is the report of the Section on Real Estate, Probate and Trust Law, Mr. F. L. Pierce, Chairman.

REPORT OF REAL ESTATE, PROBATE AND TRUST LAW SECTION

Franklin L. Pierce

Mr. Chairman, Members of the House of Delegates: In the Real Estate division of the Section on Real Property, Trust and Probate matters, the Title Standards Committee has no title standard or amendment to title standard to submit at this time. That Committee, however, is entering into a study of model standards prepared by Lewis M. Simes. It is my understanding that Mr. Pierson, who is a member of this House, as Chairman of that Committee is providing a number of copies of such model standards to committee members for their study.

They have under consideration a suggestion or a modification of the comments to Standard No. 9. They are considering a standard regarding the use of the tax lot descriptions.

The Committee for Improvement on Conveyancing, of which Mr. Robert Petersen is Chairman and Mr. Krivosha a member, as you all know, entered into the first session of the Institute and presented proposed forms of mortgage and real estate sales contracts, which are the work of that Committee.

The Committee on Current Legislation has had nothing referred to them. They have held no meetings. They are interested in further legislation on alimony and child support as recommended by the Legislative Committee of this Association.

In the Probate Division, the Committee on Improvements in Procedure is chairmanned by Mr. Thomas R. Burke, who served as a member of the panel for the county judges' convention. That Committee recommends certain actions by way of legislation. One is pertaining to the waiver of notice on final settlement in intestate estates. It is summarized that if a determination of heirship is obtained under Section 30-1709, then with an amendment to 30-1415 the heirs in an intestate proceeding could waive the final notice, and account could be settled and a final decree entered, the same as in an intestate estate.

The second amendment proposed is to make permissive the statute requiring the county judge to file a certified copy of the decree in counties in which real estate is located.

The third is making permissive the present requirement of public notice under the uniform fiduciaries' accounting act.

Fourth, legislation to establish a procedure for handling claims in a guardianship.

Then the Committee desires to be on record that they endorse

the action taken by the Judicial Council regarding the amendment of 30-217, re-issue 1956.

Adoption of legislation is proposed to the effect that foreign wills which have not previously been probated may be allowed to probate in this state without being admitted in another state.

The Committee on Will Drafting recommends the review of the marital deduction clauses in wills for the reason that it is their understanding that the Treasury Department is in the process of contesting the language of a number of marital deduction clauses that are in common use. They also contemplate drafting some model clauses for use in wills.

Third, realizing that there are certain evils existing in the indiscriminate use of model forms, they suggest that study be given to the desirability of having model forms for wills or specific clauses.

Fourth, they request that the Association submit to the Committee an indication of areas which need further study and in which model forms are desirable. They also recommend that their Committee be expanded to five members for the coming year.

The Committee for Inheritance Taxation is chairmanned by Thomas M. Davies who also sat on the panel for the county judges' convention, and that committee . . .

HARRY A. SPENCER, Lincoln: Mr. chairman, may I ask Mr. Pierce a question? Are these for action by us now or are you just making a report?

MR. PIERCE: I had these reports submitted to me and we have had no other place to make them, as a matter of fact.

JUDGE SPENCER: If they are for action here . . .

CHAIRMAN PIERCE: Only one, actually, on the legislation that would contemplate having specific action by this body.

JUDGE SPENCER: They are reports of your committee and should go to your section before they come to us. That is the only question I am raising.

MR. PIERCE: We had only fifteen minutes for our section. If you desire that I suspend this, I will be very happy to. What is the pleasure of the group?

CHAIRMAN GINSBURG: Complete the Trust Law part.

MR. PIERCE: In the Trust Law Section the Committee on Drafting of Trusts is studying the possibility of drafting clauses but is doubtful of the wisdom of trying to have anything like a standard clause.

The Committee on Taxation of Trusts has for future study

the intangible tax problem, taxation on uniform basis of profit sharing and pension trusts, in view of the opinion of the Attorney General declaring the statute unconstitutional, and the matter of tax situs in Nebraska of a living trust where the creator lives in one county and the trustee is domiciled in another.

The Committee on Trust Procedure has postponed the study of the uniform principal and income act pending a revision by the National Conference of Commissioners on Uniform Laws.

Finally, I belive that this body is thoroughly familiar, as individuals, with the work of the Section in this Institute. Thank you.

SECRETARY TURNER: Who were your Executive Committee members elected?

MR. PIERCE: The members of the Executive Committee elected were Lowell C. Davis of Sidney and Mr. Pierson of Lincoln.

SECRETARY TURNER: Did the committee elect officers?

MR. PIERCE: I have been re-elected as Chairman, George Skultety as Vice Chairman, and Albert T. Reddish as Secretary.

CHAIRMAN GINSBURG: Thank you, Mr. Pierce.

This brings matters to a head. No. 1, there is a recommendation for legislation in the report. My own feeling is that if the report is accepted then we will likewise be approving, at least, such suggested legislation.

Regarding No. 2, we have the situation here of whether or not we want to give the sections some time to do their business. During this current session they had only about five minutes each. I personally—I am probably stepping over the line—have some fear, in that we do not want to give these sections any feeling that we no longer have any use for them. We want to recognize the work that is being done.

Now with those preliminary statements I will ask if there is anyone who has any question on the report or any recommendation to make; or is there any discussion?

JUDGE SPENCER: I would move that it be placed on file and that no further action be taken because there are several matters there that do deserve the consideration of the entire session. I am certain that time will be provided at some future time. That is a matter for the officers of the section to determine. I don't believe the intention is that the House of Delegates decide the matters raised by the individual committees of the section until they have first been sent in or approved by the sections.

CHAIRMAN GINSBURG: Your motion is that the report be accepted and placed on file.

DAVID DOW, Lincoln: I second the motion.

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

QUESTION: May I further move for an amendment that they be placed on file with a vote of confidence in the committee.

CHAIRMAN GINSBURG: My attention has been called to the fact, sir, that you are not a member of the House and therefore have no right to make any motion. I am sorry I cannot recognize the motion.

I think, however, the fact that it has been accepted and ordered placed on file is indicative of the feeling of this House that we do have implicit confidence in the officers and members of the section and feel that they have done a good job. I am going to add that in myself.

Is there any further discussion? If not we will call for the vote. All in favor say "aye"; contrary the same sign. Carried.

Now the report of the Section on Corporations, Mr. Warren C. Johnson.

REPORT OF SECTION ON CORPORATIONS

Warren C. Johnson

Your Section on Corporations cooperated with the Committee on Continuing Legal Education, University of Nebraska Law School, and the Junior Bar Section in the Business Enterprises Institute held at the University of Nebraska Law School on September 23 and 24. This Section commends the sponsors of this clinic on its excellent organization, presentation, and subject matter.

It is felt that the system used this year in having one section present the entire program at the annual meeting will lead to more comprehensive, instructive, informative, and better-attended sessions.

The new members elected to the Executive Committee of this Section are: William J. Baird of Omaha and Vance E. Leininger of Columbus. Election of Executive Committee officers will be held at a later date.

CHAIRMAN GINSBURG: Thank you, Mr. Johnson. This is a report requiring no action. It will be ordered accepted and placed on file.

Next is the report of the Section on Tort Law by Mr. Robert G. Fraser.

REPORT OF SECTION ON TORT LAW

Robert G. Fraser

Mr. Chairman and Gentlemen: In behalf of the Tort Section I beg to advise that elected to the Executive Committee are: James A. Lane of Ogallala and Albert G. Schatz of Omaha. We have not as yet, however, had an election of officers.

I might further report that in lieu of having a program at the State Bar Association meeting that we are in the midst of right now, we will endeavor to go along with the Trial Technique Institute which you have all seen advertised out at the main desk. The Technique School takes place at the Creighton University College of Law moot court, covering five Wednesday evening sessions commencing October 12 and running through November 9. At that time there will be a very excellent closing program at the Omaha Town House where there will be a very fine demonstration by two very eminent trial attorneys.

We urge each and every one of the members of the Bar Association to please attend this. We hope it will be a continuing type of program very much in line with the tax clinics that we have had in the past. So tell all your friends about it and please attend it.

CHAIRMAN GINSBURG: Thank you, Mr. Fraser. The report, requiring no action on the part of the House, will be ordered received and placed on file.

Next is the report of the Section on Taxation, Warren K. Dalton, Chairman.

REPORT OF SECTION ON TAXATION

Warren K. Dalton

The Section on Taxation conducted the annual Tax Institute of the Bar Association during the week of December 14, 1959. Sessions were held at Sidney, Grand Island, and Omaha. Total attendance was 368, slightly more than in 1958.

Participants in the Institute were: Hale McCown; Frank Mattoon; Philip G. Johnson (one of our members who is a practicing CPA); D. L. Murphy, Conference Coordinator in the office of the District Director of Internal Revenue; William E. Myers of the Estate and Gift Tax Audit Section of the Internal Revenue Service; Malcolm Young; Robert Adams; Keith Miller; Robert Veach; and W. K. Dalton. Flavel Wright, President of the Bar Association, and John North, Chairman of the Executive Committee of the Tax Section were ex officio members of the group.

At the section business meeting which was held yesterday morning, after a fashion, Richard Hunter and Keith Miller were elected to the Executive Committee of the Section. Election of officers of the Section will be accomplished at a later date. We have a staggered term for officers at the present time.

During the year Jack North has done a great deal of work in setting up new procedures within the Section, particularly with regard to the organization of the Annual Tax Institute. Planning for this year's Tax Institute was started in February, 1960. A panel of speakers was chosen and a tentative program agreed upon in the summer, and outlines and materials are supposed to be in the hands of the Executive Committee this week. The speakers have agreed to prepare outlines which will be useful source materials for research and review. A fee is to charged those attending the Institute, and the money will be used to pay the cost of producing a book containing the speakers' materials suitable for use as a reference, and other expenses.

The Conference of Lawyers and Accountants has discussed the possibility of sponsoring an Institute jointly, and if this plan is adopted the program of the Tax Section may be changed radically.

We are in the process of forming a committee to assist the Committee on Legislation in evaluating proposed bills on state taxes offered during the coming session of the Legislature. Charles Oldfather has agreed to act as chairman of this committee.

CHAIRMAN GINSBURG: Thank you, Mr. Dalton. The report, requiring no action on the part of the House at this time, will be ordered received and placed on file.

Next is the report of the Section on Practice and Procedure, Mr. David Dow, Chairman.

REPORT OF SECTION ON PRACTICE AND PROCEDURE

David Dow

Mr. Chairman, due to circumstances somewhat beyond my control I am unable to make any report at this time in connection with the activities of this section.

SECRETARY TURNER: Who was elected to your Executive Committee?

MR. DOW: We were unable to hold a formal meeting.

SECRETARY TURNER: The Executive Council will then fill the vacancy.

MR. DOW: That is right.

CHAIRMAN GINSBURG: Next is the report of the Junior Bar Section, Mr. Robert Johnson, Jr., Chairman.

REPORT OF JUNIOR BAR SECTION

Robert E. Johnson, Jr.

The Junior Bar Section of the Nebraska State Bar Association this year sponsored the fourth annual fall institute jointly with the Nebraska College of Law. The 1960 institute related to the non-tax aspects of business enterprises and was attended by approximately 150 attorneys. Each registrant paid a $3.00 registration fee and was given printed materials in an attractive binder, suitable for becoming a permanent part of the attorney's library. The Junior Bar Section recommends that the registration fee be continued in future fall institutes and that materials again be printed and bound in a form suitable for becoming a permanent part of the attorney's library.

The Junior Bar Section this year instituted a program of prelegal orientation. A pamphlet is being prepared which sets forth the reasons why the high school student should consider the legal profession as a career and the reasons why the student should attend the Creighton University Law College or the Nebraska University Law College. A Junior Bar member is being contacted in each community in the State and will act as the prelegal advisor in the respective community. The pamphlet will then be distributed to the Junior Bar representatives, who will then distribute the materials to prospective law students. This program is being carried out in conjunction with Nebraska University and Creighton University. The Junior Bar Section recommends that the program of prelaw orientation be continued and developed.

The Junior Bar Section has this year established a committee to consider initiating a placement service. It is our feeling that a number of positions are presently available to young practicing attorneys but that the prospective employer has no means of contacting interested attorneys, except by word of mouth. The legal placement service would act as a confidential clearing house for employment inquiries. The Junior Bar Section recommends further study in this area.

The Committee on Continuing Legal Education has requested the Junior Bar Section to initiate a program of continuing legal education designed for the recent graduate, and designed to fill the gap between the theoretical study of law at the college level and its application in practice. The Junior Bar Section will present some specific recommendations in this area to the Committee on Continuing Legal Education of the State Bar Association.

The annual meeting of the Junior Bar Section was held at the University of Nebraska College of Law on September 23, 1960. The

two new members elected to the Executive Committee were: Jim Knapp of Kearney, and Jerrold Strasheim of Lincoln. The Executive Committee held an organization meeting on September 24, 1960, and appointed Robert D. Moodie of West Point as Chairman; Alfred Blessing of Hastings, Vice-Chairman; Jerrold Strasheim of Lincoln, Secretary-Treasurer. One member of the Executive Committee was appointed to take charge of each of the programs which has been outlined in this report.

There were some specific recommendations which were made in this report; however, I don't feel that they would be recommendations which we would feel this body would act upon but are merely suggestions to come before the Junior Bar Section.

CHAIRMAN GINSBURG: In view of what Mr. Johnson has stated concerning the recommendations in the report of the section, I would ask if there are any inquiries or any discussion concerning the report? If not, the report will be taken as one that requires no action by the House and will be ordered received and placed on file.

Now is there any matter that any section or committee wishes to bring before the House of Delegates at this time? Apparently this is the one and only time that anything outside of the printed agenda may be brought forward, so if anybody has any such, now is the time or forever hold your peace.

The Chair, seeing no one, will now inquire of the Secretary whether there is any unfinished business.

SECRETARY TURNER: Mr. Chairman, I question whether this falls under the heading of unfinished business but I think it is a matter of some interest to you.

The Executive Council adopted this new plan of organizing an annual meeting and placing the entire responsibility in the hands of one section with some misgivings, thinking it might affect attendance. I am very happy to tell you that it has not. In the past the girls at the registration desk have included in the total count some wives and others who really were not attending the business of the convention. This year they limited their counted registration to attorneys, exhibitors, and students. There were 718 attorneys, 32 exhibitors, and 5 students, which is an excellent attendance.

CHAIRMAN GINSBURG: Thank you, Mr. Turner. Is there any other unfinished business?

JUDGE SPENCER: I move we adjourn.

CHAIRMAN GINSBURG: Any discussion on the motion? If not, the 1960 session of the House of Delegates of the Nebraska State Bar Association will be declared adjourned.

[The Sixty-First Annual Convention of the Nebraska State Bar Association adjourned sine die at 4:45 o'clock.]

NEBRASKA STATE BAR ASSOCIATION

Statement of Cash Receipts and Disbursements
50 week period ended August 31, 1960*

Receipts:		
Active members' dues		$39,020.00
Inactive members' dues		5,125.00
Reinstatements		132.00
Sale of United States securities		1,934.00
Interest		152.40
Miscellaneous		2.50
		46,365.90
Disbursements:		
Salaries and payroll taxes		$ 6,882.08
Printing and stationery		586.24
Office supplies and expense		547.84
Telephone and telegraph		248.57
Postage and express		1,537.02
Directory		944.60
Officers' expenses		913.78
Executive council		1,242.11
Judicial council		412.95
Nebraska Law Review		6,153.98
Nebraska State Bar Association Journal	$1,574.72	
Less receipts for advertising	679.00	895.72
Public service	4,200.58	
Less receipts for pamphlets and racks	277.24	3,923.34
American Bar Association and House of Delegates meetings		2,927.30
Annual meeting	7,535.01	
Less reimbursements and exhibit space	2,672.25	4,862.76
Committee on medico-legal jurisprudence		66.00
Committee on inquiry		69.41
District judges association		250.00
Committee on cooperation with American Law Institute		298.13
Institute on probate practices		113.90
Advisory committee		562.15

Committee on county law libraries		119.60	
Real estate, probate and trust law section		225.50	
Committee on revision of corporation laws		5.00	
Aid to local bars		350.24	
Committee on legal education		60.55	
Tax institute		3,300.22	
Officers' loans		1,934.00	
State ex rel Nebraska State Bar Association:			
Fisher	$ 563.38		
Butterfield	205.85		
Richards	18.00		
Jensen	102.64	889.87	
Insurance		86.39	
Committee on judicial selection	1,356.60		
Less reimbursements	756.50	600.10	
Maintenance expense		241.13	
Auditing		199.03	
Dues and subscriptions		104.00	
Football tickets, 1960 season		120.25	
Miscellaneous		102.90	41,776.66
Excess of receipts over disbursements			4,589.24
Cash balance at beginning of period			2,039.20
Cash balance at end of period deposited in the First Continental National Bank & Trust Company			$ 6,628.44

*Note: The cash balance at August 31, 1960, is stated exclusive of United States savings bonds, owned by the association, at cost and maturity value of $4,000.00. The receipts and disbursements do not reflect the bequest from the estate of Daniel J. Gross which was transferred to a trust fund established for this purpose. A schedule of the cash transactions of this trust fund is attached.

NEBRASKA STATE BAR ASSOCIATION

Daniel J. Gross Nebraska State Bar Association Welfare and Assistance Fund

Schedule of Cash Receipts and Disbursements

Period July 12, 1959, to August 31, 1960

Receipts:	
Bequest, Daniel J. Gross	$ 25,000.00
Gift, The Honorable Harvey M. Johnson	1,000.00
Interest income	615.28
Balance at August 31, 1960	$ 26,615.28
Balance at August 31, 1960, consists of:	
Cash in bank	$ 1,196.26
Investments at cost, including interest, purchased at $72.48	25,419.02
	$ 26,615.28

ROLL OF PRESIDENTS

1.	1900	*Eleazer Wakely	Omaha
2.	1901	*William D. McHugh	Omaha
3.	1902	*Samuel P. Davidson	Tecumseh
4.	1903	*John L. Webster	Omaha
5.	1904	*C. B. Letton	Fairbury
6.	1905	*Ralph W. Breckenridge	Omaha
7.	1906	*E. C. Calkins	Kearney
8.	1907	*T. J. Mahoney	Omaha
9.	1908	*C. C. Flansburg	Lincoln
10.	1909	*Francis A. Brogan	Omaha
11.	1910	*Charles G. Ryan	Grand Island
12.	1911	*Benjamin F. Good	Lincoln
13.	1912	*William A. Redick	Omaha
14.	1913	*John J. Halligan	North Platte
15.	1914	*H. H. Wilson	Lincoln
16.	1915	*C. J. Smyth	Omaha
17.	1916	*John N. Dryden	Kearney
18.	1917	*F. M. Hall	Lincoln
19.	1918	*Arthur C. Wakely	Omaha
20.	1919	*R. E. Evans	Dakota City
21.	1920	*W. M. Morning	Lincoln
22.	1921	*A. G. Ellick	Omaha
23.	1922	*George F. Corcoran	York
24.	1923	*Edward P. Holmes	Lincoln
25.	1924	*Fred A. Wright	Omaha
26.	1925	*Paul Jessen	Nebraska City
27.	1926	*E. E. Good	Wahoo
28.	1927	*F. S. Berry	Wayne
29.	1928	*Robert W. Devoe	Lincoln
30.	1929	Anan Raymond	Omaha
31.	1930	*J. L. Cleary	Grand Island
32.	1931	*Fred Shepherd	Lincoln
33.	1932	*Ben S. Baker	Omaha
34.	1933	*J. J. Thomas	Seward
35.	1934	*John J. Ledwith	Lincoln
36.	1935	*L. B. Day	Omaha
37.	1936	*J. G. Mothersead	Scottsbluff
38.	1937	*C. J. Campbell	Lincoln
39.	1938	Harvey M. Johnsen	Omaha
40.	1939	*James M. Lanigan	Greeley
41.	1940	E. B. Chappell	Lincoln
42.	1941	Raymond G. Young	Omaha
43.	1942	Paul E. Boslaugh	Hastings
44.	1943	*Robert R. Moodie	West Point
45.	1944	George L. DeLacy	Omaha
46.	1945	Virgil Falloon	Falls City
47.	1946	Paul F. Good	Lincoln
48.	1947	Joseph T. Votava	Omaha
49.	1948	Robert H. Beatty	North Platte
50.	1949	*Abel V. Shotwell	Omaha
51.	1950	Earl J. Moyer	Madison
52.	1951	Clarence A. Davis	Lincoln
53.	1952	George B. Hastings	Grant
54.	1953	Laurens Williams	Omaha
55.	1954	J. D. Cronin	O'Neill
56.	1955	John J. Wilson	Lincoln
57.	1956	Wilber S. Aten	Holdrege
58.	1957	Barton H. Kuhns	Omaha
59.	1958	Paul L. Martin	Sidney
60.	1959	Joseph C. Tye	Kearney
61.	1960	Flavel A. Wright	Lincoln

ROLL OF SECRETARIES

1.	1900-06	Roscoe Pound	Lincoln	5.	1920-27	Anan Raymond	Omaha
2.	1907-08	Geo. P. Costigan, Jr.	Lincoln	6.	1928-36	Harvey Johnsen	Omaha
3.	1909	W. G. Hastings	Lincoln	7.	1937-	George H. Turner	Lincoln
4.	1910-19	A. G. Ellick	Omaha				

ROLL OF TREASURERS

1.	1900	Samuel F. Davidson	Tecumseh	6.	1914-16	Chas. G. McDonald	Omaha
2.	1901	S. L. Geisthardt	Lincoln	7.	1917-22	Raymond M. Crossman	Omaha
3.	1902-03	Charles A. Goss	Omaha	8.	1923-37	Virgil J. Haggard	Omaha
4.	1904-05	Roscoe Pound	Lincoln	9.	1938-	George H. Turner	Lincoln
5.	1906-13	A. G. Ellick	Omaha				

* Deceased

ROLL OF EXECUTIVE COUNCIL

1.	1900-04	R. W. Breckenridge	Omaha
2.	1900-08	Andrew J. Sawyer	Lincoln
3.	1900-02	Edmund H. Hinshaw	Fairbury
4.	1903-06	W. H. Kelligar	Auburn
5.	1904-07	John N. Dryden	Kearney
6.	1905-08	F. A. Brogan	Omaha
7.	1907-10	S. P. Davidson	Tecumseh
8.	1908-09	W. T. Wilcox	North Platte
9.	1909-11	R. W. Breckendrige	Omaha
10.	1910-12	Frank H. Woods	Lincoln
11.	1910-10	Charles G. Ryan	Grand Island
12.	1910-19	Alfred G. Ellick	Omaha
13.	1911-13	John A. Ehrhardt	Stanton
14.	1911-11	Benjamin F. Good	Lincoln
15.	1912-15	C. J. Smyth	Omaha
16.	1912-12	William A. Redick	Omaha
17.	1913-15	W. M. Morning	Lincoln
18.	1913-16	J. J. Halligan	North Platte
19.	1914-14	H. H. Wilson	Lincoln
20.	1915-17	Edwin E. Squires	Broken Bow
21.	1916-16	John N. Dryden	Kearney
22.	1916-17	Frederick Shepherd	Lincoln
23.	1917-17	Frank M. Hall	Lincoln
24.	1917-18	Anan Raymond	Omaha
25.	1918-18	A. C. Wakely	Omaha
26.	1918-22	Fred A. Wright	Omaha
27.	1919-19	R. E. Evans	Dakota City
28.	1919-22	Geo. F. Corcoran	York
29.	1919-20	L. A. Flansburg	Lincoln
30.	1920-20	W. M. Morning	Lincoln
31.	1920-27	Anan Raymond	Omaha
32.	1921-21	Alfred G. Ellick	Omaha
33.	1921-23	Guy C. Chambers	Lincoln
34.	1922-24	James R. Rodman	Kimball
35.	1923-26	E. E. Good	Wahoo
36.	1924-26	Robert W. Devoe	Lincoln
37.	1924-24	Fred A. Wright	Omaha
38.	1925-28	Paul Jessen	Nebraska City
39.	1925-27	Clinton Brome	Omaha
40.	1927-29	Charles E. Matson	Lincoln
41.	1927-28	Fred S. Berry	Wayne
42.	1928-29	Robert W. Devoe	Lincoln
43.	1928-30	T. J. McGuire	Omaha
44.	1928-34	Harvey Johnsen	Omaha
45.	1929-31	E. A. Coufal	David City
46.	1929-29	Anan Raymond	Omaha
47.	1930-32	Paul E. Boslaugh	Hastings
48.	1930-30	J. L. Cleary	Grand Island
49.	1931-33	W. C. Dorsey	Omaha
50.	1931-31	Fred Shepherd	Lincoln
51.	1932-34	Richard Stout	Lincoln
52.	1931-32	Ben S. Baker	Omaha
53.	1933-35	Barlow F. Nye	Kearney
54.	1933-33	J. J. Thomas	Seward
55.	1934-36	Chas. F. McLaughlin	Omaha
56.	1934-34	John J. Ledwith	Lincoln
57.	1935-35	L. B. Day	Omaha
58.	1935-37	James M. Lanigan	Greeley
59.	1935-38	H. J. Requartte	Lincoln
60.	1935-38	Raymond M. Crossman	Omaha
61.	1935-40	F. H. Pollock	Stanton
62.	1935-41	T. J. Keenan	Geneva
63.	1935-39	Walter D. James	McCook
64.	1935-37	Roland V. Rodman	Kimball
65.	1936-36	J. G. Mothersead	Scottsbluff
66.	1936-36	James L. Brown	Lincoln
67.	1937-39	David A. Fitch	Omaha
68.	1937-39	Raymond G. Young	Omaha
69.	1937-41	M. M. Maupin	North Platte
70.	1937-41	Golden P. Kratz	Sidney
71.	1938-42	Sterling F. Mutz	Lincoln
72.	1938-42	Don W. Stewart	Lincoln
73.	1940-46	George N. Mecham	Omaha
74.	1940-42	Abel V. Shotwell	Omaha
75.	1940-42	Frank M. Colfer	McCook
76.	1941-43	Virgil Falloon	Falls City
77.	1941-43	Joseph C. Tye	Kearney
78.	1941-47	Earl J. Moyer	Madison
79.	1937-37	C. J. Campbell	Lincoln
80.	1938-38	Harvey Johnsen	Omaha
81.	1939-39	James M. Lanigan	Greeley
82.	1940-40	E. B. Chappell	Lincoln
83.	1942-45	Fred J. Cassidy	Lincoln
84.	1941-41	Raymond G. Young	Omaha
85.	1942-48	Max G. Towle	Lincoln
86.	1942-42	Paul E. Boslaugh	Hastings
87.	1942-45	John E. Dougherty	York
88.	1942-49	Yale C. Holland	Omaha
89.	1943-45	Robert R. Moodie	West Point
90.	1941-45	B. F. Butler	Cambridge
91.	1943-46	Frank M. Johnson	Lexington
92.	1944-49	Floyd E. Wright	Scottsbluff
93.	1945-50	John J. Wilson	Lincoln
94.	1945-48	Robert B. Waring	Geneva
95.	1944-46	George L. DeLacy	Omaha
96.	1945-47	Virgil Falloon	Falls City
97.	1945-49	Leon Samuelson	Franklin
98.	1946-48	Harry W. Shackelford	Omaha
99.	1946-48	Paul F. Good	Lincoln
100.	1947-48	Joseph T. Votava	Omaha
101.	1947-48	John E. Dougherty	York
102.	1947-55	Lyle E. Jackson	Neligh
103.	1948-49	Robert H. Beatty	North Platte
104.	1947-50	Frank D. Williams	Lincoln
105.	1947-50	Thomas J. Keenan	Geneva
106.	1948-51	Laurens Williams	Omaha
107.	1949-51	Joseph H. McGroarty	Omaha
108.	1949-54	Wilber S. Aten	Holdrege
109.	1948-49	Abel V. Shotwell	Omaha
110.	1949-55	Paul L. Martin	Sidney
111.	1949-55	Joseph C. Tye	Kearney
112.	1949-51	Earl J. Moyer	Madison
113.	1950-	Harry A. Spencer	Lincoln
114.	1950-56	Paul P. Chaney	Falls City
115.	1950-59	Paul Bek	Seward
116.	1950-52	Clarence A. Davis	Lincoln
117.	1951-55	Barton H. Kuhns	Omaha
118.	1952-57	Thomas C. Quinlan	Omaha
119.	1951-52	George B. Hastings	Grant
120.	1952-53	Laurens Williams	Omaha
121.	1953-54	J. D. Cronin	O'Neill
122.	1954-57	Norris Chadderdon	Holdrege
123.	1954-56	John J. Wilson	Lincoln
124.	1955-56	Wilber S. Aten	Holdrege
125.	1955-58	F. M. Deutsch	Norfolk
126.	1955-	Clarence E. Haley	Hartington
127.	1955-58	R. R. Wellington	Crawford
128.	1955-	Alfred G. Ellick	Omaha
129.	1954-55	Jean B. Cain	Falls City
130.	1955-57	Hale McCown	Beatrice
131.	1956-	C. Russell Mattson	Lincoln
132.	1956-58	Barton H. Kuhns	Omaha
133.	1957-59	Paul L. Martin	Sidney
134.	1957-60	Richard E. Hunter	Hastings
135.	1957-	John R. Fike	Omaha
136.	1957-	Thomas F. Colfer	McCook
137.	1958-	William H. Lamme	Fremont
138.	1958-	Carl G. Humphrey	Mullen
139.	1958-60	Joseph C. Tye	Kearney
140.	1959-	Charles F. Adams	Aurora
141.	1959-	Flavel A. Wright	Lincoln
142.	1959-60	Thomas C. Quinlan	Omaha
143.	1960-	Hale McCown	Beatrice
144.	1960-	Ralph E. Svoboda	Omaha
145.	1960-	Herman Ginsburg	Lincoln