IDAHO STATE BAR COMMISSION

By_____,Secretary

PROCEEDINGS

OF THE

IDAHO STATE BAR

VOLUME XVIII, 1942

SEVENTEENTH ANNUAL MEETING

SUN VALLEY, IDAHO

July 9, 10, 11, 1942

PAST COMMISSIONERS

WESTERN DIVISION

JOHN C. RICE, Caldwell, 1923-25.
JESS HAWLEY, Boise, 1927-30.
JOHN W. GRAHAM, Twin Falls, 1933-36
C. W. THOMAS, Burley, 1939-42,
FRANK MARTIN, Boise, 1925-27.
Wm. HEALY, Boise, 1930-33.
J. L. EBERLE, Boise, 1936-39,

EASTERN DIVISION

N. D. JACKSON, St Anthony, 1923-25,
E. A. OWEN, Idaho Falls, 1928-34
A. L MERRILL, Pocatello, 1925-28
WALTER H. ANDERSON, Pocatello, 1934-40.

NORTHERN DIVISION

ROBT. D. LEEPER, Lewiston, 1923-26
WARREN TRUITT, Moscow, 1928-32
A. L. MORGAN, Moscow, 1935-38
C. H. POTTS, Couer d'Alene, 1926-28
JAMES F, AILSHIE, Couer d'Alene, 1932-35
ABE GOFF, Moscow, 1938-41

PRESENT COMMISSIONERS AND OFFICERS

L. E. GLENNON, Pocatello, (1940-), President

PAUL HYATT, Lewiston, (1941-), Vice President

E B. SMITH, Boise, (1942-).

SAM S. GRIFFIN, Boise, Secretary

LOCAL BAR ASSOCIATIONS

Shoshone County—H. J. Hull, President, Wallace; James E. Gyde, Jr., Secretary, Wallace.

Clearwater (2nd and 10th Jud. Dists.)—Frank F. Kimble, President, Orofino; Samuel F. Swayne, Secretary, Orofino.

Third Judicial District—Thornton D. Wyman, President, Boise; L. B. Quinn, Secretary, Boise.

Fifth District (5th and 6th Dists.)—Ben Johnson, President, Preston; P. J. Evans, Secretary, Preston.

Seventh District—George C. Huebener, President, Emmett; C. H. Higer, Secretary, Emmett.

Eighth District—Robert H. Elder, President, Couer d'Alene; J. Ward Arney, Secretary, Couer d'Alene.

Ninth District—Paul T. Peterson, President, Idaho Falls; Louise Keefer, Secretary, Idaho Falls.

Eleventh District—Frank L. Stephan, President, Twin Falls; James T. Murphey, Secretary, Twin Falls.

PROCEEDINGS

VOL. XVIII

EIGHTEENTH ANNUAL MEETING

of the

IDAHO STATE BAR

1942

C. W. THOMAS, President, Burley

SAM S. GRIFFIN, Secretary, Boise

COMMISSIONERS:

L. E. GLENNON, Pocatello; Paul W. HYATT, Lewiston

THURSDAY, JULY 9, 1942

(Morning Session)

NOTE: The Board regrets that space and finances have required digesting of many of the papers delivered. Endeavor has been to retain substance: resulting detraction from readibility must be charged to the Board, not to the authors, to whom the Board apologizes.)

PRES. THOMAS: The meeting will please come to order. The Invocation will be offered by Rev. James Opie of the Episcopal Church of Hailey.

Invocation by Rev. Opie.

PRES. THOMAS: A summary of the past year will be given by Mr. Griffin, Secretary of the Idaho State Bar.

SECRETARY'S REPORT

The activities of the Bar Commission, C. W. Thomas, Burley, President, L. E. Glennon, Pocatello, Vice-President, and Paul W. Hyatt, Lewiston, as briefed from Commission meetings since July, 1941, show:

ADMISSIONS: The preparation of questions for, and supervising and grading of, two examinations of 22 applicants (of whom 5 had previously failed); 11 passed and 11 failed.

14 applicants (4 previously failed) qualified for the June, 1942, examination, which will be graded by the Board commencing July 12th. One applicant was disqualified for false statements on his application.

By amendment of rules, approved by the Supreme Court, the Board was given discretion to relax the required period of Idaho residence of applicants about to be called into military or naval service of the United States.

The Board has been considering means by which the burden of time now required of Board members in passing upon applications, preparing questions, supervising and grading examinations, may be lightened to some extent. The present practice requires that the major part of the time of the Board members in their offices and at meetings be devoted to admission problems. For some years the Commissioners have desired to be able to devote more time to matters of practical and financial benefit to the practicing lawyer, the members of the Idaho State Bar. One evidence of this is a studied effort to formulate practical programs of interest and benefit to Idaho lawyers—to get away from generalizations, and to study and emphasize local problems. Much has been accomplished in this direction through a Program Committee, which has spent much time in contacting the lawyers of the State before deciding upon a program. During the past year E. B. Smith has been chairman, and Milton Zener and E. T. Knudsen members of such Program Committee. Another evidence is the encouragement of activity by the Local Bar Associations, and reference to the officers of such associations of many of the problems of the Bar for local study and decision.

The organized Bar, and particularly its Commissioners, has spent much of its effort in years past upon three important activities—admissions to the Bar, discipline, and improvement of procedure. The fourth and major objective of such an organization—that of improving the business of the lawyer—exploring new fields of practice, illegal and unauthorized practice of the law, public relations, selling the public on the need and desirability of legal service, getting clients into lawyers' offices—has suffered by reason of time necessarily devoted to the first named objectives.

Now the Board hopes that its plans may result in an ability to place emphasis upon this fourth objective, and make the Idaho State Bar of greater material assistance to its members.

COMMITTEES: In accordance with the directions of the 1941 annual meeting, the Board appointed committees on National Defense (W. A. Johnston, Boise, Chairman), Public Relations (Charles Darling, Boise, Chairman), Revision of Divorce Laws (E. V. Boughton, Couer d'Alene, Chairman), Appellate Procedure (O. W. Worthwine, Boise,

Chairman), Preservation of Idaho Water Rights (T. L. Martin, Boise, Chairman), Examination of Titles (George H. Van de Steeg, Nampa, Chairman), Code of Evidence (O. O. Haga, Boise, Chairman), Bill of Rights (Edwin Snow, Boise, Chairman).

The Board also created a standing Committee of Local Bar Association Presidents, consisting of the Presidents, from time to time, of each of the eight local bar associations. This committee met at Boise with the Commission, and to it were submitted several specific matters for the consideration of the local bars.

DISCIPLINE. A disbarment recommendation made to the Court by the Board, which was pending before the court at the time of last year's report, was dismissed by the court upon payment of costs by the attorney involved. Three complaints were investigated and dismissed, no grounds appearing. One complaint is under investigation.

An opinion upon ethics (Opinion No. 2) in connection with attorneys appearing for collection agencies, was written after hearing and briefs submitted.

An opinion upon illegal or unauthorized practice by collection agencies is now under consideration.

COMMITTEE ON COURT RULES OF PROCEDURE
Following discussion of Court Rules at the 1941 meeting, and receipt of suggestions from members of the Bar, the sub-committee on Rules of Procedure formulated their final proposed rules. Thereafter, the Committee met and studied the proposals; a part of the Committee has submitted its report to the Supreme Court; the other members are preparing final recommendations for rules, which should shortly be filed.

MEETINGS

The Board held six meetings, consuming twenty days, not including travel and office time.

LOCAL BAR ASSOCIATION VOTES

Under the rule for voting at annual meetings, the local associations are entitled to the following votes at this meeting:

Shoshone County Bar Assn.	24
Clearwater Bar Assn.	48
Third District Bar Assn.	109
Fifth (Sixth) District Bar Assn.	58
Seventh District Bar Assn.	48
Eighth District Bar Assn.	31
Ninth District Bar Assn.	54
Eleventh (Fourth) District Bar Assn.	70
Total	442

FINANCES AND MEMBERSHIP:

APPROPRIATION
(July 1, 1942)

Balance July 1, 1941		$5,230.56
License fees	3,547.50	
Costs	113.00	
Examination fees	217.50	
Total		$9,108.56

EXPENDITURES
(July 1, 1942)

Office	$2,321.77	
Travel	940.04	
Meetings	636.54	
1941 Proceedings	412.32	
Examinations	72.80	
Discipline	15.60	
Rules Committee	230.30	
Miscellaneous	20.69	
Total		$4,650.06
BALANCE IN FUND		$4,458.50

LICENSED ATTORNEYS:

Northern Division	102
Western Division	216
Eastern Division	103
Non-resident	20
Total	441
Judges	22
Total Membership in Idaho State Bar	463

ATTORNEYS IN SERVICE OF UNITED STATES

So far as has been reported to me, the following are in the armed service of the United States. It is probable that there are others not yet reported.

Ambrose, Grant Lewis	Boise
Anderson, Gus C.	Pocatello
Baird, Lawrence E.	Boise
Campbell, Lionell T.	Twin Falls
Clemons, Dale	Boise
Cramer, John W.	Lewiston
Dunlap, Robert B.	Caldwell
Gess, Tom B.	Boise
Goff, Abe	Moscow
James, Andrew F.	Gooding
Johnson, Edward T.	Orofino
Johnson, Wm. A.	Boise
Maxney, Stewart	Caldwell
McFadden, Jos. J.	Gooding
McQuade, Jack F.	Moscow
O'Leary, Kenneth W.	Boise
Peacock, John J.	Weiser
Price, Vaughn A.	Boise
Reed, Earl E.	Nampa
Spear, Clayton V.	Moscow
Sullivan, Willis E.	Boise
Taylor, Morton C.	Boise
Thatcher, Preston	Salmon
Trimming, Albert E.	Pocatello
Wayne, James W.	Wallace

DECEASED ATTORNEYS:

Condie, Gibson A.	Hailey
Darling, Chas. H.	Boise
Hedrick, Jos. Iva	Hailey
Peavey, Arthur J., Jr.	Twin Falls
Rehburg, F. H.	Kamiah

PRES. THOMAS: Next is something from your president. During the past year, as the Secretary has informed you, and as has occurred in previous years, your Commissioners were handicapped by time required for admissions —the giving and preparing of these examinations. We have partially worked out a plan we think will relieve that.

I want to take this opportunity to thank the committees and the lawyers throughout the state for the cooperation I have had during my administration. It has been perfect. I have not met nor contacted half as many of you

personally as I had hoped to do but times have changed and it was not possible to do so.

Organized effort is essential to the well being of any group. For that reason we came to the conclusion that we would not dispense with this annual meeting. Personally, I hope we do not find it necessary to discontinue it in the future. Much good comes from it and from contacts and if we lose them we lose one of the best means of helping ourselves and helping society generally.

War is the paramount issue. Lawyers are taking part in the civil service and in the armed forces and in the various communities we are cooperating greatly, doing, I am sure, our part. But there is a larger duty that we owe, for as sure as we are here there will come with the lowering of the standards of living a lowering of the standards in all things, and it is there that we must play our part. It is a tremendous duty. We have been confronted in America with what France was confronted with; that war couldn't happen, it wouldn't happen. We have wished to think war out of existence, but with France it came and France did not recover. America will recover.

One of the most striking and glorious things that has happened in America is that today our young people, of whom they said but recently: "They don't know geography, and they don't know history, and they don't know our American institutions," go forth so cheerfully, so courageously at a time like this. My boy is in the Air Corps and your boy is in the Tank Service and in the other services and everyone of them says: "That is the best service there is." The morale is fine. All of which bespeaks that free men make better men.

Justice is the first concern of every people and the improvement of the administration of justice was first instituted by free men. Now we must be alert against the lowering of our standards of thinking about justice. We ourselves must lead in whatever we believe and we must think and tend to promote justice, to simplify justice, to bring justice to the common man. It is only during the last four hundred years that men ceased to have the idea that very shortly this world would come to an end. No one holds that belief today, but this civilization will come to an end except as the democracies carry it on and maintain it. Not alone for the benefit of ourselves, but for the benefit of countless generations to come, for as inevitable as fate, if the forces working against democracy prevail, common man must start at the bottom again and gradually through strength make his laborious way to the top. That won't happen, but it will largely depend upon this; all those

elements which are contrary to democracy will be unpopular, but we must see to it that democracy is wholesome, that democracy fulfills its destiny in the lives of men, for only through free men may we have free government and enlightment, and after all, America is the full blown flower of centuries of common man's struggle for liberty. May we do our part. Gentlemen, I thank you.

PRES. THOMAS: "The Code of Evidence—a Committee Report," will be given by Mr. O. O. Haga.

O. O. HAGA: Mr. Chairman, Gentlemen of the Bar: the Committee on the Code of Evidence was Judge O. A. Sutton of the Seventh Judicial District, Oscar W. Worthwine of Boise and myself. The Committee hasn't been able to hold a meeting going over the final report. We have had some conferences and correspondence, prior to preparation of the report and I think I know the views of the members but anything I may say here has not been considered by the committee except as to the conclusions that I may suggest.

The committee has made such investigation and done such research work as seemed possible under the circumstances. We have conferred with members who prepared the Code or Evidence, Dean Wigmore, who was made Chief Consultant, with Judge John J. Parker, who has given much time to the matter, and with different members of the bar from different parts of the country who have been in a position to give study, and whose suggestions might be of some value.

The state has undertaken the administration of justice—one of the most important functions of the state. The improvement that may be made in the administration of justice will necessarily depend to a large extent on the rules of evidence, the code of evidence. The bar of the state must recognize its public duty and public trust in advising and assisting in directing the legislature on the question of improving the administration of justice, which is peculiarly within the expert knowledge of the members of the bar.

In bringing to your attention the Code of Evidence as prepared by the American Law Institute we must consider the present law of evidence and, if there is need for a change whether the proposed Code reasonably meets the demands of the Bench, the Bar, litigants and taxpayers.

The chief requirement of any judicial system is honest, independent and capable judges, invested with such power and discretion that there may be a simple, inexpensive and orderly proceeding for the settlement of contro-

versies between litigants. In setting up tribunals for the administration of justice and prescribing their procedure the Bar is invested with a public trust. The lawyer is trained in the investigation of facts and in searching for and weighing evidence; he must necessarily be the consultant in legislation prescribing judicial procedure. There never was a greater chance than now for the legal profession to justify its existence. Never, during our lives, will such an opportunity return and the Bar should take advantage of the situation, marshal its forces and make its influence felt, not for the selfish interest of the lawyer but for the interest of the litigant and taxpayer.

Our profession by and large has been peculiarly indifferent to the great problems of judicial administration. Procedure has been regarded as mere incident to substantive law. Delays in procedure, technicalities of pleadings and complexities of procedure have aroused the ire of clients, perhaps as much as an adverse decision on the merits of the case. Chief Justice Taft made the solemn declaration that "If one were asked in what respect we have fallen furthest short of ideal conditions in our government, I think we would be justfied in answering, in spite of glaring defects in our system of municipal government, that it is our failure to secure expedition and thoroughness in the enforcement of public and private rights in our courts."

It is said that the law of evidence is now where the common law forms of pleadings were a century ago. Obstructive devices are too often regarded as privileges of the Bar and permitted by the courts on the basis of tradition at the expense of litigants and taxpayers. When one compares the improvements in court procedure with the progress that has been made in the business world it is amazing to see the slowness with which procedural law has moved as compared with substantive law.

The growth of administrative tribunals, state and federal, for the settlement and determination of rights and questions of tremendous importance is one of the most significant developments of the century. These boards or tribunals are generally directed by laymen and they have been invested with wide powers of adjudication. They dispose of numerous controversies which could better be handled by the courts if court procedure had kept pace with the development of the times. These administrative tribunals present a challenge to the Bar to revise court procedure by looking forward and keeping pace with business instead of seeking a precedent in the distant past. Administrative tribunals claim many advantages in the dispatch of business and economy of procedure, but they also

have many disadvantages. Too often they are influenced by executive control, political consideration, new theories of social progress, and the officers are frequently selected for reasons other than technical qualifications for the positions. Few businessmen, if any, would prefer to have their cases heard by the trial examiner of the National Labor Relations Board rather than by a jury under the guidance of a judge.

It is advisable to review the historical background which preceded the preparation of the Code.

The present law of evidence is scattered through statutes, court decisions and textbooks. Dean Wigmore's latest treatise required ten volumes and contained about 85,000 citations.

In 1921 the Legal Research Committee of the Commonwealth Fund of New York appointed a special committee of two judges and six professors of the law of evidence to investigate and report on a revision of the rules of evidence. That report was published in 1927. The Chairman was Professor Edmund M. Morgan, later designated as reporter for the proposed Code of Evidence. In 1937 the president of the American Bar Association appointed a committee on judicial administration, with Judge John J. Parker, Senior Judge of the United States Circuit Court of Appeals for the Fourth Circuit as chairman, assisted by an advisory committee of judges, lawyers and law professors from practically every state in the Union.

The reports of Judge Parker's subcommittees covered: 1. Judicial administration; 2. Pretrial procedure; 3. Trial practice; 4. Trial by jury, including selection of jurors; 5. the law of evidence; 6. Appellate practice; 7. Administrative agencies and tribunals; and their reports were outstanding features of the program of the American Bar Association meeting at Cleveland in 1938.

The subcommittee on evidence was headed by Dean Wigmore, assisted by approximately 48 members, including judges, experienced practioners and teachers of evidence in the leading law schools. Dean Wigmore's report condensed the essential rules of evidence with the explanatory statements to about 33 pages.

Judge Parker's committee is carrying on a crusade to simplify, speed up and reduce the expense to litigants of the trial of cases and to place judicial procedure on a plane with modern business practices.

This work brought forcefully to the attention of the American Law Institute the necessity of immediate atten-

tion to trial procedure. It therupon undertook the work of drafting a model Code of Evidence embodying improvements suggested by the committee, and a complete restatement of the entire law of evidence. Unlike the restatement of torts or contracts, it is intended as a code for adoption either under rules of court where the courts may have authority to adopt rules, or by legislative act. Apparently, in a state like Idaho, part should be embodied in a legislative act and other parts could be rules approved by the Supreme Court under Chapter 90, 1941 Session Laws or under the inherent power of the court to make rules governing procedure.

Better to appraise the proposed Code, you should know the qualifications of the men who have prepared it. It has not been prepared by theorists but by men of practical experience at the Bar.

Mr. Morgan, the reporter or chairman, from Ohio; age about 63; educated at Harvard and Yale; in general practice from 1905 to 1912; Assistant and Acting City Attorney of Duluth for two years; Special Counsel for the Duluth Charter Commission; Lieutenant Colonel in the Judge Advocate's office during the first World War; author of law books including common law pleading, the study of law and cases on evidence and of numerous articles in law journals, principally on evidence, a professor in the Law School, University of Minnesota, from 1912 to 1917; in the Yale Law School from 1917 to 1925, at Harvard since 1925 teaching evidence and acting as dean part of the time.

Dean John H. Wigmore, the Chief Consultant, well known by his work on Evidence; active practice in Boston for about two years, but most of his life spent in teaching Evidence and as Dean of Law, Northwestern University; lately consultant for many federal agencies and departments and is undoubtedly one of the best known legal authors.

Wilbur H. Cherry, member of advisory committee, practiced in New York and Massachusetts for many years; a lecturer and teacher of law at the University of Minnesota since 1929; appointed by the United States Supreme Court as a member of the committee for drafting the Federal Rules of Civil Procedure; served on many boards of importance and has drafted much important legislation in his state.

William Green Hale, member of advisory committee; age 60; educated in Oregon and Harvard; in active practice in Portland for many years, later an instructor in the University of Illinois School of Law; Dean of Law School

of the University of Oregon, University of Washington and University of Southern California; member and vice-chairman of the Code Commission in the State of California from 1931 to 1941.

Augustus N. Hand, member of advisory committee; distinguished jurist; age about 73 years. Many of the large universities have conferred on him their highest degree in Law; engaged in active practice in New York City as a member of leading law firms for upwards of 19 years. Later United States District Judge for that District for 13 years; since 1927, a member of the United States Circuit Court of Appeals.

Lawrence Howard Eldredge, member of advisory committee; educated in Pennsylvania; practiced in Philadelphia many years; a part time lecturer at the University of Pennsylvania; active in the work of the American Law Institute and an advisor on the Restatement of Torts; annotator of the Pennsylvania state statutes and the author of many articles in law magazines.

Learned Hand, another advisor, age 70 distinguished legal scholar; practiced in Albany and New York City from 1897 until 1909 when he was appointed United States District Judge. After fifteen years he was appointed to the Circuit Court of Appeals.

Mason Ladd, born in Iowa, educated in Iowa and Harvard; practiced from 1923 to 1929; Assistant County Attorney for two years; law lecturer at Drake and University of Iowa from 1929 to 1939, and Dean of Law School, University of Iowa since 1939.

Henry T. Lummus, age 65; educated in New England colleges; practiced for twenty-three years; law lecturer at Boston University; Associate Justice of a trial court for eleven years; member of the Supreme Court of Massachusetts for ten years; author and writer on many legal subjects.

John M. Maguire, age 53; educated in Colorado and Harvard; member of leading law firms in Boston since 1911; also professor at Harvard since 1923; consulting expert of the Treasury Department since 1938.

Charles T. McCormick, age 55; educated at University of Texas and Harvard; practiced in Dallas for ten years; professor of the law of evidence at Texas, North Carolina, and Northwestern Universities; Dean of the Law School, Texas University since 1940; author of many textbooks and legal articles.

Charles Z. Wzanski, age 36; educated in New England and Harvard University; member of leading law firm in

Boston since 1931; recognized as one of the brilliant younger members of the Bar.

In short, the Code was prepared by and expresses the views of qualified men of learning and experience at the Bar and authorities on the law of evidence; it is entitled to the serious consideration of the Bench and Bar. It was tentatively approved by the American Law Institute in 1941. Copies have been widely circulated during the past year among lawyers, judges and teachers of evidence, and their criticism and suggestions were especially invited. It was again considered by the Institute in 1942 and was approved with some minor changes.

Articles by Professor Morgan in the American Bar Association Journal, September, October, November and December, 1941, explain in considerable detail the underlying principles upon which the Code was based and the reasons for provisions which we may deem important departures from existing law. In the January, 1942 Journal dissent and rather critical comment on some of the rules by Dean John H. Wigmore appears. His dissent is not with the policy of any of the rules as such. In his opinion some of the rules do not go far enough and others he says go too far. His criticism is directed largely to the draftsmenship rather than the principles involved.

The objection most frequently urged to the Code is that it vests too much discretion or power in the trial court; that it assumes that there will be a trial judge of learning, integrity and capacity to grasp and understand the law applicable to the issues in the case. Professor Morgan replies that a Code of Evidence should not be based on the assumption that trial tribunals are made up of low grade morons presided over by a high grade moron, but on assumption that the trial judge is of reasonable ability and unquestionable honesty and that the jury is composed of men and women of ordinary intelligence; that settlement of disputes should not be entrusted to men and women possessing less qualifications than that. Unless we proceed on that assumption the state fails in its duty to furnish proper tribunals for the determination of rights of litigants. If the present law for the selection of judges and jurors does not provide competency then the law should be changed. Under no system can justice be efficiently administered by judges and jurors unqualified to weigh evidence and sift fiction from the facts in the investigation of the truth. A lawsuit is but a proceeding for orderly settlement of controvesy and precedure prescribed by the state is but the means deemed necessary for the investigation of the facts in dispute so that there may be a broad and correct decision; justice delayed too often is justice

denied. Accurate results such as a scientist seeks can not normally be obtained in a lawsuit, for the judge must make his decisions and admit or exclude evidence in the heat and hurry of the trial under the emotions of the lawyers, the litigants and witnesses, and decisions thus made are generally but a rough approximation of justice. Rules with many artifical barriers to the introduction of evidence are not conducive either to speedy or correct results. That, apparently, was the opinion of those who prepared the Code.

It is impracticable to review the provisions of the Code and point out the various changes which the adoption of the Code would make in the law in this state as it stands today. It is the conclusion of the committee that more study needs to be given to this matter before final action is taken either for rejection or approval, in whole or in part. The Code was intended as a model code and it is not necessary that all the provisions of the Code should be adopted. It is likely that many states will adopt one or more of the rules from time to time and some may be modified and others rejected in their entirety.

The Code consists of 112 rules divided into 10 chapters or subdivisions. Some of the rules have many paragraphs or subdivision. Some of the more important changes which the rules, if adopted, would make in the law of this state are:

Rule 8 provides that at the close of the evidence and arguments the judge may sum up the evidence and comment upon its weight and the credibility of witnesses, if he instructs the jury that they are to determine for themselves the weight, and the credit to be given to witnesses, and are not bound by the judge's comment thereon. This rule would make two important changes in our present law—first, instructions would follow and not precede arguments. That was the law of this state until 1907. That is the rule in England and in Federal courts and has the approval of law writers and the committee of the American Bar Association on the Administration of Justice; second, it authorizes the judge the comment on the weight of evidence and credibility of witnesses. That provision is likewise sustained by the authorities and the committees referred to above.

Rule 12 provides that "All provisions of the common law or statutes of this State dealing with the subject matter of any of these Rules or inconsistent with any provisions of these Rules are hereby abrogated." That rule presumably would have to be modified so as to provide for legislative action modifying or repealing certain statutes.

Rule 101 provides that every person is qualified to be a witness unless the judge finds him incapable of understanding or making himself understood, either directly or through an interpreter. It would change the law of Sec. 16-202 I. C. A. which provides in substance that one having a claim against an estate of a deceased person may not testify as to any communication or agreement, not in writing, occurring before the death of such deceased person. The proposed rule is in harmony with the laws of several states and has the general approval of authorities on evidence. A committee of the Massachusetts Lawyers Institute, critical of some of the rules, expressly and highly approved of this rule, which had been the law of Massachusetts since about 1856. It is thought that it is just as important to protect the estates of the living as the estates of the dead. In some states they follow the rule with a brief statute that declarations of a decedent with reference to the claim may be admitted to rebut the testimony of the claimant.

Much study is being given to this Code by Bar associations and committes, and it is our report that further study be given before final action is taken by the State Bar. We think it should be referred to a committee to report at the next annual meeting as to action taken in other states and by other associations, but the work should be coordinated with the work of the committee on Rules of Civil Procedure and of the Legislative Committee.

Your committee suggested to Mr. Pendleton Howard, Dean of the Idaho School of Law, that perhaps some of the members of the School could examine the proposed Code and report which rules would come within the power of the Supreme Court to prescribe procedural rules and which contained provisions in the nature of substantive law that would require an act of legislature; also what changes the rules would make in the existing law of this state.

We have received two very helpful and instructive reports prepared by Messrs. Lawrence H. Duffin and Robert H. Copple, members of this year's graduating class in the College of Law. The report which deals with what rules can be adopted by the court, and what rules would require legislative enactment contains the citation of many authorities. That is submitted as part of this report and we suggest its publication. Their report on each rule separately pointing out changes made in existing law of this state consists of about 41 pages. It is informative and helpful in the study of the rules, but because of its length it is perhaps impracticable to include it in the proceedings. However, it is submitted as part of your committee's report.

REPORT OF MESSRS. DUFFIN AND COPPLE

The Supreme Court has no power to change substantive law by precept, as this would be a clear invasion of the legislative function under the doctrine of separation of powers; does it have power to make procedural law by precept. This concept of power is quite distinct from the power to "make law" by decision.[1] Here the court is not deciding the right of litigants in a case before it, it is prescribing rules for future guidance.[2]

Established that the Supreme Court has such power then the further question of "what rules of evidence are procedural" must be settled.

Does the Supreme Court have the power to prescribe procedural rules of evidence?

If this power exists at all it is "inherent" in the court. Any attempted "delegation" of the power by the legislature is a nullity.[3] The separation of powers principle forbids it. The Idaho legislature was aware of this tenet when it passed the statue which "recognized and confirmed" the "inherent power" of the court to "make rules governing procedure."[4]. But it does not follow that this statute has no legal effect whatever. The opinion is advanced that an "inherent" power need not be exclusive. If it is not exclusive, the legislature having a concurrent or superior power, then the effect of this statute is decidedly important. By express declaration the legislature has withdrawn its powers, leaving the Court free to assert its own power to make rules.[5] If, as many prominent writers claim, this is an exclusive inherent power of the Court, we are indeed faced with a curious situation. The statute not only becomes a mere declaration of policy, but "Codes of Procedure" have been adopted in almost every state of the union by the legislatures of those states and in only one instance was a constitutional amendment thought necessary.[6] Only since the present reform movement originated thirty years ago has this development been seriously challenged.[7] The proposition that this has been a legislative usurpation of power has inspired a re-examination of this whole concept by modern authority and many exhaustive treatments have resulted.[8]

1. Green, Thomas Fitzgerald Jr., "To What Extent May Courts Under the Rule-Making Power Prescibe Rules of Evidence," 26 A. B. A. J., 482. See articles cided in note 1.
2. Editorial, 24 Journ. Am. Jud. Soc. P. 68.
3. Grinnel, Frank W., "To What Extent may Courts Under the Rule-Making Power Prescribe Rules of Evidence," 24 Journ. Am. Jud. Soc. p. 41, but see Green supra p. 488, 2nd col.
4. Session Laws, 1941, Ch. 90, p. 163.
5. Green, supra p. 487.
6. New York, See Grinnell, supra p. 41, n. 2.
7. Ibid, p. 42.
8. See the comprehensive bibliography in 16 A. B. A. J. 199 (1930), "The Rule-Making Power: A Bibliography," 109 articles are listed. Articles subsequent to this bibliography are: Tyler, "The Origin of the Rule-Making Power and Its Ex-

While Roscow Pound is the putative father of the procedural reform movement,[9] Colonel Wigmore took tactical command in 1926. His attack was based on the above premise that legislative rules for procedure were void. "The truth is that the legislature has no more constitutional business to dictate the procedure of the judiciary than the judiciary has to dictate the procedure of the legislture."[10] The criticism this opinion evoked is matter of history. The rapid change of attitude by the legal profession made the question one of extent of the court's rule-making power, not whether it existed. The issue has not been finally settled. Many lawyers and judges still hesitate to accept. But the almost unanimous opinion of "private writers"[11] on this subject is that the court does have the inherent power to prescribe procedural rules of evidence and that a statute like Idaho's opens the door for complete reform.[12] Without a detailed account of the considerations the following observations will be made:

The rule-making power originated in the custom of English Courts. It was later embodied in written decisions of those courts and then in formal orders and rules of court.[13] Parliament early enacted laws regulating procedure, even changing fundamentals. But the English courts have never recognized the separation of powers theory so the action of Parliament has little bearing on the problem in the United States. The fundamental question is: Does the separation of powers doctrine destroy the power of the court to make rules, as asserted by some writers, or does it protect it by placing it beyond the jurisdiction of the legislature, as claimed by Wigmore, or does it do neither, merely establishing it as a matter primarily within the power of the legislature and, secondarily, within the power of the court?

The contention that the historical power of the court to prescribe rules has been abolished by the separation of powers theory is based on the argument that it was evoked

ercise by Legislatures" (1936) 22 A. B. A. J., 772; Warner, "The Role of Courts and Judicial Councils in Procedural Reform" (1937) 85 Univ. Pa. L. Rev. 441; Sunderland, "Trends in Procedural Law" (1939) 1 La. L. Rev., 447; Sunderland, "The Regulation of Procedure by Rules Originating in the Judicial Council' (1935) 10 Ind. L. J., 202; Harris, "The Extent and Use of the Rule-Making Authority" (1938) 22 Journ. Am. Jud. Soc., 27; Gertner, "The Inherent Power of Courts to Make Rules" (1936).

9. Grinnell, p. 42, 21 J. A. J. S. 176.

10. Wigmore, 23 Ill. L. Rev., 276, reprinted in 20 J.A.J.S. 159 and 24 J.A.J.S., 70.

11. See Grinnell, supra, p. 50.

12. Morgan and Maguire, "Looking Backward and Forward at Evidence" 50 Har. L. Rev. 909, 933; McCormick, "Tomorrow's Law of Evidence" (1938) 24 A. B. A. J., 507; 5B1 Wigmore, Evidence (1934) Supp. 64.

13. Tyler, "The Origin of the Rule Making Power and Its Exercise by Legislatures" (1936) 22 A. B. A. J., 772.

as an implement of checks and balances.[14] This is definitely a minority view.[15]

Wigmore supports his opinion with the claim that the state and federal constitutions, by their terms, place all judiciary except the definition of certain parts of jurisdiction and the place of criminal trials, in the judiciary.[16] The provision regarding appellate procedure would also have to be excepted in Idaho.[17] He supports this proposition with six reasons of "policy."[18] Other writers, agreeing with Wigmore, point out that the desire for an independent judiciary, considered by itself, furnishes an argument for the statement that the separation of powers requires unfettered control by the courts of court proceedings, because "when court procedure can be determined by the legislature, the courts to that extent are not independent of the legislature."[19] These authorities explain the acceptance of the legislative codes by the courts as coming under the "comity" rule, most disagreeing with Wigmore by saying the codes are not void, but voidable. The approach to the problem made by these writers is fast becoming the most popular and has been immensely strengthened by the recent adoption by the Supreme Court of the Federal Rules of Civil Procedure.[21]. Many state courts have also exercised the rule-making power[22] and some have adopted this view.[23] The very fact that so many courts have unhesitatingly accepted this right is a strong indication that they won't repudiate it when challenged.[24]

The third possible solution, which might be appropriately termed the "historical analysis," recognizes that both the court and the legislature have exercised this power in the past. [25]. These writers are willing to concede that the superior power rests with the legislature and when it legislates the court is bound to follow.[26] However, as soon as the legislature realizes that "this is a subject which the

14. See Sharp, The Classical American Doctrine of "The Separation of Powers" (1935) 2 Univ. Chi. L. Rev., 385.

15. Warner, "The Roll of the Courts and Judicial Councils in Procedural Reform" (1937) 85 Univ. Pa. L. Rev., 441. See also Green, supra 487. Also it has been suggested that the courts, by acquiescense, may have abdicated their procedural functions except as the right has been reserved to proceed by decision. Grinnell, supra, 44; Tyler, supra, 774.

16. Wigmore, "All Legislative Rules for Judiciary Procedure are Void Constitutionally' 23 Ill. L. Rev., 276. Compare cases collected in 31 Col. L. Rev. 1185 (1931), which hold "delegation" statutes constitutional.

17. Idaho Constitution. Art. 5, Sec. 13.

18. Wigmore, supra, 277.

19. Kates (1934), 18 Journ. Am. Jud. Soc. 122, 2nd col.

20. Grinnell, supra 43.

21. Adopted in 1937.

22. The legislatures of Nebraska and Iowa only have refused to grant rule making power to the courts; Gretner, "The Inherent Power of Courts to Make Rules" (1936) 10 Univ. Cin. L. Rev., 44.

23. Roberts v. Donahoe, 191 Ind. 98, 131 N. E. 33 (1921); Kolkman v People, 89 Col. 8, 300 Pac. 575, (1931); See also Kates, A New Deal for Justice (1934) 20 A. B. A. J. 148 (1937) 21 J. A. J. S. 25.

24. Green, supra, 488.

25. Green, supra, 487.

26. See cases compiled in 110 A. L. R. 35.

courts can regulate better than they and keep hands off," the court can assume full power.[27] This view represents a compromise and the most serious objection that can be made to it is the confusion that would result from a reappearance by the legislature in the field.

Thus under the view that the court has the exclusive inherent jurisdiction to prescribe rules of procedure, or under the view that it now has a complete right since the legislature has withdrawn, the Idaho Supreme Court has the power to adopt procedural rules. That leaves the further question:

What rules of evidence are procedural?

The term "procedure" is so broad in its signification that it is seldom employed in our books as a term of art.[28]

"If there is no meaning in it," said the King, "that saves a world of trouble, you know, as we needn't try to find any."[29] The American Law Institute saved itself a world of trouble. Obviously they were aware of the time honored distinction the courts have maintained between "procedural" and "substantive"law. The comment after the first rule suggests that the provisions regarding administrative agencies should be omitted if the rules are to be adopted by courts under their rule making power.[30] That is the sum total of their contribution. Perhaps this could be interpreted as an implied assertion that the remainder of the rules are procedural. Certainly they took this view of the matter in their Restatement of the Conflict of Laws.[31] At first blush it would appear that the Idaho legislature is also in accord. The provisions on evidence are incorporated in the I.C.A.[32] as part of civil procedure. Almost all of the other states have done the same.[33]

The absurdity of citing case authority for a classification of each rule becomes obvious when an examination of the cases is made. On the broad question "procedural versus substantive" the courts are in utter conflict.[34] It is

27. Warner, "The Role of Courts and Judicial Councils in Procedural Reform' 85 Univ. Pa. L. Rev., 441 (1937).
28. Ballentine, College Law Dictionary, 664.
29. Carroll, Lewis, "Alice's Adventure in Wonderland," p. 145.
30. American Law Institute, "Code of Evidence, Tentative Draft Number Two."
31. See Sections 585, 595, 598 of the American Law Institute "Conflict of Laws" (1934).
32. Vol. 1, Title 16.

other states have done the same.[33]

33. "Legislative usage has firmly established this view of the scope of procedure. Following the example of the Field Code in New York, it has become almost uniform American practice to place statutory rules of evidence with the rules of pleading and practice as a part of the code of civil procedure." Sunderland, "Character and Extent of the Rule Making Power Granted U. S. Supreme Court and Methods of Effective Exercise," 21 A. B. A. J. 404 (1935).
34. See Wigmore, Evidence, Supp. 61-82, digest of federal rulings classified as to the rules of evidence relied upon. Green, 26 A. B. A. J. 483. The Washington Supreme Court has recently declared all rules of evidence to be substantive (State v. Pavelich, 153 Washington, 379, 279 Pac. 1102, 1929) while the following courts have stated all rules of evidence to be procedural: Cochran v Ward, 5 Ind., App. 89, 29 N. E., 795; Sachheim v. Piqueron, 215 N. Y. 62, 109 N. E. 109 (1915); Jones v. Erie R. Co., 106 Ohio St. 408, 140 N. E. 366.

only after the cases are broken down that some order is brought out of chaos and the underlying principles can be discerned. The reason for this is simple. There are at least eight different concepts of procedure and the uniformity appears only when each concept is examined by itself. When this is done a basic underlying principle appears and it is only on the misty edges that the cases cannot be reconciled. But these "concepts" are present and must be considered in each instance before a conclusion can be made. Walter Wheeler Cook, who has made an excellent examination of this subject, observes.

> "If now . . . we examine into the distinction between 'substantive law' and 'remedial and procedural law' as that distinction is involved in legal problems, we find that this distinction is drawn for a number of different purposes ,each involving its own social, economic, or political problems . . .
>
> One group of cases deals with a question of constitutional law, viz., how far may the legislative bodies go in making statutes retroactive, when the constitution contains, as do some of our state constitutions, provisions forbidding retrospective legislation? . . .
>
> A second group, similar to the first, has to do with the ex post facto clause of the Constitution.
>
> A third group, again more or less similar to the foregoing, has to do with laws 'impairing the obligations of contracts'.
>
> A fourth group has to do with the question whether a statute general in terms and not professing to be retroactive shall be construed as retrospective in operation . . .
>
> Another group of cases consists of situations presented to State courts for decisions, in which the State court is to apply federal statutory law but follows its own 'procedural law'.
>
> Still another group has to do with the interpretation of the federal statute directing the federal courts, in civil cases other than equity or admiralty cases, to follow state procedure.
>
> Closely connected with the preceding group are the cases in which the federal court of equity, professedly following the "procedure' established by federal equity rules, is asked to take action to enforce what is described as a new "substantive equitable right' created by a state statute.

> As our final group we have the cases in the Conflict of Laws, in which the 'substantive law' of some foreign state is to be "applied' to determine the 'substantive rights' of the parties, but the 'remedy' and 'procedure to enforce these 'rights' are to be determine by the law of the forum.
>
> If we glance back over this list of purposes for which the distinction we are discussing is drawn, we see at once that a person asking where the line ought to be drawn might well conclude that this ought to be the place for one purpose and a somewhat different place for another purpose. . . The precise meaning to be given to 'substance' and to 'procedure' ought, therefore, to be determined in the light of this underlying purpose to be fair to the individuals concerned."[35]

Although Professor Cook's basis for making a distinction is at best vague and uncertain, it is, under the circumstances, the most accurate and satisfactory solution available.[36] What is the underlying purpose in this analysis? This is an endeavor to discover what rules can be adopted by the court under its rule-making power. It can be assumed that only those rules will be accepted which will re sult in being "fair to the individuals concerned."

What rules may not be fair?

First: Rules which abrogate a vested interest recognized as such by the court or the legislature.[37]

Second: Rules which infringe upon state policy involving matters without the scope of pure procedure.[38]

Under these provisions it seems clear that the litigant should have no legal right in those precepts which are "designed to provide for the orderly dispatch of judicial business, the saving of public time, and the maintenance of the dignity of tribunals." As Mr. Green points out it is the other class of precepts, "those designed to secure to each litigant full and fair opportunity of presenting his case and meeting the case against him," which constitutes a more complicated problem. "To what extent a canon of this second class is a matter of individual right and to what extent merely a matter of judicial convenience or of detail,

35. Cook, Walter Wheeler, " 'Substance' and 'Procedure' in the Conflict of Laws," 42 Yale Law Journal, 341, 342, (1933). A ninth concept should be added, that involving the "rule-making' power of the court.

36. "As to the exercise of its ultimate power by the court in the form of any particular rule, especially if a rule would face a conflicting statute, there may, of course, be a question of expediency in any particular jurisdiction in the light of existing conditions, and the question should be determined by the relative importance of the rule in the performance of the judicial duty to administer justice in that jurisdiction." Grinnell, Frank W., 24 Journ. Am. Jud. Soc. 41.

37. Green, Thomas F. Jr., 25 A. B. A. J., 483.

38. Grinnell, supra, 49.

depends upon public policy and the content of the concept of justice . . . If the thing to be dealt with is clearly a method by which rights and duties are to be protected and enforced, they will exercise the power; if its character is doubtful, they may decide upon the basis of policy rather than logic."[39]

Starting with a mild presumption that the court has the power to adopt all rules of evidence because the legislature has "recognized" its power to adopt rules of procedure and the evidence provisions are included in the procedural section of the Code, it is evident that only those rules should be excluded which abridge fundamental rights "clearly established as substantive rights by the constitution or statute or are essential to a full and fair opportunity of presenting one's case and of meeting the case of the opponent."[40] No extensive analysis of the American Law Institute's rules will be made for this question will depend in the main upon the policy of the committee and the final action of the court.

In general it can be said that those matters which are "probative" such as the rule as to opinions, certified copies, oath administration, burden of proof, evidence in trials without jury, interest, and matters relating to hearsay are clearly procedural, while the attorney and client privilege and the excluding of confidential communications between husband and wife seem to involve state policy and should therefore be excluded. The right of self-incrimination would appear to be a fundamental right within the constitution.[41]

The first problem for the committee is to determine what Rules in the Code of Evidence would effect a change in existing rules. If no substantial change is made it can be safely assumed, of course, that no substantial right is abridged. If there is a change, or completely new rule, then the committee must determine whether it will violate state

39. Green, Thomas F. Jr., 26 A. B. A. J., 483.

40. Green, supra, 489. The court does have the power to change evidentiary rules by decision (Funk v. U. S., 290 U. S. 371 (1933), Thurston v. Fritz, 91 Kan. 498, 138 Pac. 627 (1914). The cases on its power to do the same by means of rules of court are too few to be decisive. See 1938 Wis. L. Rev. 324, 237; Warner, "The Role of the Courts and Judicial Councils in Procedural Reform" (1937), 85 Univ. Pa. L. Rev. 441, 443. "The following students of the subject either state or assume that the rule-making power extends to evidence: Thayer, Evidence (1898)) 530; Wigmore, Evidence, 1834 Supp. 64, Morgan and Maguire, "Looking Backward and Forward at Evidence," 50 Harv. L. Rev. 909; McCormick, "Tomorrows Law of Evidence (1938) 24 A. B. A. J. 507, 581." Green, supra, and also: "It can hardly be true that the courts have felt any doubts as to their power to deal with evidence, because almost every set of rules for trial courts contains a few dealings with witnesses and methods of proof . . . No one court has made a complete set of evidence rules, but the American and English courts as a group have adopted a large number of rules on the subject. Courts apparently have not hesitated to exercise the rule making power in this field when it occurred to them to do so . . . NO COURT HAS ADOPTED A COMPLETE REVISION OF EVIDENCE LAW, BUT THE TOTAL OF ALL THE EVIDENCE REGULATIONS ADOPTED UNDER THEIR RULE MAKING POWER BY THE SEVERAL COURTS IN THIS COUNTRY IS QUITE LARGE." See authorities cited in Green. supra, note 68 at 488. 63 A. B. A. Reports 525, 527 may contain valuable material on this question. They are not available in the University libraries.

41. Grinnell, "To What Extent May Courts Under the Rule Making Power Prescribe Rules of Evidence?" 24 Journ, Am. Jud. Soc., 46.

policy as declared by statute or infringe upon a fundamental right protected by the constitution. If either of these criteria are found disturbed the rule can be classified as "non-procedural."[42] Certainly case authority presents no serious obstacle.

PRES. THOMAS: I appoint a Committtee to report on this matter and the suggestions offered by Mr. Haga, consisting of Laurel Elam, Mr. Haga and Karl Paine. I also appoint as a canvassing committee for the Western Division election, Thornton Wyman, Eli Weston and Ed Babcock.

Next is a Review of the Soldiers' and Sailors' Relief Act, by Willis E. Moffatt of Boise.

I will appoint a committee on this subject consisting of Tom Jones, Sherman Bellwood and Willis Moffatt.

MR. MOFFATT: Mr. President and Gentlemen. This isn't a review. I started out to make a review but I discovered that Congress was amending the law, so I will attempt to tell you what the law will be, probably by the end of this month. Most of you have had some contact with the Soldier's and Sailors' Relief Act. This bill amends it in virtually every respect, so if you thought you knew about it, you don't any more.

It is unnecessary for me to cover the act generally as was done by Mr. Frank Stephan, reported in the 1941 proceedings, page 46. I shall limit myself to questions in procedure and rights which are and will be most common to lawyers.

The Act is being amended by H. R. 7164 now in the Senate Military Affairs Committee, having passed the House. I am advised that it will be reported out favorably this month. I am going to treat the Act as if the bill had passed, as it is apparently certain of passage in the very near future.

That this subject is important to the lawyer and will become more so cannot be over stated. It is proposed that soon more than one-twentieth of our entire population will be in the services. Other bar associations and persons have published voluminous reports upon the Act. If I can

42. In the final analysis the whole problem must be settled by our own Supreme Court. Even its own decisions are not conclusive for this is an entirely different "purpose" from any it has considered before. The Committee can do no more than predict "violations of state policy" or "infringements of fundamental rights" and the predictions of the lawyer of what the judge will do are not always absolutely correct. It is submitted that the committee should recommend those rules it wants to recommend and "let nature take its course."

assist in helping the lawyer find the law upon the subject, this paper will serve its purpose.

The Constitutionality of the Act has been thoroughly adjudicated and cannot now be doubted.[1]

The purpose of the Act is too well known to require discussion.

DEFINITION OF TERMS

It defines persons concerned more or less specifically however, the only safe method for the practitioner to follow is to treat all persons connected with any military service of the Federal government as being within the scope of the Act. The Act applies to all courts.[2] Some question may be raised as to its application to administrative tribunals and quasi-judicial tribunals and this does not appear to be covered by any amendment to date. The United States Attorney General has given his opinion that the Act is applicable to government agencies.[2]

PERIOD OF SERVICE

It has been held that the former Act does not affect a person who is told to hold himself in readiness for service.[3] The term of service seems to be clearly defined in the Act to begin with the date of the Act, or upon the date of entering active service and terminating upon discharge or death in service, but in no case longer than the term of the Act.[4]

The Act generally includes all persons in active Federal Military Service. It also includes persons in training or education for such services under the supervision of the United States. The amendment discussed later includes certain selectees before induction, and reserves (See new sec. 106 of amendment, infra). A Captain of a private vessel transporting munitions was held not entitled to relief. [5] The military service must materially interfere

1. Ebert v. Poston, 266 U. S. 548; Hoffman v. Charlestown Five Cents Savings Bank, 231 Mass. 324, 121 N. E. 15; Wenatchee Etc. v. Great Northern Ry. Co. 271 Fed. 784; Erickson v. Macy 231 N. Y 86, 131 N. E. 744; Pierrard v. Hoch, 97 Ore. 71, 184 Pac. 494, reversed 191 P. 328 (Holding similar state statute to Federal law invalid); Konkel v. State 168 Wis. 335, 170 N. W. 715 (State law in conflict invalid).

2. Riordan v. Zube, 50 Cal. App. 22, 195 Pac. 65, (Justice Court) 85 Housing Legal Digest, p. 18-19, Sept. 1941.

3. Continental Jewelry Co. v. Minsky, 119 Me. 475, 111 A. 801; Bolz Cooperage Corp. vs. Beardslee, 211 Mo. App. 109, 245 S. W. 611; Greenwood v. Puget Mill Co. 111 Wash. 464, 191 Pac. 393.

4. But see Ebert v. Poston supra, Clark v. Mechanics American Nat. Bank, 282 Fed. 589; Taylor v. McGregor State Bank, 144 Minn. 249, 174 N. W. 893; Ilderdon v. Charleston Consol. Ry v. Itg. Co. 113 S. C. 91, 101 S. E. 282; Nelson, Etc. v. Seeman, 147 Minn. 354, 180 N. W. 227; Hickernell v. Gregory, 224 S. W. 691.

5. Greenwood v. Puget Sound Mill Co. supra.

with ability to appear and defend in a proceeding.[6] A corporation is not a person within the scope of the Act. However, a corporation may claim some benefit of the Act because of its officers in the service.[7]

SURETIES, GUARANTORS, ENDORSERS AND PARTIES SECONDARILY LIABLE, ETC.

Sec. 103 provides that the Act shall be for the benefit of sureties, guarantors, endorsers, and others subject to obligations or liabilities, the performance or enforcement of which is stayed, postponed or suspended. H. R. 7164 amends paragraph (1) of sec. 103 to include "accommodation makers, and others, whether primarily or secondarily liable". Sec. (2) of 103 is likewise amended to include accommodation makers.[8]

The House Military Affairs committee explains the amendments as follows:

"Section 3 adds two new subsections to section 103 of the act.

"The proposed new subsection (3) makes discharge of sureties upon the criminal bail bond of a person in military service and exoneration of the bail mandatory in those cases where the attendance of the principal cannot be enforced by reason of his military service.

"The proposed new subsection (4) applies to sureties, guarantors, endorsers, accommodation makers, or other persons who are primarily or secondarily liable upon an obligation or liability of a person in military service. Waivers of the relief afforded by this section executed by such persons prior to the date upon which subsection (4) becomes law are not affected. It is provided that subsequent to such date no waiver shall be valid unless executed as an instrument separate from the obligation or liability in respect of which it applies and a waiver so executed becomes ineffectual after the period of military service if executed by an individual who subsequent to the execution of such waiver becomes a person in military service, or if executed by a dependent of such individual, unless executed by such individual or dependent during the period specified in proposed section 106."

6. Dietz v. Treupel 184, App. Div. 448, 170 N. Y. S. 108; The Sylph, 42 Fed. Supp. 354; Fennel v. Frisch 192 Ky 535, 734 S. W. 198 (Negligence action where officer was permitted to spend some time at home where accident occurred).

7. See cases under Stay and Continuance.

8. See Continental Jewelry Co. v. Minsky supra. House Committee report No. 2198, Sec. 2, p. 2; "This section is for the purpose of clarifying the scope of section 103 of the original act. The words 'others subject to the obligation or liability' were intended to include accommodation makers and others primarily or secondarily liable upon the obligation or liabilty. The new language is designed to overcome those decisions which have failed to interpret the provisions in that manner. See In re Itzkowitz (30 N.Y.S. 2d 336)."

(House Committee report No. 2198, sec. 3, p. 3).

It should be noted that the relief granted to endorsers, etc. may be waived but only by a written waiver independent of the instrument evidencing the obligation. Also a waiver obtained before the person enters military service is not good after such person is in the service but another may then be obtained.

NEW SECTIONS TO ARTICLE ONE

H. R. 7164 adds four new sections to this article. The first section is explained by the committee as follows:

> "Proposed section 104 is for the purpose of extending the benefits of the Civil Relief Act to persons who serve with the armed forces of our Allies. At present, under the provisions of section 512 of the Civil Relief Act, such persons receive the benefits of article V with respect to public lands and taxes if they are honorably discharged and resume United States citizenship or die in the service of the Allied forces or as a result of such service. Section 104 provides that relief shall be granted unless such persons are dishonorably discharged from service or it appears that they do not intend to resume United States citizenship.
> (Committee report, supra, sec. 4, p. 3).

Section 105 is explained by the Committee:

> "Section 105 provides for the giving of notice of the benefits accorded by the act to persons entering military service. Sections 401 (2), 500 (5), and 509 of the present law provide for such notice only with respect to certain sections of the act."
> (Committee report, supra, sec. 4, p. 3)

In this connection, the American Bar Association has issued an exhaustive pamphlet entitled "A Manual of Law for use by Advisory Boards for Registrants" which deals with the recent Acts affecting soldiers and especially selectees.

The Committee's explanation of Sec. 106 is:

> "Section 106 extends the relief and benefits of articles I, II, and III to persons ordered to report for induction and to members of the Enlisted Reserve Corps ordered to report for active duty during those periods intervening between the date of receipt of such an order and the date of reporting. It was felt that during such periods such persons were in as great need of protection from civil proceedings as during

the period of military service. The relief authorized by this section is in addition and supplemental to the relief and benefits granted all persons upon entrance upon active duty."

(Committee report, supra, sec. 4, p. 3)

New Section 107 permits the modification of contracts, leases, etc., and repossession, foreclosure, etc., by written agreement executed during or after period of military service. Any agreement for foreclosure, etc, entered into before such service would be void. I take it that the effect of this amendment is to permit a ratification in writing by the person after military service of an act of foreclosure committed during such service.

GENERAL RELIEF

Paragraph 1, Section 200, provides that if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment, shall file in the court an affidavit setting forth facts that the defendant is not in military service. We are all familiar with the rule but questions often arise under it. It has been held that the filing of such affidavit is not jurisdictional and judgment is not absolutely void without the affidavit.[9]

An appearance by the party defendant without reference to military service eliminates that question.[10]

The Act provides that an affidavit may be filed setting forth that the plaintiff is not able to determine whether or not the defendant is in the service and the court can make an order allowing plaintiff to proceed.

A finding of fact by the court that the defendants are not in military service will support a judgment in the absence of affidavit.[11]

It has also been held that this section applies to executor's petition for confirmance of account.[12]

The Act then provides (Par. 1, Sec. 200) that if no affidavit is filed and the defendant is in the service, an

9. Schroeder v. Levy, 221 Ill. App. 252; Eureka Homestead Society v. Clark, 145 La. 917, 83 S. 190; State ex rel Smith v. District Court (Divorce) 55 Mont. 602, 179 P. 831; Howie Mining Co. vs. McGary 256 Fed. 38; Harrell v. Shealey 24 Ga. App. 389, 100 S. E. 800; Alzurgaray v. Onzurez 25 N. M. 662, 187 Pac. 549, (quiet title action); affidavit not filed until after default but before judgment—Mader v. Christie 52 Cal. 138, 198 P. 45 and Waytek v. King 218 S. W. 1081 (Tex); Combs v. Combs, 18 N. C. 381 104 S. E. 656 (divorce—defendant in army—motion to vacate filed 21 months after discharge—held judgment not void); Wells v. McArthur 77 Okla 279, 188 P. 322 (default after answer filed).
10. People ex rel Regonlot v. Byrne, 189 N. Y. Sup. p. 916.
11. Re Institution for Savings in Newbury Port, 309 Mass. 12, 33 N. E. 526.
12. Re Cool 19 N. J. Misc. R. 236, 18 Atl. (2d) 714.

attorney shall be appointed. The Act is quite clear on this point but if the defendant is in default and no affidavit is filed, the question is for the court to decide as to whether it is necessary to appoint an attorney. The attorney appointed cannot waive any right of the defendant or conclusively bind him by his act. It has been said he stands in much the same position as a guardian ad litem.[13]

As to the matter of fees an improvement since the 1918 act is noted. Then the courts held such appearance to be a patriotic duty but apparently now the appointed attorney is entitled to a fee.[14]

The section further provides for the filing of a bond but I could find no case in which a bond had been filed.

SETTING ASIDE JUDGMENTS

The Judgment may be set aside if made during service, upon a showing of prejudice and that the defendant has a meritorious or legal defense to the action.[15]

STAY OF ACTIONS

Section 201 provides for a stay of actions upon application by defendant in the service. The question is within the discretion of the Court. Under the 1918 Act a stay was not granted merely because of the fact that a person in military service might be liable on a deficiency judgment.[16] An army officer obtained a decree of divorce by publication and nine days after decree the wife filed a motion to set it aside. The officer moved for a stay of proceedings and that he be present at the proceedings. The motion was denied.[17] A writ of restitution was stayed on motion of defendant that he was dependent on a son in military service.[18]

Under the 1918 Act the court refused a stay in personal injury suit where defendant was on duty at home and apparently spent considerable time operating his own business.[19] In Oregon Judge Fee refused to postpone a personal injury case where the defendant was in service and the plaintiff had agreed to limit recovery to the limits of defendant's casualty insurance. Defendant had appeared in the case, his deposition had been taken and he had been present at pre trial conferences. The court retained power

13. Davison v. Lynch 103 Misc. 311, 171 N. Y. S. 46.
14. Davison v. Lynch, supra (under 1918 Act); In re Cools estate 19 N. J. 236, 18 Atl. (2d) 714 Probate Court; Weynberg v. Downey 25 N.Y.S. (2d) 600 (Mortgage foreclosure).
15. Par. 4, sec. 200; Harvie Mining Co. v. McGary, 256 Fed. 38; Combs v. Combs, N. C. 104 S. E. 656. See cases under Note 9 (affidavit.)
16. Dietz v. Treupel, supra.
17. State ex rel Clarke v. Klene, 201 Mo. App. 408, 212, S. W. 55.
18. Gilluly v. Hawkins, 108 Wash. 79, 182 Pac. 958.
19. Fennell v. Frisch's Admr. 192 Ky. 535, 234 S. W. 198.

to postpone proceedings if it appeared that injury to defendant would result.[20] But the Sixth Circuit Court of Appeals has stated that the ability to conduct a defense is materially affected because of defendant's absence in military service and action was stayed on condition that insurer post bond for plaintiff equal to policy. The plaintiff had agreed to limit recovery to limit of policy.[21]

Judge Cavannah recently had an automobile case under consideration involving joint defendants, one of whom was in military service. On the petition of the defendant in military service, a stay was granted of the whole proceedings.[22]

A stay was granted to a sailor of proceedings to foreclosure a mortgage on his home upon condition that he pay a sum each month to cover taxes and interest on unpaid balance of mortgage.[23]

A stay was denied in an ejectment proceeding against a wife upon a mortgage executed by both husband and wife. The court held that the sections re landlord and tenant did not apply and the husband's title was not affected. This rule would be doubtful in community property states and in my opinion violates the purpose of the Act.[24]

To the reverse of the above holding a stay was granted a wife of a person in service, who was joint owner of an automobile involved in an action as to the liability of the wife and husband as operators and owners of the vehicle.[25]

RELIEF AGAINST FINES AND PENALTIES

Section 202 of the Act provides that upon stay of action to comply with contract no fine or penalty shall accrue and if a penalty or fine is incurred by a person in military service a court may relieve the person of such penalty, provided it was incurred by reason of the military service which impaired the persons ability to pay or perform.[26]

Section 203 provides for a stay of executions and attachments. This is discretionary, not mandatory, and the court should examine into the circumstances of the judgment creditor.[27]

20. Swiderski v. Moodenbaugh 44 Fed. Supp. 687.
21. Royster v. Lederle C.C.A. 6 (Hamilton C. J.) March 3, 1942, U. S. Law Review 2656, 128 Fed. (2d) 197.
22. Lanaham v. Cline 44 F. Supp. 897.
23. Cortland Savings Bank v. Ivory 27, N. Y. Supp. (2d) 313.
24. Union Labor Life Ins. Co. v. Wendeborn, 21 Atl. (2d) 317.
25. Griswold v. Cady, 27 N. Y. Supp. (2d) 302.
26. State Realty Co. v. Greenfield 110 Mic. Rep. 270, 181 N. Y. S. 511.
27. See Kuehn v. Neugebaur (Tex.) 216 S. W. 259; Konkel v. State, supra.

Section 204 provides such stay of judgments, attachments, etc. may be made for period of service and three months. It is expressly provided that a plaintiff may proceed against codefendants by leave of court. It is also provided that the court may establish terms of payments.[28]

LIMITATIONS

Section 205 is amended by H. R. 7164. The committee report gives as the purpose of the amendment:

> "This section amends section 205 of the act to toll for the period of military service of the person concerned the running of any period limited by law, regulation, or order for the bringing of any proceeding in any board, bureau, commission, department, or other agency of Government. The running of the statutory period during which real property may be redeemed after sale to enforce any obligation, tax, or assessment is likewise tolled during the part of such period which occurs after the enactment of the Soldier's and Sailors' Civil Relief Act Amendments of 1942. Although the tolling of such periods is now within the spirit of the law, it has not been held to be within the letter thereof (I. R. 1269 C. B., June 1922, p. 311; Ebert v. Poston, 266 U. S. 549)."
>
> (Committee report, supra, Sec. 5, pp. 3-4)

The apparent purpose of this amendment is to cover all limitations. It expressly affects redemptions which were not covered under the former act.[29] It also enlarges upon the meaning of "action" by including "or proceeding" which would include ancillary and supplementary proceedings not formerly affected.[30] It was held under the Act before the Amendment that the time for filing notice of appeal was not extended but this would probably now be included as a proceeding.[31]

As a liberal construction is to be given to the Act, I think that it would be held to extend all limitations established by statue or rule of court.[32] On the other hand does the Act extend limitations provided by contract? The United States Supreme Court has said of the 1918 Act that it would not be expanded by judicial construction in

28. See New Article VII infra. Steedt v. Trueblood, 190 Iowa 1225, 181 N. W. 445; White v. Kimerer, 83 Okla. 9, 200 Pac. 430; Davies & Davies v. Patterson, 137 Ark. 184, 208 S.W. 592.
29. Wood v. Vogel, 204 Ala. 692, 87 So. 174; Ebert v. Poston, supra; Bell v. Buffington, 244 Mass. 294, 137 N. E. 287.
30. Halle v. Cavanaugh (1920) 79 N. H. 418, 111 Atl. 76.
31. Johnson v. Cook, 368 Ill. 160; People v. Wagman 295 Ill. App. 614, 15 N. E. (2d) 37.
32. Clark v. Mechanics Amer. Natl. Bank, 282 F. 589, 591.

order to include transactions supposedly within its spirit, but which did not fall within its letter.[33]

Another new section is added to Article II, the committee report on this section stating:

> "Section 6 adds a new section 206 which prohibits interest at a rate in excess of 6 percent upon obligations of persons in military service, incurred prior to his entry therein, unless such service has not materially affected his ability to pay. The present law does not prevent an accumulation of excess interest. The only relief now authorized for such cases is a stay of any proceeding commenced on such a claim during the period of military service."
>
> (Committee report, supra, Sec. 6, p. 4)

It should be noted that this amendment shifts the burden of removing limitation from the soldier to the lender.

RENT, INSTALLMENT CONTRACTS, MORTGAGES AND EVICTIONS

The title to Article III is amended to include liens, assignments and leases.

The first section of the Article (300) provides for no eviction for rent which does not exceed $80.00 per month where chiefly used for dwelling purposes by soldiers' dependents.

The second paragraph of the section provides that the court shall stay eviction proceedings for not longer than three months unless it finds the person's ability to pay is not affected by service. The stay is within the discretion of the court.[34] It has been held that a defendant has no cause in equity to prevent the execution of a judgment in unlawful detainer where it appeared the execution had been stayed three months.[35]

This section is amended by addition of relief to secondary persons.

> "Subsection (a) amends section 300 (2) of the Civil Relief Act so as to authorize the court to grant

33. Ebert v. Poston, supra. But see Stenfield v. Mass. Bonding & Ins. Co. 80 N. H. 89, 112 A. 800 (where limitation in insurance policy held extended). For other cases on limitations see: Olson v. Gowan Lenning Brown Co. 47 N. Dak. 544, 182 N. W. 929, Kosel v. First Nat. Bank 55 N. Dak. 445, 214 N. W. 249; Easterling v. Murphy (Tex.) 11 S. W. (2d) 329; Bell v. Baker (Tex.) 260 S. W. 158; Bolz Cooperage Corp. v. Beardslee (Mo.) 211 Mo. App. 109, 245 S. W. 611, (Corporation not granted extenstion to file claim because of officer in service); Perkins v. Manning (Ariz.) 122 Pac. (2d) 857, (claims for salary against state).

34. Gilluly v. Hawkins, 108 Wash. 79, 182 P. 958.

35. Riordan v. Zube, 50 Cal. App. 22, 195 P. 65.

> certain relief with respect to mortgages and taxes on property owned by persons not in military service where the rent for such property is not paid by dependents of persons in military service."
>
> (Committee report, supra, Sec. 8. p. 4)

An interesting case arose in New York where the landlord brought an action for hearing January 15 for ejectment which the court continued until April 15 on motion. On April 15, the soldier's wife tendered the landlord a month's rent for the next month. He refused it and she paid it into court. The court held the landlord must accept it, dismissing the action. The delinquency for the three months during the continuance continued to be a debt.[36]

The rest of Sec. 300 (paragraphs 4 and 5) provide criminal penalties for violation of paragraph 1 and authorizing allotment of rent from soldiers pay by Departments of War and Navy.

Under the old law it was held a business lease was cancelled when lessee called into service, because of impossibility of performance.[37] This situation is now determined by H. R. 7164 by a new section 304.

> "Section 304 is designed to relieve individuals called into the armed services from liability for rent accruing subsequent to induction under certain leases. Under the present act the only relief allowed is a stay of an action for the enforcement of the liability for the period of military service, with no relief from the liability itself. Provision is made for a lessor to apply to a court for relief in those cases where a substantial injustice would result from termination of any such lease."
>
> (Committee report, supra, Sec. 12. p. 5)

CONTRACT PURCHASES, TERMINATION THEREOF, REPOSSESSIONS, ETC.

Section 301 of the Act deals with contracts of sale and rights thereunder. Under the Act before the amendment relief was only granted on contracts entered into prior to October 17, 1942, but this limitation is removed by the amendment.[38]

This section as amended is broader than the old section in that it applies to any "breach" whereas the old section applied to "any installment." There is also elimi-

36. Jonda Realty Co. v. Marabotto 34 N. Y. S. App. (2d) 301.

38. Sec. 9 (a) H. R. 7164.

37. State Realty Co. v. Greenfield, 110 Misc. Rep. 270, 181 N. Y. Supp. 511.

nated the proviso concerning alteration, termination, etc. by agreement in writing as this is covered in Sec. 107 as amended.

It has been held that oil, gas and mining leases do not come under this section as they do not convey an interest in land.[39] The rule is doubtful in Idaho.[40]

In a New York case on replevin of an automobile, the court allowed the replevin but required the plaintiff to pay the defendant his equity in the car computed at the commencement of the action.[41]

MORTGAGES

Section 302 applies to mortgages. Under the Act before amendment it applied only to mortgages executed prior to the Act (October 17, 1940). The limitation is removed by section 9 (b) H. R. 7164 so that now it applies to all "obligations originated prior to such person's period of military service".

The section generally provides that the court may stay a foreclosure proceeding or make equitable disposition of the case. The amendment prohibits foreclosure by entry and possession and would probably prohibit foreclosure of chattel mortgages by notice and sale. This is not a complete bar to foreclosures and should not be so construed by the courts. If the defendant's ability to pay is not impaired by the service he should not be granted relief.[42]

When the person in service knew of the foreclosure and made no objection it was not invalid.[43] It has also been held that where the foreclosure sale was completed before the effective date of the Act it did not apply even though the redemption period might possibly be suspended and the sheriff's deed held until after the Act had gone into effect.[44]

Also, the interest of the person in military service must be actual.[45]

Equitable interests are protected under the Act. An equitable interest based upon payments made on mortgage and parole agreement with mortgagor is sufficient for a stay of proceedings.[46]

39. Luna Oil &Gas Co. v. Pritchard, 92 Okla., 113, 216 Pac. 863; Hickernell v. Gregory (Tex.) 224 S. W. 691.
40. Page v. Savage, 42 Ida. 458; 246 Pac. 304.
41. Associates Discount Corporation v. Armstrong 33 N. Y. Supp. (2d) 36.
42. Hoffman v. Charleston Five Cents Savings Bank, 231 Mass. 324, 121 N. E. 15; Dietz v. Treupel 170 N. Y. S. 108. See committee report, supra, sec. 10, p. 4.
43. Church v. Brown 247 Mass. 282, 142, N. E. 91.
44. Olson v. Gowan Lenning Brown Co. 47 N. W. 544, 182 N. W. 929.
45. Great Barrington Sov. Bk. v. Brown 239 Mass. 546, 132 N. E. 398; Hunt v. Jacobson et al. 1941, 33 N. Y. Supp. 661 (defendant in military service known to the court—an attorney—nominal party.)

In a New York case the defendant contradicted the supporting affidavit for motion to stay with a showing that the property operated at a profit and the court refused the stay.[47]

But where a foreclosure is made without order of court but return made and approved by court, such sale is invalid and mortgagee proceeds at his peril.[48]

In Oregon a foreclosure under Oregon Law relative to soldiers and sailors was held void when in conflict with Federal Law.[49]

MOTOR VEHICLES

Section 303 of the present Act relative to repossession of motor vehicles, etc., if 50 % of purchase price unpaid, is repealed.[50] Such property now is in the same category as other property and has no special treatment in the Act.

Section 303 now reads as provided by sec. 12, H. R. 7164:

> "Sec. 303. Where a proceeding to foreclose a mortgage upon or to resume possession of personal property, or to rescind or terminate a contract for the purchase thereof, has been stayed as provided in this Act, the court may, unless in its opinion an undue hardship would result to the dependents of the person in military service, appoint three disinterested parties to appraise the property and, based upon the report of the appraisers, order such sum, if any, as may be just, paid to the person in military service, or his dependent, as the case may be, as a condition of foreclosing the mortgage, resuming possession of the property, or rescinding or terminating the contract."

The purpose of this entirely new provision is:

> "The proposed new section 303 gives the court authority to appoint three disinterested parties to appraise personal property which is the subject of a stay under the act. Based upon such appraisal the

46. Twitchell v. Home Owners Loan Corp. (Ariz.) 122 Pac. (2d) 210, Hoffman v. Charleston, etc, supra, Morse v. Stober 233 Mass. 223; 123 N. E. 780, 9 A.L.R. 78.
47. Brooklyn Trust Co. v. Papa, 33 N. Y. Supp (2d) 57; (On material effect of military service on defendant see also Jamaica Sav Bk. v. Bryan, 175 Misc. 978, 25 N. Y. Supp. (2d) 17.
48. John Hancock Mutual Life Ins. Co. v. Lester 234 Mass. 559; 125 N. E. 594.
49. Pierrard v. Hoch 97 Ore. 71, 191 Pac. 328. For cases generally on mortgage foreclosures see: Ebert v. Poston 266 U. S. 548; 69 L. Ed. 435; Wood v. Vogel, 204 Ala. 692, 87 So. 174; Kendall v. Bolster, 239 Mass. 152; 131 N. E. 319; Taylor v. McGregor State Bank, 144 Minn. 249; 174 N. W. 893; Bassham v. Evans (Tex) 216 S. W. 446.
50. Sec. 11—H. R. 7164.

court may order such sum, if any, as may be just, paid to the person in military service, or his dependent, as a condition to foreclosing the mortgage upon the property, or resuming possession of such property under contract."

(Committee Report, supra, Sec. 12, p. 5)

INSURANCE

The provisions relative to insurance payments and lapses are exhaustively amended by H. R. 7164, but as these are not of general interest to the Bar, they will be omitted.

TAXES AND PUBLIC LANDS

The section on Taxes remains about the same except for the following amendments provided in Sec. 14, H. R. 7164:

"Sec. 500. (1) The provisions of this section shall apply when any taxes or assessments, whether general or special (other than taxes on income), whether falling due prior to or during the period of military service, in respect of personal property, money, or credits, or real property owned and occupied for dwelling, professional business, or agricultural purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.

"(2) No sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon application made therefore by the collector of taxes or other officer whose duty it is to enforce the collection of taxes or assessments. The court thereupon, unless in its opinion the ability of the person in military service to pay such taxes or assessments is not materially affected by reason of such service, may stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the period of military service of such person."

This section would apparently shift the burden of claiming the relief from the soldier to the Tax Collector tc show that the taxpayer was not in military service. Is a tax deed to the county a "proceeding" for purpose of sale? Taxes do not have to fall due during the person's military service.

A new section is added by section 17, H. R. 7164 relative to residence or domicile and prevents multiple taxation in that it is provided the soldier does not acquire a new domicile or lose the old one by reason of military service.

FURTHER RELIEF

It has been apparent to everyone who has read the Act that some additional legislation would be required when the war was over. A person discharged from military service would be faced with a tremendous burden of stayed actions, accumulated taxes, interest, etc, under the present law. Some sort of moratorium or other arrangement was inevitable. Congress has now provided such procedure in a new Article numbered VII. It is:

"ARTICLE VII—FURTHER RELIEF

"Sec. 700. (1) A person may, at any time during his period of military service or within six months thereafter, apply to a court for relief in respect of any obligation or liability incurred by such person prior to his period of military service or in respect of any tax or assessment whether falling due prior to or during his period of military service. The court, after appropriate notice and hearing, unless in its opinion the ability of the applicant to comply with the terms of such obligation or liability or to pay such tax or assessment has not been materially affected by reason of his military service, may grant the following relief:

"(a) In the case of an obligation payable under its terms in installments under a contract for the purchase of real estate, or secured by a mortgage or other instrument in the nature of a mortgage upon real estate, a stay of the enforcement of such obligation during the applicant's period of military service and, from the date of termination of such period of military service or from the date of application if made after such service, for a period equal to the period of the remaining life of the installment contract or other instrument plus a period of time equal to the period of military service of the applicant, or any part of such combined period, subject to payment of the balance of principal and accumulated interest due and unpaid at the date of termination of the period of military service or from the date of application, as the case may be, in equal installments during such combined period at such rate of interest on the unpaid balance as is prescribed in such contract, or other instrument evidencing the obligation, for installments

paid when due, and subject to such other terms as may be just.

"(b) In the case of any other obligation, liability, tax, or assessment, a stay of the enforcement thereof during the applicant's period of military service and, from the date of termination of such period of military service or from the date of application if made after such service, for a period of time equal to the period of military service of the applicant or any part of such period, subject to payment of the balance of principal and accumulated interest due and unpaid at the date of termination of such period of military service or the date of application, as the case may be, in equal periodic installments during such extended period at such rate of interest as may be prescribed for such obligation, liability tax, or assessment, if paid when due, and subject to such other terms as may be just.

"(2) When any court has granted a stay as provided in this section no fine or penalty shall accrue during the period the terms and conditions of such stay are complied with by reason of failure to comply with the terms or conditions of the obligation, liability, tax, or assessment in respect of which such stay was granted."

By this provision a person applying to the court for relief from an installment contract might obtain the unexpired time of the contract plus his period of service and the court would determine the amount of installments. In other words, the court may tack a time equal to the person's period of service onto the term of the contract.

Section (b) applies to all other obligations and would, in my opinion apply to judgments and accelerated installment notes. Here the court can extend the time for payment for a period equal to the period of military service and prescribe the installment payments.

It would appear that the court might grant such relief at the time that a stay is applied for, however, it should be noticed that here the act is silent concerning the court acting on its motion.

SUMMARY AND CONCLUSION

The act will have a tremendous effect upon our civil practice, pleading and procedure as well as upon our substantive rights. It does not establish hard fast rules but is designed to permit relief where needed but not permit the avoidance of obligations by those whose abilities are materially affected by military service.

The administration of the Act is left to the courts in their discretion. Whether the relief granted is appropriate to the particular case depends upon the discretion of the courts. A review of the cases to date indicates that the courts are as jealous of the private citizen's rights as of the military person's privileges.

Throughout the Act admonishment appears that in all cases the court shall protect the parties and property so that no one shall be prejudiced.

We may trust our courts will administer the Act fairly and impartially in the spirit in which it was designed.

CARL A. BURKE: I want to ask Mr. Moffatt about defense workers.

MR. MOFFATT: They are not included under this Act, such as those on Wake Island or Guam, but they are absolutely protected against all process. You will find some cases in the United States Supreme Court Reports back in Civil War times. You cannot proceed against a man who is a prisoner of war. Judge Koelsch so held even though personal service was had prior to occupancy of Wake Island, and the Supreme Court has said that the essence of our jurisprudence is the ability to appear and defend.

PRES. THOMAS: Next is "Idaho's Divorce Laws, Recommendations: A Committee Report." Mr. Moffatt, you have that report?

MR. WILLIS MOFFATT: Yes, Mr. Boughton, the chairman, couldn't get down here.

Your committee on divorce appointed at the 1941 convention makes the following recommendations:

1. That Section 31-207, I.C.A. be amended, omitting the words in Paragraph 1, "more than six months," as did the original statute (Sec. 2426 Re. S. 1887), the statute to read as follows:

"31-207. Polygamous marriages. — A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning unless:

1. The former marriage of either party has been annulled or dissolved * * *; or,

2. Such former husband or wife was absent and not known to such person to be living for the space of

five successive years immediately preceding, or was generally, reputed and was believed by such person, to be dead at the time such subsequent marriage was contracted.

In either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal."

PURPOSE OF AMENDMENT

While the six months provision of the statute probably has no extra-territorial effect, it does raise a question in the minds of attorneys inside and outside of the State of Idaho as to the finality of the decree, validity of early second marriage and legitimacy of children thereof and inheritance thereunder. We think the limitation is without merit and should be removed. Further the present law is a trap—the decree of divorce on its face is final, but this statute, separated from the divorce statute and decree, makes remarriage void notwithstanding. If the policy of non-marriage for six months after decree is to be retained then the divorce law should make the decree interlocutory.

As paragraphed the last sentence is ambiguous. Does it apply to subdivisions 1 and 2? If so it is contradictory. In Sec. 2426 R. S. 1887 it was part of subdivison 2 only and it should again be so arranged.

It would seem also that the wording of subdivision 2 and Sec. 17-1801 (polygamy) and Sec. 17-1802 and 17-1803 (bigamy) should be harmonized. Perhaps also Sec. 17-1806 (Adultery).

Also note the contradicton of the six months limitation with Sec. 31-602 which states that the *decree* restores the parties to the state of unmarried persons.

2. That Section 5-905 be amended by inserting the words "except in action for divorce where either of the parties is married," the section to read as follows:

"5-905. General power to permit amendments—Relief from defaults—Negligence of attorney—Party relieved and attorney penalized. * * * *Except in actions for divorce where either party has remarried subsequent to the decree,* when from any cause the summons in an action has not been personally served on the defendant, the court may allow on such terms as may be just, such defendant, or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action. * * *."

PURPOSE OF AMENDMENT

The purpose of this amendment is also to make the decree of divorce more final by eliminating the possibility of reopening a default after the remarriage of one of the parties to the divorce action.

3. That Section 31-603 be amended by adding thereto, two additional causes as follows:

"31-603. Causes for divorce. — Divorces may be granted for any of the following causes: * * *

8. Incompatability.

9. Mutual separation."

4. That new sections be inserted after Section 31-608, reading as follows:

"31-608A. Incompatability. — Incompatability is the habitual behavior by one spouse towards the other, for not less than six months, in such manner as to indicate a settled aversion to the other and to destroy permanently the latter's peace and happiness." (Kentucky, Section 2117; similar statutes, North Carolina, Texas and Wisconsin).

"31-608B. Mutual separation. — Mutual separation shall be the living, separate and apart, of the husband and wife without cohabitation for one year next before the filing of complaint." (Washington, Texas).

PURPOSE OF AMENDMENTS

To add a ground of divorce of incompatability. This ground is quite similar to mental cruelty. It has been confused with mental cruelty in the past and, in fact, courts have not distinguished between incompatability and mental cruelty. There are cases, however, where we find that the definition of mental cruelty must be stretched almost beyond recognition but the case does demand relief. For that reason we think that incompatability should be a ground of divorce. We have taken our definitions from the statutes of Kentucky and there are similar statutes in North Carolina, Texas and Wisconsin, although these states do not define it as incompatability.

The second amendment, "Mutual separation" covers a situation which has caused trouble for a long time, that is, where persons have been separated and are living apart, but where there was no actual affirmative desertion. There were some differences among the committee as to whether the period of such separation should be one year or three years. This statute is taken from the Washington and Texas codes.

In connection with this ground the legislative committee should take into consideration whether it should be restricted to consent or mutually agreed separations. As written, could not, for instance, a husband by conduct toward wife cause separation and then after one year the husband, though the party at fault, and though the wife did not desire to secure divorce, get a decree. Also if there is consent separation, should not Sec. 31-610, requiring denial of decree for collusion, condonation, recrimination or limitations, be made inapplicable—there would likely be collusion; there could obviously be recrimination on the same ground; and frequently limitations would apply. Perhaps recrimination could remain provided it set up another and *different* ground. Also as written this ground might apply where husband got a job at another place and for valid reasons, such as home ownership, the wife, by agreement, remained at domicile—neither had any thought or intent of any real separation—they live separately, without cohabitation, for one year—thereafter one or the other forms an *intent* to take advantage of the statute, though the other does not wish divorce; apparently on mere showing of actually living separate and apart, without cohabitation for one year, decree would have to be granted (unless recrimination on same grounds was permitted and pleaded.)

Your committee recommends that the above amendments be made a part of the State Bar legislative program. Other possible amendments were suggested such as eliminating corroboration. Sec. 31-703, not required in other actions; permitting the taking of deposition before default to be used in default cases, thus cutting down the time required before proof can be made; elimination of residence period, Sec. 3-701, not required in other actions. Is there any reason for the extended residence requirement of Sec. 31-801 (insanity); also should not the six years apply to the period of *insanity* and not to the period of *due and regular* confinement in a *public* institution. Many spouses, from sense of duty or love, distrust of public hospitals, or other reasons, finance private treatment without adjudication as long as they can afford it, and do not secure an adjudication until they are at the end of their financial rope. Of course an adjudication should be required. Is there reason for the distinction in assigning community property (Sec. 31-712). If subdivision 1 is intended to permit punishment for marital offenses, isn't a spouse who deserts or neglects just as culpable. On the other hand isn't a deserted or neglected or sane spouse just as much in need of support out of more than one half of the property, under subdivision 2, and Sec. 31-804, as in the cases under subdivision 1? Should an undivided one half of community real estate, not capable of partition, remain in a deserting spouse whose whereabouts may be unknown or in an insane spouse; true a sale may be had (Sec. 31-713) and proceeds divided, but one half thereof may be wholly inadequate for support of the innocent or sane party. Under subdivisions 3 and 4 should there be restrictions to statutory homestead? Many spouses do not file a statutory homestead because of adverse effect on credit, or a feeling of obligation toward creditors and payment of debts; shouldn't this be broadened to include any dwelling places of the innocent or sane spouse, amending also Sec. 31-714. Or would not the best course be to repeal, and substitute disposition in all causes within the discretion of the court, based on facts and conditions of *need* (not punishment) in each case?

Should not the permanent alimony section 31-706 be amended so that allowance to wife for support end automatically upon her remarriage and not require application for modification? See McHan v. McHan, 59 Idaho at 506. Add at end of section 31-706 a sentence, "Such allowance for the support of the wife shall cease upon the wife's remarriage."

The committee was unable to arrive at definite conclusions on such matters.

Mr. MOFFATT: I have one further thing in the nature of a minority report. I think we should amend the law so as to require corroboration only so far as residence is concerned. This is a minority report.

PRES. THOMAS: Next is "Insurance Adjusters"—Marcus Ware of Lewiston. I will appoint as a committee on this Lawrence Huff, Marcus Ware and Asher Wilson.

MARCUS WARE: For some time the lawyers of Idaho have been considering the effect on the law practice of the adjustment of insurance claims by lay adjusters. For several years the American Bar Association has been using its best efforts with the insurance companies of the United States to the end that the insurance companies will employ lawyers as adjusters, at least in those instances where the act of adjusting and settling insurance claims involves the practice of the law. The State Bar Associations of Missouri and Wisconsin have been very active in this work and have been securing definite results in behalf of the legal profession.

The effect of the work of the American Bar Association in this respect is being felt in Idaho. A few years ago most of the adjusters operating in this state were lay adjusters but the tendency of the insurance companies now

is to replace lay adjusters with adjusters who are members of the legal profession here. However, the appointment by the insurance companies of adjusters who are lawyers does not help the members of the legal profession in Idaho as much as it should. In Northern Idaho adjustments are generally made by adjusters from Spokane, Washington, who are members of the Bar of the State of Washington. I am told that the same situation is true in the Southeastern part of the State of Idaho, in that adjusters from Salt Lake, who are members of the Bar of Utah, frequently come into Idaho for the purpose of the adjustment of insurance claims.

Many lawyers in Idaho feel that the time has come when definite legislation should be enacted by which the business of insurance adjusters is restored to the members of the legal profession.

At the present time insurance adjusters are licensed by the Director of Insurance under the statutory provisions of Sections 40-2501 to 40-2503, I.C.A.

Some have thought that the matter could be handled by a rule of court or legislation to the effect that the adjustment of insurance claims constitutes the practice of the law. However, the work of adjusters in some respects does not constitute the law practice and in other respects does involve the practice of law. Pages 138 and 139 of the State Bar Proceedings for 1938 describe in detail the acts constituting law practice and the acts which do not constitute law practice by adjusters as determined by a Missouri court. There is no legislation in Idaho attempting to define what constitutes the practice of the law and for that reason I believe we should avoid an attempt to define the law practice by legislation. However, I do believe that legislation should be adopted by which all adjusters would be required to be residents of Idaho and members of the Bar of the State of Idaho in good standing, except that residents of Idaho who hold licenses as adjusters at the present time should be permitted in fairness to continue to hold their licenses if they wish to do so.

Since the Director of Insurance has charge of the licensing af adjusters, it would seem only proper that those attorneys who desired to adjust insurance claims should continue to be licensed through the Insurance Director, but, of course, the fee should be nominal.

I, therefore, suggest that for the protection of the Bar the present system of licensing of insurance adjusters be repealed by the State Legislature and the following legislation enacted in lieu of the existing law:

"Each 'adjuster' or 'insurance adjuster' shall annually on or before the first day of April in each year, procure a license from the director of insurance, permitting such person to adjust losses for insurance companies authorized to do business in the State of Idaho. If such person is a resident of the State of Idaho and a duly licensed attorney at law admitted to practice in the State of Idaho it shall be the duty of the Director of Insurance to issue to such applicant a license as an adjuster or insurance adjuster upon the payment of the sum of $1.00. In the case of all other persons applying for such license it shall be the duty of the Director of Insurance to make an investigation as to the qualifications of each applicant and if the Director of Insurance is satisfied with the qualifications and integrity of such applicant and such applicant is a resident of the State of Idaho and held a license as adjuster or insurance adjuster on July 1, 1942, a license shall be issued to him upon the payment of a fee of $25.00.

Any person advertising or holding himself out to the public as an adjuster for the insurer or assured shall pay an adjuster's license fee. Each and every license issued under the provisions of this chapter shall expire on the 31st day of December subsequent to the date of issue and shall be revoked if the holder ceases to be a resident of the State of Idaho.

No person shall act as adjuster or insurance adjuster or hold himself out as such or act or assist in the adjustment of any insurance claim unless he holds a license as an adjuster or insurance adjuster pursuant to the provisions of this chapter, and any person violating the provisions of this chapter shall be guilty of a misdemeanor, and shall, upon conviction thereof be punished by a fine not exceeding $100.00 or imprisonment in the county jail for not more than thirty days for each and every offense."

The proposed change in the law is open to the objection that it requires an additional licensing of lawyers to permit them to do business for which they are already licensed under their general license as attorneys. However, a reasonable consideration of the matter makes it seem only reasonable that the Director of Insurance should be advised of the names of all persons in the State of Idaho who claim to be adjusters and conduct business as such.

PRES. THOMAS: Thank you very much, Mr. Ware.

MR. LAWRENCE HUFF: I would like to suggest one or two points. We should take into consideration the

problem of company adjusters and of independent adjusters. What can you do about the company adjusters? The independent adjusters can be regulated. We lawyers, you know, like to make money for ourselves. The only point is to make ourselves more income. But we have to take into consideration the insurance business. We are jealous in the matter of practicing law. We have to take into consideration the practice of insurance. How many lawyers are there in this body who have licenses to counter-sign bonds or write insurance who are not honest-to-heaven insurance agents. We ought to consider that before we jump into the other fellow's back yard. I suggest that we ask the Insurance Agency Association to appoint a committee and work with them. The insurance agents have an honest beef coming because the lawyers are stepping into their business. I think they will go with us on the non-licensed adjusters if we go with them on the proper qualifications for writing insurance.

PRES. THOMAS: Mr. Huff, you are chairman of the committee that is to report Saturday morning and you can embody the substance of what you say into that report.

Next is "Community Property—Does a Tort Action Survive against the Community Estate" by Walter M. Oros of Boise.

MR. WALTER M. OROS:

THE RULE AT COMMON LAW

At common law, personal rights of action die with the person, expressed in the maxim 'actio Personalis moritur cum persona.' The rule applies whether death from injury is instantaneous or not. This principle has never been a favorite with the courts and exceptions were ingrafted upon it even before the rules were changed by statute."[1] The rule is sometimes designated as the "tort dies with the tort feasor,"[2] or "At common law an action or cause of action abates on the death of one of the parties. * * * Indeed it has been stated generally that at common law, the only causes of action that do not survive the death of either party are causes of action ex delicto. * * * However, while most causes of action founded upon tort abate at common law, not all of them do; there are some exceptions; and the statement sometimes made that all causes of action ex delicto die with the person, is not strictly accurate.[3]

1. 1 Amer. Jurisprudence, para. 76, page 67; see Blashfield on Automobiles Vol. 9, para. 5855, page 123; see cases 61 ALR 830 respecting causes of action against estates under Lord Campbell's act.

2. Webb v. Franch, (Ala) 152 So. 215; Bing v. Knox (Mo.) 54 SW (2nd) 797; Layton v. Rowland (Wisc. 222 NW 811; Kranz v. Wisconsin Trust Co. (Wisc.) 143 NW 1049; Mellan v. Goodyear 277 U. S. 335—72 L. Ed. 906.

3. 1 Corpus Juris Sec. para. 138, page 189, also 70 ALR 1315.

By the early English statutes * * * which constitute a part of the common law in the United States, the rule * * * was so modified as to permit an action in favor of a personal repreesntative for injuries to personal property. And * * * by allowing an action in favor of the personal representatives for injuries to real and personal property but none of these statutes changed the common law rules as to the injuries of the person.[4]

ACTIONS TO WHICH COMMON LAW RULE APPLIED

Some of the causes which would not survive at common law were alienation of affections,[5] Assault and battery;[6] bastardy proceedings against the personal representative of the alleged deceased father.[7] breach of promise to marry;[8] an action against a third person for procuring the breach of contract;[9] conspiracy, annulment of marriage or divorce proceedings;[10] slander and libel;[11] malicious prosecution;[12] malpractice by an attorney;[13] nor by a physician;[14] injuries to personal and real property except as was modified by statute as heretofore stated;[15] an action for injuries to the person, regardless of the form in which it is brought; and this is true, although property is incidentally affected.[16]

REASON FOR THE COMMON LAW RULE

The rule at common law was justified on the ground that damages for torts to the person, which then were considered as a penalty against the tort feasor, should not be assessed when there no longer was anyone to penalize.[17] It has been further stated that since death had closed the mouth of one party, the other party should not be permitted to testify. The reasons have been lost in antiquity and have no logical foundation, as will be hereinafter discussed.

4. 1 Amer. Jurisprudence, para. 88, page 73.

5. Hallet v. Wilmington Trust Co. (Del.) 172 At. 763; Grow v. Ledford, 190 (Ky.) 526, 228 SW 24; 14 ALR 488; 57 ALR 351.

6. Henshaw v. Miller, 17 How. (US) 212; 15 L. Ed. 222.

7. 1 Amer. Jurisprudence, para. 101, page 79.

8. 1 Amer. Jurisprudence, para. 102, pages 79, 80; Hayden v. Vreeland, 37 NJL 372; 18 Amer. Rep. 723.

9. 1 Amer. Jurisprudence, para. 104, page 81.

10. 1 Amer. Jurisprudence, para. 106, 110, 111, pages 81 and 83, cases cited.

11. Blodget v. Greenfield (Cal.) 281 Pac. 694; Miller v. Nicholls, 76 (Ark.) 485, 89 SW 88; Aker v. Aker (Tenn.) 57 Amer. Rep. 207.

12. Myers v. Peters, (NJ 157 Atl. 250; Woodford v. McDaniels, 73 (W. Va.) 736, 81 SE 544.

13. 6 Anno Cases 652; 1 Amer. Juris. para. 124, page 88.

14. Boor v. Lowery, 103 (Ind.) 468, 3 NE 151; Hess v. Lowry, 122 (Ind.) 225 23 NE 156, 11 LRA 700.

15. 1 Amer. Juris. para. 130, page 90.

16. Florida East Coast RR. Co. v. McRoberts, 111 (Fla) 278, 149 SW 631; 94 R.A.R. 376; Russell v. Sunbury, 37 Ohio St. 372, 41 Am. Rep. 523; Webb v. French (Ala.) 152 So. 215; 1 Amer. Juris. para. 133, page 92.

17. Wilfong v. Omaha & Council Bluffs St. & Ry (Neb.) 262 NW 537.

INTERPRETATION OF COMMUNITY PROPERTY STATUTES

Community property is a creature of statute.[18] It did not exist at common law and its origin is said to have arisen from the civil law. " * * the community property law of Idaho rests on a statutory basis clearly explained by judicial interpretation;"[19] which position was reiterated in the case of LaBonte v. Davidson in which the court said, "There was no community property known to the common law, hence its rules could have no application to the matter before the court."[20]

COMMUNITY PROPERTY IN IDAHO

In order to properly understand the problems presented a short reference to the community property statutes and some of the cases is in order.

Community property in Idaho is defined, "All other property acquired after marriage by either husband or wife, including the rents and profits of separate property of the husband and wife is community property, unless by the instrument by which such property is acquired by a wife, it is provided that the rents and profits thereof be applied to her sole and separate use, in which case the management and disposal of such rents and profits belong to the wife and they are not liable for the debts of the husband."[21]

Separate property of the spouses is that property acquired by either husband or wife by gift, bequest, devise or decent.[22] All property acquired, no matter in what manner, during marriage is presumed to be community property,[23] irrespective of the person in whose name the property stands.[24] Property acquired in a foreign State partakes of the character that the law of that State designates it to be.[25]

The time and earnings of both husband and wife are community property, not owned exclusively by either, but the community property of both.[26]

18. Bortle v. Osborn 155 Wash. 585; 285 Pac. 425.
19. Law of Community property F. W. Jacobs, Vol. 1, page 7, Idaho Law Journal; Northern Pac. RR. Co. v. Heizel, 29 Idaho 438, 161 Pac. 854; Cox v. Bank, etc., & Co. 41 Idaho 776, 242 Pac. 785.
20. 31 Idaho 644; 175 Pac. 588.
21. I. C. A. 31-907.
22. I. C. A. 31-903 and I. C. A. 31-906.
23. Clifford v. Lake, 33 Idaho 77; 190 Pac. 714; Vaughn v. Hollingsworth, 35 Idaho 722; 208 Pac. 838; Oylear v. Oylear, 35 Idaho 731; 208 Pac. 857; Bannock Bank v. Auto Accessories Co., 37 Idaho 787, 219 Pac. 200; Chaney v. Gauld Co., 28 Idaho 76; 152 Pac. 466; Humbird Lbr. v. Doran, 24 Idaho 507; 135 Pac. 66; Aker v. Aker, 52 Idaho 713; 20 Pac. (2nd) 796.
24. Snell v. Stickler (1931) 50 Idaho 648, 299 Pac. 1080.
25. Printz v. Brown (1918) 31 Idaho 443; 174 Pac. 1012; NW Bank v. Ranch (1901) 7 Idaho 152; 61 P. 516.
26. Griffin v. City of Lewiston, 6 Idaho 231, 55 Pac. 545; Ahlstrom v. Tage (1918) 31 Idaho 459, 174 Pac. 605.

The husband has the management and control of the community property,[27] and the wife cannot sue alone on a community property cause of action.[28] Personal injuries to the wife are community property for which the husband, having the management and control of the community property is the only necessary party.[29]

Since there is statutory provision for community property and for the separate property of each spouse, the legislature no doubt recognized three distinct capacities in which property may be owned during coverture; namely community property, the separate property of the husband, and the separate property of the wife.[30]

WHAT IS THE COMMUNITY IN IDAHO?

Having recognized two classes of property owned by the spouses during coverture, or three capacities in which property may be owned during marriage, the inquiry then is what the legislature intended by the enactment of the community property laws. It would follow that if property can be owned in community, distinct from the persons forming that community, then a new legal entity estate, with all the legal incidents attached thereto, was created. With that thought, reference to cases dealing with the problem follows.

The first case is Van Rosenburg v. Perrault[31] involving a suit by the surviving children of the deceased's spouse to partition the community realty which had been conveyed after the death of the surviving spouse to the defendants. The court said:

> "Upon the death of either spouse the community is at once terminated. The survivor, whether husband or wife cannot alienate more than his or her moiety, nor make contracts imposing any liability upon the share of the deceased spouse, unless for the purpose of discharging the obligations of the community, but for the purposes of settling the affairs of the community, the surviving husband or wife seems to possess powers somewhat analagous to those of a surviving partner. He or she may sell or convey community property, in good faith, and its necessity ,seems to be presumed.**

27. Wilson v. Wilson, 6 Idaho 587; 57 Pac. 708; I.C.A. 31-913.
28. Holton v. Sandpoint Lbr. Co. (1901) 7 Idaho 573; 64 Pac. 889; Campbell v. Kerns (1907) 13 Idaho 287; 70 Pac. 108.
29. LaBonte v. Davidson, 31 Idaho 644; 175 Pac. 588; Muir v. City of Pocatello, 36 Idaho 532; 212 Pac. 345; Sprouse v. Magee, 45 Idaho 622; 269 Pac. 993.
30. Hall v. Johns, 17 Idaho 224, 105 Pac. 71. See also Briggs v. Mason, 44 Idaho 283, 256 Pac. 368 where Justice Givens said, "Community property means property belonging to husband and wife acquired during marriage and specifically excludes the separate property of either.
31. 5 Idaho 719, 51 Pac. 744.

"Mr. Platt on his work on rights of married women speaks of a case similar to the one at bar. 'Upon her death the husband held as surviving partner, (1) to pay the debts (2) as trustee for her descendants.' The husband is the head of the family, and the active and acting, and only authorized, business agent of the firm."

In Kohny v. Dunbar,[32] the court said:

"It will be seen from an examination of the chapter on husband and wife * * * that the law deals with the husband and wife as a kind of partnership with reference to all their community property accumulations * * *. The statute intends that the property acquired by either the joint efforts of the two members of the community or their independent and separate effort shall constitute the community fund or estate * * *. The foregoing section of the statute (the decedent community property) recognizes the husband and wife as equal partners in the community state and authorized each to dispose of his or her half by will. It also provides that the survivor shall continue to be the owner of the half of said property subject only to the community (firm) debts * * *. While * * * the survivor * * * receives the entire community estate by reason of the death of the husband (intestate and without issue) half of it also is already hers * * *. Death has worked a dissolution of the community partnership and left the survivor to act for himself**. It is clear, however, that she does not inherit her share of the community property (upon the death of the husband)."

Kohny v. Dunbar, has been the law in this State ever since it was announced.[33] In the case of Ewald v Hufton,[34] the court stated:

"In the case of the death of either the husband or wife, intestate, his or her half of the community property (not an interest therein) descended equally to the legitimate issue of his, her or their bodies. Under these statutes we think, following the case of Kohny v. Dunbar, supra, that it was the intention to make no distinction between husband and wife as to the degree, quantity, nature or extent of the interest each has in the community property (cases cited). Upon the dissolution of the community by the death of either spouse, the survivor became a tenant in common with

32. 21 Idaho 258, 121 Pac. 544; Nuckols v. Lyle 8 Idaho 589, 70 Pac. 401.
33. Radermacher v. Radermacher, 61 Idaho 261, 100 Pac. (2nd) 955.
34. 31 Idaho 373, 173 Pac. 247.

the heirs of the deceased member in the community property then in existence. The mortgage in this case, to the extent that it purports to cover the interests of the children was a nullity and created no lien thereon."

Where the wife went into a foreign jurisdiction and obtained a divorce and then returned to Idaho and sought to quiet title to one-half of all the community property, the court said:

"It is clear that in a marital partnership, the interest of the wife in the community property is a vested interest, which is not divested ipso facto by the wife going to a foreign jurisdiction and dissolving the the marital community by securing a divorce. * * *"[35]

In Sencerbox v. First National Bank of Idaho[36] the court had under consideration the question of the extent of control and management by the husband of the wife's separate property at the time such statute was in force. At page 101 the court said:

"It must be understood that the rights of married women as to the management and control of separate property and their powers over it, in the State of Idaho, do not depend alone on the principles of the common law, but mainly on the constitution and the statutes of the state. Under the provisions of sec. 2498 the husband is made the statutory agent to manage and control the wife's separate property."

and at page 102:

"This power he exercises solely, and not jointly or concurrently with the wife. The property thus received vests in him as trustee, and he has the right to manage and control the same. It is apparent that the title does not vest in the husband. That remains in the wife . . ."

and again at page 100:

"The words 'management and control' as used in said section are words of well defined meaning. Those words have not acquired a peculiar and appropriate meaning or definition in and under the provisions of sec. 15, Rev. Stat. They must be construed according to the context and the approval usage of the language. Those words are of broad significance and meaning. The Century Dictionary defines the word 'manage-

35 .Peterson v. Peterson, 35 Idaho 470, 207 Pac. 425; McKay on Community Property page 470, sec. 413; Law of Community Property by F. W. Jacobs, Idaho Law Journal, Vol. 1, page 3; Poe v. Seaborn (Wash.) 282 U. S. 101.
36. 14 Idaho 95, 93 Pac. 369.

ment' as 'the act of managing by direction or regulation; conduct; administration . . . care; charge; superintendence.' It defines the word 'control' as meaning 'subject to authority; direct; regulate; govern; dominate; to have superior force and authority over'."

The Sencerbox case is a weighty authority for two propositions: (1) the interpretation of the statutory community law of this State does not depend solely upon the common law, and (2) the husband is the statutory agent in the management of the wife's separate property by which construction and interpretation he is also in like manner the statutory agent for the community property, with comparable incidents, powers and restrictions upon his control and management. The very definitions and meanings of the words 'management' and 'control' as found in both the statutes pertaining to community property and separate property of the wife over which the husband then had the control and management, meant that his powers are subject to some superior authority. That superior authority is the principal created by the statute with the restriction on the husband's agency set out in the statute and by judicial interpretation.

The case of Cook v. Stellman[37] further shows that an estate of some nature was created by the community property law of this State and, that the husband is an agent for the transaction of community's business.

"Under the provisions of Rev. Codes, Sec. 2686, in force at the time the note and mortgage were executed, the husband had the management and control of the community property except as to the power to distribute that part of the community property used or occupied by the husband and wife as a residence. He was the community agent. In agreeing with appellant to postpone the time of payment of the indebtedness, Stellman represented the community and what he did was for the benefit of the community. From the date of the creation of the indebtedness, by the execution of the note and mortgage, Stellman made the payments upon the community obligation, and bound the community when he made the payments through the bank, which acted as his agent. Payments made by the bank were payments of Stellman and when he drew his individual checks therefore it was on behalf of the community and for its benefit. The community received the money and owes the debt. Since Stellman acted as the representative of the community in entering into the written agreement with appellant postponing the date of payment of the indebtedness, such action, coupled with annual payments of interest on the principal obligation, operated as a sufficient acknowlegdment under C. S. Sec. 6631, and removed the bar of the statute of limitations against the debt."

37. 43 Idaho 433, 251 Pac. 957.

In Overland Bank v. Halveston,[38] the court ruled that the husband was the managing partner of the community property.

Again in Nuchols v. Lyle,[39] the court ruled that the husband has the management and control of the community property, but was only part owner of it.

In Mitchell v. Atwood[40] the court said:

"It must be remembered that the statute here invoked is one enacted for the protection of the community, and one dealing with the community may not invoke the statute to obtain an advantage over the community." (Cases cited).

In Muir v. City of Pocatello[41] the court considered the nature of a cause of action for personal injuries to the wife; the court stated that the community property laws had created a relationship comparable to a trust relation.

The latest expression on the question of whether the community in Idaho is a legal entity is Radermacher v. Radermacher [42] in which the court, ruled that the husband was the agent for the marital partnership.

As to whether a legal entity was formed under our law Professor F. W. Jacobs in his very excellent article said,

"When it was enacted by the Fourth Territorial Session that property acquired by husband or wife after marriage should (with exceptions) be common property, the legislature intended just what it said; that is, that such property should be owned in common, subject to the further statutory provisions as to management, control, and distribution. In other words, the legislature created a new type of co-tenancy or concurrent estate (in personal as well as in real property) comparable to, though quite different from, the familiar joint tenancy, tenancy by the entirety, tenancy coparcenary, and tenancy in common. It did not under-

38. 33 Idaho 489, 196 Pac. 217.
39. 6 Idaho 589, 70 Pac. 401.
40. 55 Idaho 772, 47 Pac. (2d) 680.
41. 36 Idaho 532, 212 Pac. 345.
42. 61 Idaho 261, 100 Pac. (2nd) 955.

take to create, and it did not create, a new legal entity." [43]

With all due respect to Professor Jacobs it is rather difficult to understand how he could state that the legislature created a new type of co-tenancy or concurrent estate and immediately thereafter conclude that a new legal entity was not created. A careful reading of the ten cases last referred to in which the court likened the community to a partnership and spoke of the community as a separate entity apart from the husband and wife, with Kohny v. Dunbar as the landmark case, reveal the most persuasive argument that our court, in interpreting community property laws entertained the opinion that a new legal entity was created, even though not specifically designated up to this time. If that is not so, then Kohny v. Dunbar, which has been the law of this State ever since it was announced, [44] is saturated with "loose talk" which the court did not mean. Indeed, now it is rather late to re-write a decision, which has been the law of this State for the past thirty years.

IS THE COMMUNITY A TENANCY IN COMMON?

I. C. A. 54-508: "Every interest in real estate granted or devised to two or more persons other than executors or trustees, as such constitutes a tenancy in common, unless expressly declared in the grant or devise to be otherwise."

I. C. A. 54-104: "Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes or unless declared in its creation to be a joint interest, or unless acquired as community property."

Our Supreme Court has not ruled directly upon the point whether husband and wife during marriage hold the community property as co-tenants; but co-tenancy is recognized in Idaho.[47] A partnership is not a co-tenancy.[48] Upon the death of the husband, intestate, it has been held that the wife became a tenant in common with the husband's heirs in the community property.[49] It was held in Thurston v. Holden [50] that when a co-tenant pays off an incumbrance from the sale of the common property, he is

42. 61 Idaho 261, 100 Pac. (2nd) 955.
43. Law of Community Property, Idaho Law Journal, Vol. 1, page 20.
44. Radermacher v. Radermacher, 1941, 61 Idaho 261, 100 Pac. (2nd) 955.
47. Keyser v. Morehead, 23 Idaho 501, 130 Pac 992; Washburn & Wilson Seed Co. v. Alexie, 54, Idaho 727, 35 Pac. (2nd) 990; Twin Falls Orchard Co. v. Salsbury 20 Idaho 110, 117 Pac. 118.
48. Brattan v. Morris, 54 Idaho 743, 37 Pac. (2nd) 1097.
49. Coe v. Sloan, 16 Idaho 49, 100 Pac. 354; Vaughn v. Hollingsworth, 35 Idaho 722, 208 Pac. 838.
50. 45 Idaho 724, 265 Pac. 697.

immediately subrogated to the right of the creditor, and acquires an equitable lien on the moiety of his non-contributing co-tenant.

In view of the statute and decisions of the State of Idaho above, it is doubtful whether a community of husband and wife is a co-tenancy, for the reason that I. C. A. 54-508 would not need have included therein the phrase, "unless acquired as community property," if it was meant that the community and a co-tenancy were the same. Further, the very definition of "community property" excludes it from being a form of co-tenancy because the statute pertaining to the formation of co-tenancy embraces the acquisition of property whether it be by devise, gift, bequest or descent," whereas property acquired in that manner by either husband or wife is not community property, but the separate property of the spouse so acquiring it. [51] And when the court spoke of "common property" in the Thurston case, it was not referring to the property as being comparable to that which we know as community property.

IS THE COMMUNITY A JOINT TENANCY?

No case has been found wherein our Supreme Court has likened the community to a joint tenancy. I. C. A. 54-104, provides.

"Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless disclosed in its creation to be a joint interest, or unless acquired as community property."

That section of the statute excludes the possibility that husband and wife are joint tenants in community property. It must be further remembered that there is no survivorship in community property, and that upon the death of one spouse, no more than one-half of the community property is subject to testamentary disposition. [52] For the same reasons the community is not a tenancy by entirety.

IS THE COMMUNITY A TRUST RELATIONSHIP?

In the case of Muir v. City of Pocatello, [53] the court, by way of dictum, compared the community to a trust, but it is submitted that the community is not a trust for the

51. Powell v. Powell, 1912, 22 Idaho 531, 126 Pac. 1058.
52. I. C. A. 14-113.
53. 38 Idaho 532, 212 Pac. 345.

reason that the spouses both are owners of the community property [54] with vested interests therein. [55].

THE COMMUNITY IS A "KIND OF PARTNERSHIP."

The elimination of the community as a tenancy in common, joint tenancy, tenancy by the entirety, or trust, leaves just one other possibility—that the community is a "kind of partnership" based upon the authorities headed by Kohny v. Dunbar. Certainly the Supreme Court had in mind the creation of some new legal entity or estate beside those of which we are familiar, and accordingly a comparison of partnerships generally and the community is in order; for only in that manner can it be determined whether the attributes of partnership exist in the community; only thus could it be concluded that a new legal entity was formed.

CREATION

Partnerships and the duties and obligations arising therefrom can be created only by contract, express or implied, [56] and the marriage relation between individuals can be created only by contract, express as stated in Beard v. Beard, [57] "Marriage is a civil contract****and it is regarded as a status based upon public necessity and control by law for the benefit of society at large." I. C. A. 31-901 provides "husband and wife contract toward each other mutual obligations of mutual respect, fidelity and support." Implied contracts of marriage may be found in our recognition of common law marriages in this State. [58]

AGENCY

"In a partnership any agent may bind both firm and individual assets by his contract or tort in conducting the firm's business." [59] In like manner under our Idaho statute, the husband, as statutory agent, can bind his own assets as well as the community estate, no attention being paid to the question of whether the obligation which gave rise to the judgment is for the benefit of the community. [60]

"A partner has the power to transact the whole business of the firm, whatever that may be, and so to bind the firm in such transactions as entirely as himself." [61]

54. Kohny v. Dunbar, supra.
55. Kohny v. Dunbar, supra.
56. Russell v. Barry, 61 Idaho 216, 102 Pac. (2nd) 276.
57. 53 Idaho 440, 24 Pac. (2nd) 47.
58. Huff v. Huff, 20 Idaho 450, 118 Pac. 1080; Maudlin v. Sunshine Mining Co. 61 Idaho 9, 97 Pac. (2nd) 608.
59. I. C. A. 52-309.
60. McDonald v. Rozen, 8 Idaho 353, 69 Pac. 125; Holt v. Empey, 32 Idaho 106, 178 Pac. 703; Gustin v. Byam (1925) 41 Idaho 538, 240 Pac. 600.
61. Kallash v. Claar, 48 Idaho 714, 284 Pac. 1032.

In the conduct of that business a partner, as agent for the firm, has the authority to delegate his duties, and the husband, too, may constitute his wife the agent and render her acts, within the scope of her apparent authority, binding on him, and subject the community assets to a liability therefor. [62] In some instances the wife may even become the agent of the community by necessity as where the husband abandons the wife and family, "for the husband by his conduct relinquishes his power and right to control the community property disposition." [63]

I. C. A. Sec. 31-914 provides that the wife has the management and control of the earnings for her personal services, and the rents and profits of her separate estate; consequently she is the agent with respect to that community property. With respect to the other community property, in order that the wife bind the same as agent, she must be permitted to act as such through her husband, and if she is not so acting, neither the separate property of the husband nor the community property is liable for her acts. [64]

The responsibility of the partnership for the acts of its agents or partners rests upon the doctrine of "respondent superior"; the act must be within the scope of the firm's business. [65] For example, a creditor who receives the firm's assets for a pre-existing debt, knowing it is being used for the individual partner, is not in good faith, and consent of the other partners must first be obtained. [66]

To a certain extent the liability of the husband and of the community in Idaho rests upon the doctrine of "respondent superior". For example, the owner of a car is not liable for accidents arising by reason of its operation unless the relationship of principal and agents exists, and the act is for and on behalf of the principal. [67] Of course, the doctrine does not apply when the husband himself is operating the car for the reason that no attention is paid to whether or not the husband is on community business, but this is not strictly the law in all instances in this State, for "in one way or another the wife has a remedy for alienation (of property) made in fraud of her by her hus-

62. Carron v. Guido, 54 Idaho 494, 33 Pac. (2nd) 345; 27 Amer. Jur. page 82. Hutchings v. Heffner, 63 Colo. 365, 167 Pac. 966; LRA 1918 A.
63. Sassman v. Root, 37 Idaho 588, 218 Pac. 374; Hall v. Johns 17 Idaho 224, 105 Pac. 71; Powers of Deserted Wife (Merrill) Idaho Law Journal Vol. 2. No. 2.
64. Hall v. Johns 17 Idaho 224, 105 Pac. 71; McKay on Community Property (2nd Ed. 1925) para. 811; Werker v. Knox (Wash.) 85 Pac. (2nd) 1041, Washington Law Review Vol. XIV, No. 3 July, 1939, page 228.
65. Johnston v. Ellis, 49 Idaho 1, 285 Pac. 1015; Gold Ford Co. v. Sweaney & Smith, 35 Idaho 226, 205 Pac. 554; Magee v. Hardgrove Motor Co., 50 Idaho 442; 296 Pac. 774; a comparable rule exists in joint venture, see Russell v. Boise Cold Storage Co., 43 Idaho 759 254 Pac. 797.
66. Redfield v. Wells, 31 Idaho 415, 173 Pac. 640.
67. Gordon v. Rose, 54 Idaho 502, 33 Pac. (2nd) 351.

band" [68] which is just an example that all acts of the husband which are not on behalf of the community are permissible. The case of Stowell v. Tucker exemplifies this statement; therein the husband filed a disclaimer in a suit against the husband and wife, and the court, finding the subject matter to be community property, held that the wife under the statute in force could defend the action. [69]

The wife has even been permitted to intervene in an action against the husband in order to protect her interest in the community property, [70] but the action probably could not be maintained in the absence of allegations of fraud or collusion on the part of the husband, [71] her interest being so vested that the husband cannot deprive her of it by a voluntary alienation for the mere purpose of divesting her claim to it. [72] In Washington it has been held that the husband cannot give away the community property to his mistress, thereby depriving the wife of her interest therein. [73]

The relationship of partnership does not entitle one partner to the exclusive possession of the firm property as against the remaining partner, [74] and likewise the wife is entitled to equal possession of the community property with the husband. [75]

The agency of the husband is dependent on the statute, and the court can by proper order transfer the management and control of the community property to the wife during pendency of a divorce action. [76]

RATIFICATION

In the law of partnership the firm can ratify the agent's acts when it has, with full knowledge of the facts, accepted the benefits of the acts. [77] That rule likewise applies to dealings between husband and wife and third persons, [78] and applies whether the action is one on contract or ex delicto. [79]

68. Kohny v. Dunbar 21 Idaho 258, 121 Pac. 544.
69. 7 Idaho 312, 62 Pac. 1033; accord, Aker v. Aker 52 Idaho 713, 20 Pac (2nd) 713; Muir v. City of Pocatello 36 Idaho 532, 212 Pac. 345.
70. Pittock v. Pittock, 15 Idaho 47, 96 Pac. 212.
71. Holt v. Empey 32 Idaho 106, 178 Pac. 703.
72. Hall v. Johns 17 Idaho 224, 105 Pac. 71.
73. Marston v. Rue (Wash) 92 Wash. 129, 159 Pac. 111.
74. State v. Roby, 43 Idaho 724, 254 Pac. 210.
75. Kohny v. Dunbar, supra.
76. Bennett v. District Court, 57 Idaho 85, 62 Pac. (2nd) 108.
77. Johnston v. Ellis, 49 Idaho 1, 285 Pac. 1015; Naylor Co. v. Bowman, 39 Idaho 764, 230 Pac. 347; Generally, on the question of ratification, see Hammond v. McMurry Bros., 49 Idaho 207, 286 Pac. 603; Pettingill v. Blackman, 30 Idaho 241, 164 Pac. 481; Spongberg v. First Nat'l. Bank 18 Idaho 524, 110 Pac. 716; Blackwell v. Kercheval, 29 Idaho 471, 160 Pac. 741; Hammett v. Virginia Min. Co., 32 Idaho 245, 181 Pac. 336; Hample v. McKinney, 44 Idaho 435, 258 Pac. 179; Kennison v. McMillan Sheep Co. 46 Idaho 754, 270 Pac. 1062; Findley v. Hildenbrand, 17 Idaho 403, 105 Pac. 790; Heath v. Potlatch Lbr. Co., 18 Idaho 212, 108 Pac. 343.
78. McShane v. Quillin 47 Idaho 542, 277 Pac. 544.
79. Bailey v. Idaho Irrig. Co., 39 Idaho 354, 227 Pac. 1055; McShane v. Quillin, supra.

ESTOPPEL

A principal may be estopped to deny the acts of its agents. [80] If an individual has possession of partnership property and he is permitted to handle it so as to mislead others in believing that it is his individual property, the partners are estopped to assert it to be firm property. [81] So, property purchased with a design that it shall become partnership property, and actually so used must thereafter be regarded as firm assets. [82]

Estoppel has also been invoked in reference to the wife, husband and the community, in their dealings with third persons with respect to both separate and community property. In Moore v. Croft [83] a wife who permitted her separate property to be taken in the name of her husband represented to the world that the property was community property, and she and her personal representatives were estopped to deny it. This doctrine is of long standing in Idaho.

> "If she permits or encourages her husband to hold himself forth as the owner of property, if she voluntarily put the title to her property in him, thus knowingly clothing him with indicia of ownership, or by conscious acts acquiesces in his apparent ownership, knowing, or having good cause to know, that he is using the property to obtain credit, or if she conspire with him to that end, or if (when applied to for information) she lie, deceive, or mislead, it is not unreasonable to estop her to claim the property when such claim makes her husband insolvent." [84]

Estoppel has been applied to a wife who attempted to deny that property is her separate property, [85] and to a wife who attempted to deny that her separate property was community property. [86] An oral sale of real estate was made by husband and wife and they were estopped to deny its validity. [87] But in order to apply an estoppel the party being estopped must be fully cognizant of all the facts upon which estoppel is based. [88]

80. McCormick & Co. v. Tolmie Bros., 42 Idaho 1, 243 Pac 355; Bogue Supply Co. v. Davis, 36 Idaho 249, 210 Pac. 577; Palmer v. Maney, 45 Idaho 731, 266 Pac. 424; Gore v. Richard Allen Mining Co., 61 Idaho 622, 105 Pac. (2nd) 735; Doner v. Honstead, 61 Idaho 669, 106 Pac. (2nd) 868.
81. Paine v. Strom, 51 Idaho 532, 6 Pac. (2nd) 849.
82. Gold Ford Cov. Sweeney and Smith, 35 Idaho 226, 205 Pac. 554.
83. 47 Idaho 568, 277 Pac. 554.
84. Feltham v. Blunck, 35 Idaho 1, 198 Pac. 763.
85. Sassman v. Root 37 Idaho 588, 218 Pac. 374.
86. Boise Butcher Co. v. Ainxdale 26 Idaho 483, 144 Pac. 337.
87. Grice v. Woodworth, 10 Idaho 459, 80 Pac. 912.
88. Leaf v. Godd, 41 Idaho 547, 240 Pac. 593; McKeehan v. Volmer Clearwater Co., 30 Idaho 505, 166 Pac. 257; generally on estoppel, see: Quirk v. Bedal, 42 Idaho 567, 248 Pac. 447; Chaney v. Gauld Co. 28 Idaho 76, 152 Pac. 468; Overland Bank v. Halveston 33 Idaho 489, 196 Pac. 217.

In applying an estoppel against the community, the court said,

> "Where husband and wife sign a mortgage and they or their agent cause or permit a false acknowledgement to be placed upon it, and one not a party to procuring the false certificate and without notice of its false procurement for a fair consideration takes the instrument relying upon its verity, the makers in good conscience ought and in equity are estopped from disputing its verity. (cases cited)" [89]

FIDUCIARY RELATION

A fiduciary relation exists in the relation of principal and agent, which is a part of a partnership contract. That high degree of trust and confidence is expressed in Jensen v. Sidney Stephens Implement Co.[90] as follows:

> "Loyalty to his trust is the first duty which an agent owes to his principal. It follows that as a necessary conclusion that the agent must not put himself in such a relationship that his interests become antagonistic to those of his principal. Fidelity in the agent is what is aimed***. The law regards the fiduciary relation, which the relation of principal and agent is, with jealous care. It seeks to prevent the possibility of a conflict between duty and personal interest***"

In the same manner a fiduciary relation exists between the husband and wife, even greater in degree, for husband and wife contract toward each other obligations of mutual respect, fidelity and support. [91] Fidelity in all matters between spouses is the foundation upon which the marriage relation exists. Even though the husband is the statutory agent, he possesses such powers only so long as they are executed in strict accordance with honesty and the best interests of both. For example, the wife can protect herself against fraudulent and collusive acts by the husband during marriage,[92] and when the husband abandons his family, he relinquishes his powers as agent of the community. [93]

The ruling in Kohny v. Dunbar, supra, that the community is "a kind of partnership" perhaps does not

89. Kansas City Life Ins. v. Horroun, 44 Idaho 643, 258 Pac. 929.
90. 36 Idaho 348, 210 Pac. 1003.
91. I. C. A. 31-901.
92. Kohny v. Dunbar, 21 Idaho 258, 121 Pac. 544; Pittock v. Pittock 15 Idaho 47, 96 Pac. 212; Holt v. Empey 32 Idaho 106, 178 Pac. 703; Gustin v. Ryam, 41 Idaho 538,240 Pac.600, the court denied relief to the wife because she failed to prove fraud.
93. Powers of a deserted wife, A. L. Merrill, Idaho Law Journal Vol. 2, No. 2. Sassman v. Root, 37 Idaho588, 218 Pac. 374.

mean that the community is a general partnership, but the court had in mind an entity comparable to the "limited partnership."

We have seen that the community assets and the individual assets of the husband are liable for his separate debts as well as those of the community; then, is not this the conclusion? The assets of the community, part of which are owned by the wife and in which she has a vested interest, constitutes the only amount and extent which the wife stands to lose by the acts of her husband, either individually, or for and on behalf of the partnership or community. [94] The wife is in effect a "limited" partner. If she goes beyond this limited investment, her interest in community funds, and clothes her husband with indicia of ownership in her separate property, and thus misleads third persons, she will be estopped to claim that such property is her separate property. [94A]

At one time the legislature passed an act called "The Sole Trader Act," if the wife conformed to the act she could then engage in private enterprise. [95] "A married woman may establish and carry on a business with her own funds or funds secured on the faith and credit of such business***. The assumption of payment of pre-existing indebtedness, as well as the indebtedness contracted in the course of the business after she became the owner, were contracts in relation to her separate property under C. S. Sec. 4657."[96] So today, even though the Sole Trader Act has been repealed, the wife can carry on a business which is entirely consistent with the purposes and the spirit of the "limited partnership act," [97] and no liability will attach against the community in the absence of grounds for estoppel. In that regard note I. C. A. 52-207 which provides:

> "A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business."

The spirit of the "limited partnership act," to permit the limited partner to carry on a business separate and apart from that of the partnership, is in accord with the

94. I. C. A. 31-912 providing that the wife is not liable for the debts of her husband; 31-914, the wife has the management and control of the earnings of her personal services and the rents and profits of her separate estate; 31-910 earnings of the wife while living apart from the husband is her separate property.
94-A. Feltham v. Blunch, 35 Idaho 1, 198 Pac. 763. See 52-201 (ICA) in which the limited partner is not bound by the obligations of the partnership.
95. McDonald v. Rozen, 8 Idaho 352, 69 Pac. 125.
96. Boise Assoc. of Credit Men v. Glenns Ferry Meat Co., 48 Idaho 600, 283 Pac. 1038.
97. Boise Assoc. of Credit Men v. Glenns Ferry Meat Co. supra.

right of the wife to do likewise. She can contract with reference to her separate property, [98] and can become a creditor of the husband and the community, and a transfer to her in discharge of a debt which is bona fide, is not collusive or fraudulent. [99]

> "The payment of a debt by the husband to the wife is a legitimate transaction and one which the law permits. In the case of Wilkerson v. Aven, 26 Idaho 559, 144 Pac 1105, it was said, 'If the husband borrow money from the wife, we fail to understand why he would not have as valid a right to pay her the money borrowed as he would to pay any of his creditors.' And also the case of Bates v. Papesh, 30 Idaho 529, 166 Pac 270, it was held, 'A wife, who loans the proceeds of her separate property to her husband, becomes one of his creditors, and her rights as such are governed by the same legal principles as the rights of any creditor'." [100]

It has even been held that the husband can convey community property to the wife as a gift if not in fraud of creditors. [101]

There no longer can be any question in this state as to the power of a married woman to bind her separate property and estate for the payment of a debt. [102] But in order to keep distinct the business carried on by the wife from that of the community, the Supreme Court has held on numerous occasions that a married woman cannot bind herself personally for the payment of a debt that was not contracted for her use and benefit or for the use and benefit of her separate property, or in connection with its management and control. [103]

DISSOLUTION.

A partnership may be dissolved by the death of a partner [104] by voluntary dissolution, [105] or involuntary

98. Bassett v. Beam, 4 Idaho 106, 36 Pac. 501.
99. Bates v. Papesh, 30 Idaho 529, 166 Pac. 270; Wilkerson v. Aven 26 Idaho 559, 144 Pac. 1105; McMillan v. McMillan 42 Idaho 270, 245 Pac. 98; Moody v. Beggs 33 Idaho 535, 196 Pac. 306; Craig v. Partridge 48 Idaho 471, 282 Pac. 940; Chicago Portrait Co. v. Sexton 49 Idaho 128, 286 Pac. 615.
100. See ICA 52-213 providing for loans by limited partners to the firm. Bannock Nat'l. Bank v. Automobile Accessories Co. 37 Idaho 787, 219 Pac. 200; Littler v. Jefferies 36 Idaho 606, 212 Pac. 866.
101. Bank of Orofino v. William 26 Idaho 424, 142 Pac. 1169; Prescott v. Snell 50 Idaho 644, 299 Pac. 1079.
102. Tipton v. Ellsworth, 18 Idaho 207, 109 Pac. 134; Stewart v. Weiser Lbr. Co. 21 Idaho 340, 121 Pac. 775; Roberts v. Hudson 49 Idaho 132, 286 Pac. 364; Pacific Acceptance Corp. v. Meyers 49 Idaho 585, 290 Pac. 404.
103. Jaechel v. Pease 6 Idaho 131, 53 Pac. 399; Bank of Commerce v. Baldwin 14 Idaho 75, 93 Pac. 504; Larsen v. Carter, 14 Idaho 511, 94 Pac. 825; McKenzie v. Frank v. Bruce 30 Idaho 732, 168 Pac. 5; Rogers v. National Surety Co. 53 Idaho 128; 22 Pac. (2nd) 141; Loomis v. Gray 60 Idaho 193, 90 Pac. (2nd) 1029.
104. McElroy v. Whitney 12 Idaho 512, 88 Pac. 349.
105. See I. C. A. 52-332 and I. C. A. 52-331.

dissolution, [106] or by the expiration of the time for which it was formed. [107]

Upon dissolution of the partnership general or limited the assets of the firm creditors are paid first; [108] afterwards the limited partners come in for profits and other compensation. [109]

Marriage and the community are dissolved upon the death of either spouse [110] or by divorce.[111] Upon the death of either, one-half of the community property goes to the survivor subject to the community debts and the other half is subjct to testamentary disposition, the entire res however being subject to community debts. [112] Upon the husband dying intestate, the wife becomes a tenant in common with the husband's heirs insofar as community property is concerned. [113] Both moieties of the community property are subject to administration by the Probate Court. [114]

Upon dissolution of a partnership and the winding up of the affairs, the court may appoint a receiver to handle the property, if adequate reason exists. [115] In like manner the court, pending a divorce, may divest the husband of his management and control of the community property and place it in the wife, for his right as to management and control is not absolute. [116]

In dissolution of the affairs of the partnership, after payment of the firm debts, the assets are distributed in accordance with equitable principles. [117] "Upon the dissolution of marriage the court should by decree so dispose of the community property as to give each spouse sole and immediate control of his or her determined share." [118]

Upon the dissolution of the partnership the court can, upon proper showing by one of the partners, take over the administration of the firm assets; and in dissolving the marriage by divorce the court is empowered to divide only the community property. [119] Further, a partner who dissolves the firm becomes liable for breach of contract to the other partners if the dissolution is without reason-

106. Delay v. Foster 34 Idaho 691, 203 Pac. 461.
107. I. C. A. 52-331.
108. I. C. A. 52-223.
109. I. C. A. 52-223.
110. Ewald v. Hufton 31 Idaho 373, 173 Pac. 247; Amonsen v. Amonsen 55 Idaho 42, 37 Pac. (2nd) 228; Peterson v. Peterson 35 Idaho 470, 207 Pac. 425.
111. Radermacher v. Radermacher, 61 Idaho 261, 100 Pac 955.
112. I. C. A. 14-113.
113. Coe v. Sloan 16 Idaho 49, 100 Pac. 654.
114. Burnham v. Turner 44 Idaho 461, 259 Pac. 3.
115. McElroy v. Whitney 12 Idaho 512, 88 Pac. 349.
116. Benson v. District Court 57 Idaho 85, 62 Pac. (2nd) 108.
117. I. C. A. (2-340) See Tolmie v. San Diego Fruit & Produce (1936) 57 Pac. (2nd) 51 (joint adventure).
118. Largilliere v. Largilliere 50 Idaho 496, 298 Pac. 362.
119. Benson v. District Court 57 Idaho 85, 62 Pac. (2nd) 108.

able cause. [120] Likewise, the husband is liable on his contract for separate maintenance, which contract may become a part of the divorce decree. [121]

If the theory is acceptable, that the wife is comparable to a "limited partner", then the legal entity, known as the community, should be held liable for acts committed by the husband, as agent, or the wife as agent, for and on behalf of the community, for when there are two or more joint defendants, as in the case of principal and agent, partnerships, co-tenants, joint ventures, trustees, and cestui que trusts, or joint tenants, the death of one party does not abate the action with respect to the other.

> "While it may be stated by way of dictum, that at common law the death of two or more defendants in any action pending caused a total and absolute abatement of the action, there is a general rule, obtaining not only in equity and under statute, but even apart from statute, that the action or suit does not abate entirely or as against the remaining defendant or defendants where the cause of action survives against such remaining defendant or defendants. and, among other actions, this rule has been invoked and applied in actions ex delicto or ex delicio against two or more defendants, in actions and suits against partnerships, in actions and suits against two or more personal representatives, also on the death of a co-tenant, * * * and on the death of one defendant jointly and severally liable with a co-defendant." [122]

Such is the law in the case of the death of the "limited partner" or the death of a general partner,[123] and the estate is liable after death.

The liability of the principal continues even though the agent dies or is killed in the performance of his duties. [124]

It ought to follow, therefore, that the community estate should be liable for the debts of the husband, whether they grow out of contract or tort. [125]

120. Delay v. Foster 34 Idaho 691, 203 Pac. 461.
121. Lamb v. Branner 29 Idaho 770, 162 Pac. 246.
122. 1 C. J. Sec. para. 122, pages 170 & 171; Hess v. Lowery. 122 Ind. 225; 25 NE 156; 7 LRA 90; 1 Amer. Juris. para. 64, page 61, 20 RCL 914, para. 126; 1 RCL 21 & 22.
123. I. C. A. 52-221 and 52-340. On the question of liability of the agent for his torts the following cases permitted suit against such agents. Scrivner v. Boise Payette Lbr. Co. 46 Idaho 334, 268 Pac. 19; Faris v. Burroughs Adding Machine Co. 48 Idaho 310, 282 Pac. 72; Jakeman v. Oregon Shortline RR 43 Idaho 505, 256 Pac. 88; Hartman v.Gas Dome Oil Co. 50 Idaho 288, 295 Pac. 998; Dedman v. Oregon Shortline RR 57 Idaho 180, 63 Pac. (2nd) 667; Corey v. Beck 58 Idaho 281, 72 Pac. (2nd) 856; Normington v. Neeley 58 Idaho 134, 70 Pac. (2nd) 396.
124. Gorton v. Doty 57 Idaho 792, 69 Pac. (2nd) 136.
125. I. C. A. 14-113 providing that the community property upon death is subject to the community debts.

PROTECTION OF THE WIFE.

It may, perhaps, be urged that if we permit the survival of the action against the community estate, that we will be, in effect, depriving the wife, if she be the surviving spouse, of the property upon which she must thereafter rely for her livelihood and, that such hardship of the wife will thereafter be visited upon the State. But when one considers the number of laws enacted for the protection of the wife against the acts of her husband in connection with the management and control of the community property, and the protection afforded her against third persons, such argument becomes insignificant. For example, by statute, one spouse cannot sell or dispose of the homestead by grant or conveyance unless the instrument is executed and acknowledged by both, [126] nor can one spouse convey real property except by like formality, [127] and no personal property of either husband or wife, exempt by law from execution, shall be mortgaged by either husband or wife without the joint concurrence of both. [128]

The separate property of the wife is not liable for the debts of the husband but is liable for her own debts contracted before or after marriage. [129] And the earnings of the wife living separate and apart from her husband are the separate property of the wife. [130] She has the management and control of her earnings from personal service and the rents and profits of her separate estate. [131] While married she may sue and be sued as a feme sole. [132]

"If the husband and wife be sued together the wife may defend in her own right, and if the husband neglects to defend, she may defend for his right also." [133] As said in Karlson v. Hanson & Karlson Co., [134] in a case involving the failure of the husband to execute a contract as required by the statute, "This statute (and the other) has for its primary purpose the protection of the wife and the martial community of which she is a member***."

"A married woman has, at least potentially, all the civil rights of her husband; she has been fully emanci-

126. I. C. A. 31-913. Hughes v. Latour Creek Ry 30 Idaho 475, 166 Pac. 219; Mellen v. McMannis 9 Idaho 418; 75 Pac. 98.
127. I. C. A. 31-913. Metropolitan Life v. McClelland 57 Idaho 139, 63 Pac. (2nd) 857; Fargo v. Bennet 35 Idaho 359, 206 Pac. 692; McKinney v. Merritt 35 Idaho 600, 208 Pac. 244.
128. I. C. A. 44-1002. Kendall v. Lincoln Hardware Co. 8 Idaho 664, 70 Pac. 1036.
129. I. C. A. 31-912.
130. I. C. A. 31-910.
131. I. C. A. 31-914. See McMillen v. U. S. Fire Ins. Co. (Idaho) 280 Pac. 730.
132. I. C. A. 5-304.
133. I. C. A. 5-305 Muir v. Pocatello; Larson v. Carter 14 Idaho 511, 94 Pac 825. 134. 10 Idaho 361, 78 Pac. 1080.

pated as a citizen both by the state and federal constitution, and is eligible to any position which her husband can hold * * *. It would therefore seem that most of the restrictions and disabilities placed upon a married woman by the common law have been removed in this State." [135]

Since the wife has been so amply protected under our statutes and Constitution, and the common law disabilities have been removed, in like manner the common law rule, "actio personalis moritur cum persona" should not apply for her benefit, nor for the benefit of the community estate. The reason for so concluding is clearly expressed in Muir v. City of Pocatello:

> "A law which attempts to extend to married women all the rights and privileges of persons sui juris, where she is seeking to enforce her rights against other persons, and does not give to such persons (against whom the rights are being enforced) correlative rights against her, but places her under disabilities of the common law, when being sued, often leads to incongruities and inability to administer exact justice under such system, because no class of citizens can properly be given rights and privileges of fully emancipated citizens without being required to assume corresponding duties and obligations of such citizenship."[136]

Keeping in mind what the Supreme Court said in the Muir case, it would seem to follow that since the surviving spouse has been provided by the legislature an action for wrongful death, [137] which did not exist at common law, then an injured party should have an action for injuries against the tort feasor's estate, if such action can be justified by accepting the theory that the community is a legal entity, or justified on other grounds which will be discussed.

SURVIVABILITY OF CAUSES OF ACTION AGAINST ESTATES IN THE STATE OF IDAHO.

Kloepfer v. Forch [138] was an action for damages by Kloepfer against the defendants for having sold a chemical which destroyed his crops. Five others so damaged by such sales assigned their causes of action to the plaintiff; from an order sustaining a demurrer of the defendant (now Rosina Forch the executrix's wife) an appeal was perfected. The court said:

135. Overland Bank v. Halveston 33 Idaho 489, 196 Pac. 217, page 498.
136. 36 Idaho 532, 212 Pac. 345.
137. I. C. A. 5-311.
138. 32 Idaho 415, 184 Pac. 477.

> "Two questions are submitted for our consideration which are so closely related that they will be discussed and disposed of together: (1) Are the claims assignable? (2) Do the causes of action survive?
>
> "As a general rule, in the absence of statute providing otherwise, causes of action ex contractu survive while causes of action ex delicto do not. However, there are well recognized exceptions to both branches of the rule. As was said by the Supreme Court of Virginia in Lee's Amdr. v. Hill, 87 Va. 497, 12 SE 1052; 'The true test is, not so much the form of the action, as the nature of the cause of action. Where the latter is a tort unconnected with contract and which affects the person only, and not the estate, such as assault, libel, slander and the like there the rule, actio personalis, etc., applies. But where, as in the present case, the action is founded on a contract, it is virtually ex contractu, although nominally in tort, and there it survives.' Case cited.
>
> "We have no statutory provision abrogating the common law rule of survival of cause of action referred to. Applying that rule to this case it may be said that while the action, in form, is ex delicto, the cause is, in fact, ex contractu. The injury for which the recovery is sought grows out of the contract of purchase of sodium arsenate***. These facts distinguish this case from those where recovery is sought for injury to the person or for torts resulting in damage to the estate, generally, and make these claims assignable and cause them to survive the death of a party to the action."

In McLeod v. Stelle [139] the plaintiff, as assignee, sued the defendants for fraud and misrepresentation involving the sale of real property. The defendants urged that the claims could not be assigned. The court said:

> "The assignability of a cause of action is by the authorities intimately associated with, and in most cases held to depend upon, the same principle as the survival of a cause of action. Thus, if it survives, it may be assigned; if not, it may not. (C. S. sec. 6652). Broadly stated and referred to in Kloepfer v. Forch, supra, actions of a personal nature are not assignable. A long line of authorities has established this

139. 43 Idaho 64, 249 Pac. 254. Accord: Dunn v. Boise City 48 Idaho 550, 283 Pac. 608 in which plaintiff was allowed to bring action on assigned claim for damages to land. Carver v. Ketchum 53 Idaho 595, 26 Pac. (2nd) 139, holding that conversion survives the death of the party deprived of his property.

principle. Some cases have held that an injury suffered by fraud, false representations, or deceit, is of such personal nature, does not survive, and is not assignable. This was not involved in the Kloepfer case, and not therein decided or necessary to the decision.

The later, and to me the better considered, cases have tended toward, and many of them have reached the conclusion that the injuries of a personal nature which do not survive are such as injury to person, malicious prosecution, false imprisonment, libel, slander, and the like; and that an injury which lessens the estate of the injured party does survive, and thus is assignable. While the New York cases cited at 23 Cyc. 409, are decided under a statute which defines injury to property, yet this statute was adopted in 1876, and these authorities have been widely cited as sustaining the principle that an injury suffered through fraud, false representations, or deceit, resulting in the diminution of the estate of the injured party, survives and is assignable. I think that the statute is but a statement of the principle which should control our decisions, even in its absence, and that an injury such as alleged herein does diminish the estate, is an injury to property, survives, and is assignable. (C. S. sec. 5364; Cleveland v. Barrows 59 Barb (NY) 364."

In Helgeson v. Powell, [140] against a tort feasor and a surety company for wrongful death, the court ruled that the action against the defendant was ex delicto and did not survive at common law.

The court has held that an action for alienation of affections abates on the death of the plaintiff; [141] a decree for separate maintenance (embodying a contract entered into between the parties) continues enforceable up to the time of the death of the defendant husband, and accrued amounts, prior to his death, are collectible from the estate, but not thereafter; [142] an action to remove a public officer for failure to perform his official duty abates upon death of the officer; [143] an award of compensation (an approved agreement by the Board) is in the nature of a judgment for liquidated damages, and survived to the widow administratrix after the death of the claimant husband;[144] and

140. 54 Idaho 667, 34 Pac. (2nd) 957.
141. Green v. Kandle 20 Idaho 190, 118 Pac. 90.
142. Simonton v. Simonton 40 Idaho 751, 236 Pac. 963.
143. Dygert v. Harrison 34 Idaho 377, 201 Pac. 719. See I. C. A. 5-319.
144. Haugse v. Sommers Bros. 43 Idaho 450, 254 Pac. 212. Thacker v. Jerome Creamery 61 Idaho 726, 106 Pac. (2nd) 863; State Insurance Fund v. Hunt 52 Idaho 639, 17 Pac. (2nd) 354.

an action for rescission of a contract on the ground of fraud survived the death of one of the defendants and the substitution of an administrator was permissible; [145] and annulment of divorce actions abate on the death of a party. [146]

It is submitted that the survivability or non-survivability of the causes of action in the above mentioned cases cannot be relied upon as authorities dealing with the matter of personal injuries surviving for the following reasons: (1) The Kloepfer case was an action sounding in tort but really ex contractu, (2) In none of the above mentioned cases was the question of liability of the community discussed, (3) The Kloepfer and MacLeod cases were actions for damages to property or pertaining to property, and Idaho has a law permitting the assignment of causes of action arising out of the violation of a right of property, [147] and a law providing a cause of action for injury to property against a decreased tort feasor; [148] (4) Since the action in the Kloepfer case was ex contractu, the dictum in the case was unnecessary for its decision, (5) The tort feasor did not die in the Helgeson case and survivability was not in issue; therefore the dictum is not controlling and (6) Justice Morgan in the Kloepfer case stated that actions of assault, libel, slander, etc., do not survive and that statement appears to be in direct conflict with Article 3, Section 18 of our State Constitution (Declaration of Rights) providing:

> "Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay, or prejudice."

With respect to abatement of the action against the deceased defendant public officer to remove him from office, no necessity exists for continuing the action after his death; there could be no further liability against the deceased's husband for separate maintenance because that would depend upon the continuation of his estate, which immediately becomes subject to probate upon the death; it has always been the law that a party to a contract who dies may have the rights under such contracts enforced by his personal representative; and on the authority of the MacLeod case, supra, a deceased defendant's estate which has been augmented by his tort while alive is liable for conversion or for fraud in the execution

145. Fehr v. Haworth 33 Idaho 96, 190 Pac. 248; Kilborn v. Smith 38 Idaho 646, 224 Pac. 432.
146. Weisgerber v. Prescher 37 Idaho 653, 217 Pac. 615.
147. I. C. A. 54-402.
148. I. C. A. 15-805.

of a contract. [149] However, with reference to the case of alienation of affections the tort against the plaintiff, if he or she be married, is community property[150] or, if living separate and apart from the spouse, may be separate property; [151] but there is no reason for such action to survive in favor of the estate because it would be, in effect permitting the survivor of the community (who may be an heir) to profit by his or her own wrong; if there be no survivor, since the heirs have not been wronged, there should be no recovery.

Again referring to the MacLeod case, if we are to accept as law announced therein, that an injury which lessens the estate of the injured party does survive, then certainly personal injuries incapacitating a party from work for a period of time, necessitating hospitalization and medical treatment; and perhaps resulting in permanent incapacity, certainly lessens the estate of the injured party whether he dies or not.

In the MacLeod case, supra, the court, in referring to the statute under which the New York case was decided, held that even in the absence of such statute, it should be decided that such statute is but a statement of the principle controlling the case and that the cause of action was assignable. Here then is a direct indication by the court that a statute is unnecessary to make the common law rule inapplicable as far as property damage actions are concerned. Doesn't it appear reasonable that the same logic should apply with reference to actions for personal injuries?

In dealing with the question of survivability of actions against the community, it is appropriate to briefly refer to some of the other states which have had occasion to rule upon the question. However, this warning is as important today as when it was first announced. [152]

> "A number of years ago there was a tendency on the part of counsel before the Supreme Court to quote in their briefs and in argument passages from decisions in other jurisdictions with no indication that any recognition was given to the possible dissimilarity of foreign law; and a corresponding tendency was occasionally shown on the part of the court to adopt such language without reference to its applicability. This tendency must be regarded as unfortunate; that it tended to throw the law into confusion ***. In recent years the court has been much more astute to recognize the unsoundness of this practice."

149. 43 Idaho 64, 249 Pac. 254; on conversion see case of Carver v. Ketchum, 53 Idaho 595, 26 Pac. (2nd) 139.
150. Muir v. City of Pocatello 38 Idaho 532, 212 Pac. 345; Labonte v. Davidson 31 Idaho 644, 175 Pac. 588.
151. I. C. A. 31-910.
152. Law of Community Property by F. W. Jacobs, Idaho Law Journal Vol. 1, No. 1, page 5.

The law in California is to the effect that the action does not survive against the deceased tort feasor, but an action for property damage does survive. [153] A perusal of the cases does not disclose that the question of survivability against the community was discussed as far as the writer has been able to find.

In Kangley v. Rogers, [154] the husband, a notary public, fraudulently notarized an instrument for which he received the regular fee. Plaintiff sued for damages sustained by reason of the false acknowledgment; but the husband died in the meantime. Recovery was allowed against the community estate, probably on the theory that the community had been augmented by the husband's act.

The case of Bortle v. Osborne, [155] is cited in texts as authority for the proposition that an action for personal injuries abates with the death of the tort feasor husband or wife. Therein the plaintiff wife sued for the death of her husband caused by an automobile accident. The tort feasor Frye had invited friends to go swimming at his summer home and permitted one friend to invite Mr. and Mrs. Bortle to go along, without the knowledge of Mrs. Frye; enroute the car overturned, killing Bortle and Frye. Osborne was sued as the personal representative of Frye. It was urged by the plaintiff that since the Washington Court in the past had called the community a partnership, the liability for the death should survive. No statutory provision existed in the State of Washington for the survival of personal injury actions against deceased persons or their estates. The court very neatly met plaintiff's contention that the community was a partnership or a new legal entity by saying that these terms had been used in the past only for purposes of convenience; that the tort did not survive because the community ended upon the death of Frye; that there could be no survival since partners were liable for such torts after the death of an agent only because of their joint and several liability, and thusly, the wife was not jointly and severally liable with the husband. The court further stated that at early common law such damages, if awarded, were puni-

153. Phillips v. Gonzales (Cal.) 112 Pac. (2nd) 272; Rideau v. Torgrimson, (Cal.) 102 Pac. (2nd) 1104; Clark v. Goodwin, 170 Cal. 527, 150 Pac. 357 Severn v. California Highway etc. 100 Cal. Ap. 384,200 Pac. 215; De La Torre v. Johnson 200 Cal. 754,254 Pac. 1105.
154. 85 Wash. 250, 147 Pac. 898.
155. 153 Wash. 585, 285 Pac. 425; 67 ALR 1152.

tive, and the personal representative of the deceased should not be penalized.

It is difficult to reconcile the Bortle and Kangley cases; however this may be said of the Kangle case—at the time of the tortuous act, the husband was acting for and on behalf of the community in notarizing the instrument; that requirement must be present in Washington before any liability can attach against the community. [156] Whether or not there was an unjust enrichment of the community in the Kangley case, upon which the court justified its decision, I withhold comment.

But in the Bortle case the facts do not indicate that the husband was on or about the business of the community at the time of the accident; hence there was no reason to hold the community estate liable. As a matter of fact, and outside the record, it is just as feasible to assume that the tort feasor, prior to death, might have been out on some "extra curriculum activities", and in such case it would be unconscionable to hold liable the community estate, upon which the surviving wife must thereafter rely for her support and maintenance.

The court's ruling that the damages for such injuries were punitive is not the law in Idaho for damages in tort actions are compensatory [157] and not punitive, unless the statute so provides or unless the action of the wrongdoer is wanton, malicious, outrageous or oppressive. [158]

The statement of the Washington court that the wife should not be held liable, because she was not jointly and severally liable with the husband, is answered in that the plaintiff was endeavoring to hold the community estate liable and not the wife personally, jointly or severally.

As for the statement that the community ends with the death of one of the spouses, that is not strictly accurate for the reason that the community estate is kept open for administration, and the estate is subject to community debts. [159]

With reference to there being no survival act, the Washington court apparently overlooked the following statute or believed it did not apply. [160]

156. Sun Life Assurance Co. v. Cutler (Wash.) 20 Pac. (2nd) 1110.

157. Maloney v. Winston Bros. 18 Idaho 740, 111 Pac. 1080; Denbeigh v. Oregon Washington R. Co. 23 Idaho 663, 132 Pac. 112; See I. C. A. 5-311.

158. Unfried v. Libert, 20 Idaho 708, 119 Pac. 885.

159. Ballinger's Code, Sec. 1435.

160. Rem. Rev. Statutes Sec. 967.

> "All other causes of action (than those enumerated in Sec. 183) by one person against another, whether arising out of contract or otherwise, survive to the personal representative of the former and against the personal representatives of the latter. Where the cause of action survives, as herein provided, the executors or administrators may maintain an action at law thereon against whom the cause of action has accrued, or after his death against his personal representative."

Sec. 183 aforementioned is the wrongful death statute.

In speaking of the survival act in Washington, the court in State v. Blake[161] stated that the legislature could not have meant that all causes of action die, hence the statute was merely declaratory of the common law, and by the enactment of Rem. Rev. Statute 967, the legislature was not attempting to announce what causes of action survive. That statement leaves me without comment, and may be the reason why the court did not talk about the survival statute in Bortle v. Osborne. That case certainly cannot be regarded as an authority in Idaho. In the court's attempt to distinguish Bortle v. Osborne from Kangley v. Rogers, supra, I submit that there is little, if any, difference in the two cases in principle.

The latest expression of the Washington court on survival of personal injury actions against the community is Compton v. Evans, [162] was an action by an employee against the community grounded on the theory of breach of contract; the employee plaintiff was injured in an automobile accident; the employer was driving and the employee riding in the automobile. The court ruled that though the action was founded in contract, it sounded in tort, which tort died with the death of the employer, "not simply that the action cannot be prosecuted against the heirs and legal representatives of the deceased, but that the action dies." The decision is well written and logical. Having definitely committed itself on this subject, it was now too late for the court to rule otherwise, but the court did not miss the opportunity to say that the change, if any, from that harsh rule, must come from the legislature.

No necessity appears for the contention that the Supreme Court of Idaho is judicially legislating upon the subject in holding that the maxim "actio personalis moritur cum persona" is not the law in Idaho, if careful

161. 107 Wash. 294, 181 Pac. 685.

162. 93 Pac. (2nd) 341.

examination is made of the decisions, statutes, and constitution of this state.

In Northern Pacific Railway Company v. Hirzel[163] the Idaho court said:

> "It is contended by counsel for the appellant that by the provisions of Sec. 18 of our Revised Codes, this State adopted the common law doctrines of England to the effect that the ownership in fresh water streams, or the beds thereof, extends to the thread of the stream. * * *
>
> "By the adoption of that section this state did not adopt the common law rule of England when such common law was inapplicable to the conditions of the state. The territory and state of Idaho following the lead of other states having similar statutory provisions, only adopted such provisions of the common law as were applicable to the conditions of the state. The English Doctrine of riparian rights has been repeatedly held not applicable to this country, especially to navigable non-tidal rivers and lakes, since such rivers and lakes did not exist in England. * * *"

As early as 1886 the Supreme Court of Idaho has been abolishing common law rules, without the aid of statute, because such rules were inapplicable to the conditions in this state. In McCarthy v. Boise City Canal Co.,[164] the court held that the owner of the land who permits water to escape therefrom was only liable on the theory of negligence and was not an insurer as the rule existed at common law. In Burger v. Clark [165] the court said:

> "In territorial days this court, rendered a decision which supports the above instruction (to the effect that reasonable inspection of land by vendee was his duty before recovery allowed for fraud and deceit in its sale). At that time perhaps the weight of authority was to that effect. In later years this court and many others have been breaking away from that harsh rule (of the common law)".

In Merchants Protective Association v. Jacobsen,[166] it is said:

> "* * * the common law of England upon the subject of champerty is immaterial and not involved in this case, even if the statute is not as comprehensive as the common law."

163. 29 Idaho 438, 161 Pac. 854.
164. 2 Idaho 245, 10 Pac 623, see also Munn v. Twin Falls Canal Co. 43 Idaho 198, 252 Pac. 865. Burt v. Irrig. Co. 30 Idaho 752, 168 Pac. 1078.
165. 37 Idaho 235, 215 Pac. 981.
166. 33 Idaho 387, 195 Pac. 89.

In the case dealing with the rights of the wife and the husband's control of the wife's separate property (when such a statute was in force) the Idaho court held that such subjects must be interpreted in the light of the statutes and the constitution of this state and not the common law. [167] In discussing the relationship to the community of a personal injury action it is interesting to note LaBonte v. Davidson:[168]

> "* * * there was no community property known to the Common Law hence its rules could have no application to the matter before the court."

It must be remembered that under the common law the husband was a necessary party in any action affecting his wife's separate property, conversely, under our law, in McShane v. Quillin[169] we find, "Under our present statutes he is not a necessary party, but he is a proper party."

In breaking away from harsh common law rules, with or without the assistance of a law, the State of Idaho is not alone. See Wilfong v. Omaha and Council Bluffs Street Railway[170] and Waller v. The First Savings and Trust Company.[171]

Even in Idaho's compensation act, which provides recovery for perhaps a great majority of personal injury cases in this state, the attitude of the legislature is indicated;[172] "the common law system governing the remedy of workmen against employers for injuries received in industrial and public works is inconsistent with modern industrial conditions."

Since community property was unknown to the common law, it logically follows that the maxim "actio personalis moritur cum persona" can have no application thereto. Our community property laws, purely statutory in origin, itself abrogated common law principles in applications to community property.

If the abolition of the rule "actio personalis moritur cum persona" may be said to be judicial legislation, then

167. Sencerbox v. First Nat'l. Bank 14 Idaho 95, 93 Pac. 369. See also Paul v. Johns 17 Idaho 224, 105 Pac. 71.
168. 31 Idaho 644, 175 Pac. 588.
169. 47 Idaho 542, 277 Pac. 544. See also Muir v. City of Pocatello, 36 Idaho 532, 212 Pac. 345. Ness v. Coffer, 42 Idaho 78, 244 Pac. 125. It is interesting to note here that the husband is a necessary party plaintiff in an action involving personal injury to one of the spouses, but the wife is not. Under ICA 52-226 the wife is a "limited partner" is not a necessary party to the action.
170. Nebraska, 262 NW 537.
171. Florida, 138 So. 780.
172. I. C. A. 43-902.

attention need only be called to the following constitutional provisions and sections of the statute of the State of Idaho denouncing that rule. Article 1, Sec. 18 of our constitution provides:

> "Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and right of justice shall be administered without sale, denial, delay or prejudice."

I. C. A. 70-102 provides:

> "The compiled laws establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed, with a view to effect their objects and to promote justice."

I. C. A. 5-319 provides:

> "An action or proceeding does not abate by the death or disability of a party, or by the transfer of any interest therein, if the cause of action or proceeding survive or continue * * *".

I. C. A. 14-113 provides:

> "Upon the death of either husband or wife, one-half of all of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, * * * subject also to the community debts * * *".

I. C. A. 70-116 provides:

> "The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state."

A careful reading of those sections clearly shows that the action ex delicto against the community estate after its dissolution survives against the estate. By 14-113 if there is liability for the tort committed the statute provides that the community property shall be liable for its payment. The implication of I. C. A. 5-319 is to the effect that all actions ex delicto do not die with the death of a party; otherwise there would be no need for the statement, "if the cause of action or proceeding survive or continue * * *". That phrase is placed therein to indicate that some actions survive. Such construction is indeed in order, for I. C. A. 70-102 specifically provides for a liberal construction of the statute, with a view to effect their objects and to promote justice. "The law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law.[173]

I. C. A. 70-116, when read in light of our constitutional provision, Article 1, Sec. 18 leads to the inescapable conclusion that the common law rule is not the law in Idaho because such is inconsistent with our statute and constitution. Provision being made that the court shall be open to every person for every injury to person or character (and that applies to all actions whether the tort feasor be living or dead) then it follows, that a liberal construction of our statute and constitution requires that the tort survive against the community estate or the estate of the deceased person.

The theory enunciated is not without authority.

In re Grainger's Estate[174] was an action for personal injuries growing out of an automobile accident which caused the death of the tort feasor. Nebraska had three statutes, one providing for survival of named actions (not personal injuries) in addition to those surviving at common law: one that no actions pending abated by death (except certain named actions): and one adopting applicable common law not inconsistent with the constitution and statutes.

In sustaining the plaintiff's contention that the cause of action survived, the court said:

> "There now appears to be a noticeable deviation from the Common Law rule as applied to a tort committed by one who subsequently came to his death. It has been held that a cause of action does not abate with the death of the person injured, and that such injured person's estate or surviving relatives may recover from the wrongdoer for damages sustained by his death. (cases cited * * * 'The determinative question, therefore, is whether a wrong has been inflicted for which plaintiff is entitled to recover lawful damages, and not whether there is a precedent for the suit."

173. 1 Cooley's Blackstone (3rd Ed.) para. 70.
174. Nebraska 237 NW 153.

"The common law of a country, will, therefore, never be entirely stationary, but will be modified, and extended by analogy, construction, and custom, so as to embrace new relations, springing up from time to time, from an amelioration or change of society. * * * Though principles once established can only be changed by legislative enactment; yet such is its malleability (if we may use the expression) that new principles may be developed, and old ones extended by analogy, so as to embrace newly created relations and changes produced by time and circumstances."

But there has not been a decision pointed out bearing directly on the facts herein, nor do we know of any in this state. The claimant argues that it is not an equal protection of the laws to deny her the right of recovery against the decedent's estate when, under our decisions, as noted above, the right to recover from a living tort feasor has been granted to a dead person's estate.

We do not think that the claimant should be precluded from presenting the facts pertaining to the accident and her injuries. Nor does any valid reason appear that should tend to prevent her from being heard upon the presentation of her cause of action.

In Wilfong v. Omaha and Council Bluffs St. Ry.,[175] the plaintiff father sued for the death of his minor son under the wrongful death act and for the physical pain and suffering sustained by the minor son from the time of his injury until death. The defendant challenged the right of the plaintiff to recover under the cause of action relating to the pain and suffering of the minor son prior to his death. The court pointed out that the reason for the rule at common law was "one of some antiquity, but its origin obscure and post classical", and that the damages recoverable for torts at that time were in the nature of penalties against the tort feasor, however,

"When once the notion of vengeance has been put aside and that of compensation substituted, the rule actio personali moritur cum persona seems to be without plausible ground."

The court then quoted its constitutional provision, similar to Idaho's Article 3, Sec. 18, supra:

Constitutional provisions are self executing when

175. Nebraska, 262 NW 537.

there is a manifest intention that they have immediate effect.[176]

"* * * and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed. That the right granted by a consti tutional provision may be better or further protected by supplementary legislation does not of itself prevent the provision from being self-executing; nor does the self-executing character of the constitutional provision necessarily preclude legislation for the better protection of the right secured. A constitutional provision which is merely declaratory of the common law is self-executing. A constitutional provision designed to remove an existing mischief should not be construed as dependent for its efficacy and operation on legislative will.[177]

The court continues:

"In view of the obvious evil sought to be prevented or remedied by the constitutional provision quoted, so far as 'personal injuries' are concerned, the purport of its language is to wholly invalidate and destroy the legal effect and force of the common law maxim, viz. actio personalis moritur cum persona.

* * * It follows, in view of the principles embodied in our Declaration of Rights, that the courts of this state must be open at all times to afford a 'remedy in due course of law' for 'any injury done him (a party) in his * * * person * * * without denial or delay', and without reference to the subsequent death of the wronged party or the wrongdoer."

In Wallter v. The First Savings and Trust Company [178] in which it was urged that the tort died with the tort feasor, the court said:

"All courts in this state shall be open, so that every person for any injury done him in his lands,

176. Day v. Day, 12 Idaho 556, 86 Pac. 531 at page 563 the court said: "It is contended that said section of the constitution is self-acting, self-executing and requires no legislative provision for its enforcement, and cannot be abridged or modified by any legislative or judicial act. There is no question but what said provision is self-operating, and it is regarded as settled in this country that all negative or prohibitive clauses in a constitution are self-executing. The legislature, neither by neglect to act nor by legislation, can nullify a mandatory provision of the constitution.*** This provision of the constitution cannot be brushed aside by saying that it is a mere maxim of the law and means nothing. For the principle therein expressed is one of the foundation-stones of our judicial system and jurisprudence, and could not be removed without shattering the entire system."

177. 12 C. J. 729.

178. Florida, 138 So. 780.

goods, person or reputation, shall have remedy, by due course of law * * *

(The statute) which declared the Common Law of England to be in force, in the absence of any statute to the contrary, expressly excepts from such common law adoption of any rule of the Old England common law which is inconsistent with the constitution and laws of Florida.

"So if the rule of the Old English Common Law was to the effect that a cause of action in tort died with the tort feasor, but such rule is found to be contrary to the intendments, effect, purpose, and object of Sec. 4 of our Declaration of Rights then such rule of the Old England Common Law did not become a part of the common law of Florida.

* * * So the question here is whether or not we shall decide that under the common law of Florida the cause of action which accrued against Hodasz in his life time can be enforced after his death by a damage suit against his estate represented by his administrator, notwithstanding the holdings of previous cases referred to, or whether we shall modify or overrule such cases in whole or in part."

To affirm such a judgment as has been rendered in this case is to ignore the plain provision of our constitutional Declaration of Rights that the courts shall always be open so that a person injured in his person or property shall have a remedy against his wrongdoer. Does this 'remedy' not mean redress or recompense, and, if so do we not then have a situation under the laws of Florida which as Pollack, in his work on Torts points out, did not exist at the England common law?

The American theory of Constitutional protection to life, liberty and property and the theory of Florida law as expressed in our State Constitution is clearly to the effect that actions for the recovery of damages for torts are no longer regarded as mere punitive retaliations against the tort feasor, but as means of recompense to the citizen wronged.

The reason for the English rule to the contrary was that a tort action died with the tort feasor because a tort action was regarded as punitive in character, all of which has been changed in Florida by the intendment of our Declaration of Rights which recognizes not only the punitive nature of the tortious

wrong done, but also recognizes and preserves in organic language a legal 'remedy' for that wrong, and provides that the courts shall always be open to afford it. * * *

"* * * So, it appearing that the rule of the English common law is not in harmony with our policies. institutions, customs, or theory of Constitutional rights we should have no hesitancy in rejecting it in this case on the ground, if no other, as stated in the language of Judge Raney, that a different policy would be ruinous. When the reason for the rule has passed, the rule itself should no longer stand, and a new rule in harmony with changed conditions should be recognized * * *.

"* * * The point is not that any new right is created by the Declaration of Rights, but that the old English common law rule which terminated by death of the tort feasor the acknowledged pre-existing right of action which had accrued against him, did not become a part of the common law of Florida because the intendments not only of our Declaration of Rights, but of the whole system of Florida law, which recognizes the right of action for torts as remedial, not punitive.

"* * * But, if necessary to do so, we should unhesitatingly modify or expressly overrule the holdings of our previous cases in so far as they may conflict with the rule here announced.

We acknowledge that the doctrine of stare decisis is absolutely sound. It is ordinarily a wise rule of action which should be faithfully adhered to by the court in most cases to preserve the integrity of judicial administration of legal principles. But the doctrine of stare decisis is not a universal inexorable command. The instance in which the Supreme Court of the United States itself has departed from it to accomplish true justice and uphold fundamental rights, are many (citations)"

The Florida court denounced the maxim, "actio personalis moritur cum persona" in spite of having previously held that such maxim was applicable, and in spite of a section of the Florida statute from which it could reasonably be inferred that the cause of action did not survive.

On the authority of the above cases and Idaho's constitution and statutes, it is submitted that an action for

personal injuries survives against the community estate, or the estate of the deceased tort feasor.

Mr. Pollock,[179] text writer on torts, says that the rule is "one of the least rational parts" of the old English common law, and when once the ancient common law notion of vengeance for the wrong done has been discarded and the idea of compensation substituted, the rule then remains without plausible grounds and should be rejected. "It is better that the residuary legatee should be to some extent cut short than that the person wronged should be deprived of redress."

CONCLUSIONS

It has been my endeavor to restrict the question of survivability, to causes of action for personal injuries against the personal representatives or estates of deceased tort feasors, community or otherwise.

The theories submitted present much food for thought, and perhaps our courts may choose the enlightened path of our constitution and statute in upholding the theory of compensatory damages in such actions. Clearly the common law rule ought not to be applied for it has no place in this presentation under our system of law. The refusal of courts to apply the common law rule, whether by constitution, or statute, or by consciously ignoring it, already has, I am sure, reacted in favor of society as a whole.

FRIDAY, JULY 10, 1942

(Morning Session)

PRES. THOMAS: The meeting will come to order. The Invocation will be by Father Ahern of the Catholic Church in Hailey.

Invocation by Father Ahern.

PRES. THOMAS: We will have now Milton Zener's subject: "Insurance—are Military Casualties Accidents?"

MILTON ZENER: Mr. President and gentlemen, "Are Military Casualties Accidents." In order to present this question in its practical application to possible claims on health, accidents, and life insurance policies that may arise by virtue of participation in the present war, it is

179. Pollock on Torts 11th Ed. pages 61 and 62. The above statement was quoted with approval in Compton v. Evans, Wash. 93 Pac. (2nd) 341. The common law rule is also severely criticized in Harris v. Nashville Trust Co. 128 Tenn. 573, 162 SW 584, 49 LRA (NS) 897. See also Hooper v. Gorham, 45 Me. 209.

necessary to go somewhat beyond the strict wording of the subject assigned and give some consideration to the validity, construction, and effect of provisions in life or accident policies in relation to military service.

The legal consideration that arises in establishing liability and non-liability under life or health and accident policies containing military restrictions is largely dependent upon the particular wording of the policy itself, and it would be manifestly impossible to lay down any broad rule which would cover all policies. The Courts have been called upon to construe the wording of many of the ordinary military and naval service exclusions and although there is not an absolute uniformity in interpretation as applied to particular wordings, the law is reasonably well settled.

It is safe to say, as a general proposition, that the validity of a provision in a life or accident policy entirely releasing the insurer or in some way restricting its liability under the policy because of the connection of the assured with military or naval forces, or because of his entrance into military service, is almost universally recognized.

It has been ably argued that such provisions limiting liability are invalid as contrary to public policy in that they would tend to prevent men of military age from serving in the armed forces. This position has uniformly been rejected. It has also been argued that a distinction should be drawn between persons who volunteer and those who are conscripted on the ground that the latter is required to lose his protection through no act of his own, but this distinction has not been allowed.

One pertinent inquiry that should always be made in advising a client in respect to liability under a policy with a military restriction is to determine when the service actually commenced. Ordinarily the courts hold that military service commences immediately upon a person taking oath in the armed services and as soon as he has subjected himself to the orders of military authority. However, this rule has been held not to apply when the policy uses the term "active service." This has been construed to mean that period when a man actually entered upon the performance of duty in a military sense, that is, in a garrison or at sea in time of peace or before an enemy in time of war, and the Missouri Supreme Court has held that such term would not prevent a person in a military training camp from collecting under a policy where "active service" in the military forces is the test.

In respect to the character and nature of the risks contemplated to be exempted by the provisions of a policy, the courts have been very liberal in construing under the ordinary exemption clause just what type of accident would be construed to be peculiar or directly connected with a military service; thus that no exclusion of risk was intended, even though the insured was actually in the military services, if the cause of death was one that civilians and persons in armed forces were equally likely to meet with, such as death by reason of pneumonia or influenza while the insured was in the armed services. The Wisconsin Supreme Court has likewise held that death from the skidding of a motorcycle while an insured was riding from one sawmill to another as a part of his military duty in supervising construction, was not such an accident as was peculiar to military service and permitted a recovery. The Georgia Supreme Court held that a man killed when struck by a girder on an overhead bridge as he was riding on a troop train could recover under a policy containing a military restriction, the basis being that the cause of death, and not the mere status of the insured, would relieve the company from liability, and as the accident was one which might as possibly befall a civilian as a soldier, the company would be liable. A New York Court, following the Civil War, held that the insured while in military service was entitled to collect on a policy containing an exemption for military services where he was shot by armed bandits while superintending the building of a bridge used by the Union army some thirty (30) miles behind its lines. In that case there was no evidence connecting these armed bandits with the Confederate army nor to show that they were other than highway robbers. The Georgia Supreme Court found there was no liability where the assured was killed in a collision between two transport ships between Scotland and Ireland during the last World War. It was probably found to be a hazard that would not be common to both soldiers and civilians, and in addition there was a provision in the policy that, by the payment of additional premium, military service risks could be insured. An English Court held that a member of the military service, killed while on guard at a bridge, was not entitled to collect under an exemption "where death arose directly or indirectly from or traceable to war," since death occurred at a place where civilians would not be entitled to be and was not a risk common to both cilivians and military personnel.

In a policy where the exemption was "while in the army or navy of the Government in time of war" a death resulting from pneumonia in a military camp was held not to be within the protection of the policy, because simply the status of the person insured as being in the army or navy was made the test of liability. The Wisconsin Court held that under an exemption "that if the insured should become a soldier in the regular army in time of war," liability would be limited to 40% of the face of the policy, death occuring from pneumonia. The Supreme Court of Arkansas, construing a clause "death while engaged in military or naval service in time of war or as a consequence of such services" held the company liable for death due to pneumonia when the insured was in the army, on the reasoning that the disease was prevalent throughout the United States and that soldiers and civilians alike contracted it and died from it and the death of the insured was in no sense caused by military service or by consequence of being engaged in military service. The Supreme Court of Missouri, under a similar exclusion clause, placed the burden of proving that death resulted from a cause peculiar to the military or naval service on the company, and held that in the absence of proof on this point an insured accidently wounded by gunshot from a gun in the hands of another soldier was not shown to have been a risk peculiar to the military service. The Missouri and Indiana Courts arrived at a similar result in cases of death from influenza. The North Dakota Court has likewise held that it must be shown that by reason of the military service an extra hazard was incurred and that death came about by this extra hazard before liability could be avoided.

A number of courts have construed the wording of an exclusion clause "while engaged in military or naval service" to prevent recovery if the person insured was in the military or naval services. These courts go upon the theory that the exclusion means the status of the insured and has no relation to the cause of the death and any death occurring while in the armed services comes within the exclusion. (Kansas, Iowa, Washington, and North Dakota.)

The courts have not been very reluctant to hold waiver by, or estoppel against, the insurance company under military exclusion clauses. The Minnesota Supreme Court held a waiver when notice of death in military forces was forwarded to the company and it furnished legal blanks for Proof of Death. A Missouri Supreme Court held waiver was made by a company that accepted and retained the premium after being specifically notified that the insured had entered military service and that the premium payment was made only in the event that coverage under the policy be provided.

It would seem to be safe to make the following generalizations, subject, of course, to the particular wording of

the exclusion clauses and also subject to the holdings of Courts expressing a minority view; First, the exclusions generally will be upheld in accordance with their terms; Second, under the ordinary exclusion clauses death must result from some cause directly related to military or naval service and not from a cause common to both civilians and naval military personnel.

Is death or injury in battle due to accident or accidental means as provided in both life and accident policies and particularly in respect to double indemnity provisions? Assuming there is no restriction on liability if the insured is engaged in military or naval service, the courts generally have inclined to the view that death in battle is death "by accident" or "by accidental means" within the contractual stipulations of the ordinary policy. The Federal Court has held that death of an insured Doctor, member of the Medical Corps of the Colorado National Guard, killed by gunshot wounds while observing through field glasses to determine whether a group of men were soldiers or strikers, came about "by accidental means." A Federal Court has held that a soldier killed by a piece of shrapnel in battle was killed "by accidental means" and the Supreme Court of Oklahoma reached a similar conclusion in the death of a soldier by a bullet wound. The Supreme Court of Arkansas, however, reached an exactly opposite conclusion where a soldier in battle was wounded by the explosion of an enemy shell, holding it was not accidental means under an accident policy. The reasoning of the courts is expressed in the following from the cases:

In State L. Ins. Co. v. Allison (CCA 5th) 269 F 93, 14 ALR 412, supra, it was said: "While it was to be expected that some of the soldiers engaged in the military operation in which the insured was engaged when he was killed would be injured or killed, it is not to be denied that it was by chance (the insured's) person was in the path of the piece of shrapnel which caused his death. He would not have been injured or killed by that missile but for the accidental or fortuitous circumstance that his person happened to be in its path. It was chance which determined that he was the soldier who was the victim of that stray missile. * * * Of the millions of Americans who served as soldiers in the war with Germany, comparatively few were wounded or killed in battle. Battle casualty lists, in great measure at least, disclosed results of the chances of war. Whether the injury or death of a particular soldier is a consequence of his participation in a battle ordinarily depends on his happening to be, or not to be, in the path of a missile of war. It cannot well be said that the wounding or killing of any particular soldier belonging to a force going into battle is so far a natural and to be expected consequence of his so being exposed to danger as to prevent a casualty happening to him properly being regarded as within the category of accidents."

In Martin v. People's Mut. L. Ins. Co. 145 Ark. 43, 223 SW 389, 11 ALR 1111, it was said: "We do not think that the injury sustained by the insured in the case at bar was an accidental one. He was drafted in the United States Army, and was injured in battle by an explosion of a shell fired from the gun of the enemy. The injury was the direct and immediate result of the explosion of the shell. If the words * * used in the policy are to be understood in their plain and ordinary meaning, they include injury from any unexpected event which happens as by chance, or which occurs without the agency of the insured. In the case at bar the injury took place according to the usual course of things. It is true the insured became a soldier in the United States Army by reason of the draft law after the United States had engaged in the war with Germany; but the two armies voluntarily engaged in battle, and there was a mutual design to kill and injure as many of the enemy as possible."

Concerning war effects upon accident contracts as related to Aetna Life. Insured is protected while in the United States during training period. However, should an invasion take place, the coverage would automatically become non-effective. Foreign training and foreign service makes coverage void.

The last part of this paper was taken from an annotation in 137 A. L. R. 1268.

PRES. THOMAS: Next is: "Public Relations—A Committee Report," by Edward G. Rosenheim. He isn't here and our Secretary will read the paper.

THE SECRETARY: Public relations may be said to be the relationship which exists between your profession and the general public. That relationship may be good, bad or indifferent. It depends fundamentally upon our conduct as a profession in placing ourselves in the most favorable light possible before the public.

Whether or not we as a profession are able to create good will in the matter of public relations depends upon whether we have something to sell in which we believe. The cardinal rule of salesmanship is the belief of one in his own product; unless we are convinced and believe that we are rendering a distinct service to the public, and reflect such belief in our conduct, both as a profession and as individuals, we will fail in our public relations.

We shall not cover all of the various ramifications of public relations. We offer a few suggestions or fundamental ideas and trust that the subject matter will develop in time. We shall limit the committee report to three ideas.

COMUNITY CONTACTS BY COMMUNITY SERVICE

Community contacts with the public by rendering community service is not a new thought to you. We present it to you, however, hoping that new angles may develop and to impress upon you once again, especially upon the younger members of our profession, the value of community contacts. Through these activities does our profession get the advertising it deserves. When a lawyer talks to a group, that group of necessity is conscious of the profession that he represents and to the extent that he makes a favorable impression upon such group does the profession profit thereby. Many members know that a lawyer who becomes identified with a civic group is soon called upon for advice and counsel. The young lawyer may not be aware of that fact but we want him to become conscious of it and we want to urge him to take advantage of the great principle of unselfish public service.

Active officials of local bar associations could accomplish a great deal in the way of personnel work among the lawyers, especially younger members of the association. A canvass could be made of the civic organizations to which each lawyer belongs. A simple card index would be the only record necessary. The lawyers ought to have representation in every kind of civic organization. If the proportionate representation is under par, the lawyer should be urged to join. The question of cost of such representation borne by the individual lawyer would, of course, enter the picture to a minor extent but in the long run dividends would be returned many fold to the lawyer belonging to such groups. Furthermore, there should result a gradual upliftment of the lawyers as a whole by their willingness to assume responsibility of unselfish service for which their background of education and training fits them. Modesty, of course, must at all times go hand in hand with a learned background.

Again, public relations can be broadened by new associations and friendships in our own profession. Aren't we just a trifle lax in our own communities in failing to get together upon a basis of friendship and understanding. We cannot accomplish large objectives without a basic understanding of the trend of public thought. An example —the project commenced by our Seventh District Bar Association on standardization of preparation and examination of abstracts of title,—a project in which the general public

is vitally and inseparably concerned. The more entries in an abstract of title, the more the public must pay for their abstract, and the more work must be done by the lawyer in examining it. Time is the thing that the lawyer has to sell. It is his stock in trade. The more time he consumes in examination of abstracts of title, the more he feels he must charge. That Association set about to correct some of those evils. They have made splendid progress in agreeing upon matters having to do with titles in their own communities, by way of simplification. They have now agreed upon the base titles of their additions and subdivisions. Their idea has now taken root in the Third District Bar Association and a committee has been working continuously in that district to the same end. It is hoped that such good work will shortly extend through and be carried on by all of the other bar associations in this state.

Attendance at the annual meeting should be stressed from the standpoint of public relations and creation of good will.

A lawyer ought to feel at home in every nook and cranny in this state and he can and will feel at home if he knows his brethren.

He can become acquainted with the members of the bar all over the state by steady attendance at annual meetings over a few years. It is to the lawyers we meet and visit on friendly terms at our bar meetings that we refer business and from whom we obtain referred business.

"In modern times it is only by the power of association that men of any calling exercise their due influence in the community."—Elihu Root.

ADVERTISING AS A PROFESSION

Manifestly individual advertising by an attorney is taboo but the best thought of the various State Bar Associations and the American Bar Association is that conservative advertising for the profession as a whole is both necessary and proper. The cost of a direct advertising campaign by our association would be prohibitive but the thought of this committee is that through a proper approach of attorneys to banks and trust companies throughout the state we could tie in an advertising campaign at a small cost by use of their mailings.

The advertisers of dentifrices advise their customers to "see your dentist regularly." The pharmaceutical houses advise readers of their advertising to "consult your doctor" and by the same token we think there is a definite tie up between the attorneys and the banks and trust companies

through which these institutions could well afford to permit us to reach the public through their various mailings in a conservative campaign advising people to "consult your lawyer."

A concrete illustration or two in this connection will suffice.

All of you have noticed advertising mailed from time to time with your bank statement. One had to do with banks and trust companies being named as executors under wills. With your October 1941 bank statement was mailed a slip about the size of an ordinary draft or check wherein the banks mentioned the real service they can perform in advising depositors upon tax matters; that each depositor set up a monthly reserve to pay taxes at the end of the year, the fund to be kept separate and apart from other assets of the tax payer. Recently you have received in your coal statements from your fuel dealer, a small pamphlet to the effect that the United States government urges storage of coal now; on the reverse side of this small sheet was an advertisement of the coal handled by the coal dealer urging you to fill up your coal bin now.

Recently in your public utilities statements, you received advertising urging you to invest in war bonds.

There is much community of business interest between banks and trust companies. They want to be executors, trustees, escrow holders, or depositories, or to make loans. Lawyers draw wills, trust agreements, escrow contracts for clients, and are frequently asked for advice as to corporate executors, trustees, etc.—lawyers influence the place of deposits of individual executors, administrators, trustees, and guardians, and of corporations and businesses—they influence applications for loans, and otherwise are "feeders" of business to banks, trust and abstract companies. Banks, particularly, mail or hand out thousands of bank statements monthly to their depositors. There would be no additional expense to the bank to include in each an advertisement printed on a slip the size of a check, advertising the services of the bank and those also of the profession, and composed and furnished at the expense of the Idaho State Bar. A half million of such slips would probably not cost the Bar over $500.00, and could be furnished the banks through the local associations, each of which should in its area arrange with the local banks for inclusion in monthly statements. Of course the banks would be consulted as to their part of the advertisement, and the profession's part should fit therewith naturally and smoothly—something which an experienced advertising man, employed by the Bar, could easily do. Is the idea worth a try?

Perhaps similar "natural" relationships exist with other local institutions, with whose advertising the Bar might be permitted to "hook up". Nationally it has already been done with law book publishers, as hereafter mentioned.

Perhaps some approved advertising professional service (not the individual) also could be mailed by the lawyer himself with his statements at the end of the month and in letters to selected clients.

We have the assurance of the Commissioners of the Idaho State Bar, that the Bar Commission will enter into a study of advertising media as suggested and that the Commission will help bear the expense of such a plan, if found feasible.

We cannot refrain from referring to the work of the Board of Governors of the California State Bar. In the February, 1942 California State Bar Journal appeared an article setting forth the work of a national bank in San Jose. The bank inserted in San Jose newspapers, and paid for, an advertisement calling attention to the functions of the legal profession, urging the public to consult a lawyer before getting into trouble, instead of going to him in desperation after unfortunate complications had developed; that the bank was speaking for members of the legal profession who represented a tremendous volume of business, running into amazing figures; that legal business is a big business, an important business and that the lawyers rendered real service to business and industry, many of them being customers of the bank; that practically all were associated with various individuals and institutions, customers of the bank; also that the lawyers and the bank had very much in common. The full text of that article will be furnished any committee on public relations in this state.

Ewell D. Moore, chairman of the Public Relations executive committee of the California State Bar stated:

> "Happily, a great change is taking place in the bar's attitude toward its problems. It is becoming articulate in its own behalf. For the first time it is showing its definite resolve to act collectively; to present a common front in attacking its difficulties, and to assume its full public duty and responsibility to the public. * * * *

"The state bar of California * * * is the first to adopt a definite plan to publicize its work on behalf of its members, and to offer its full cooperation to other agencies striving to improve and bring about certain reforms in the administration of justice."
Mr. Moore's article also covered:

Assistance in coordinating the State Bar with all local bar associations;

Assistance in development of a means to further the relationship of the bar to newly admitted lawyers;

Endorsement of a plan of conservative bar group publicity;

and in connection with advertising he states:

"There is a growing sentiment in its favor. Whether it will take the form of paid advertising, or be confined to proper publicity in other channels, cannot yet be determined."

Noteworthy too are a series of illustrated advertisements relating to the legal profession published by the Lawyers Cooperative Publishing Company and Bancroft Whitney Company in National Magazines during the fore part of 1942. In each of the advertisements it was mentioned that they were published in behalf of the public and the legal profession by the agencies named.

THE LAWYER IN MILITARY SERVICE:

A brief survey of the lawyer in military service shows that in many instances the lawyer enters the service as a buck private; however, because of his background of learning he is given opportunity to attend training camps and ultimately become a commissioned officer; but we also find that the lawyer, while he is connected with various fields of military endeavor, such as infantry, ordnance, quartermaster and administration, nevertheless, is called upon to perform many legal functions. His background and learning essentially qualifies him for various types of administrative work.

The government itself has recognized need for lawyers in military intelligence.

The United States Civil Service Commission stated that the commission is calling upon lawyers to take positions in government intelligence work because of the war emergency, because of the experience required in making investigations, in prosecution of civil and criminal cases; the need for general practice of law as well as court presentation, investigation, and preparing cases for trial; that such responsible positions require the exercise of tact and independent judgment in meeting and dealing with the public.

The fact is that the lawyer has no clearly defined status in military service, other than in the judge advocate general's department. The doctors of medicine, the osteopath, the dentist, the veterinary, the engineer and the minister all have a recognized status, entitling them to commissions in the military and naval service. Yet, as we are all aware, the lawyer has a distinct valuable service and place in military and naval operations which could add to their efficiency—the coordination and interpretation of orders and regulations, contacts between departments and civilians involving legal rights and duties, contracts, etc.—advice to personnel concerning wills, rights, etc.

What is the reason for this situation? Is it an unaggressive muteness on the part of the lawyer? Is it a lack of exerting a "speak for yourself, John" attitude; a reverse attitude would not only answer the well-publicized challenge flung at the profession by speakers and newspapers, but would serve to inspire that confidence which the profession as a whole deserves, and to publicize the beneficial services it is best prepared to render and of which the public is so little conscious that it permits incompetence to serve instead.

Isn't it time that the American Bar Association got back of a movement, supported by every state and local bar association, having for its purpose the recognition by the army and navy of their need and place for the lawyer's specialized training and skill not alone in the judge advocate general's department but in various branches of military and naval administrative service. Is it not a reflection, in some measure, upon our profession, that the Civil Service Comission, not the Army and Navy, formulates a movement to obtain lawyers for intelligence departments, only one of the services which may be more efficiently done by legally trained men. Isn't it high time that a concerted movement of enlightenment and education should obtain whereby the Army and Navy be advised of the many services in their organizations which the lawyer alone is trained to perform, which justify and require entry into their organization by commission just as doctors, etc., not for the purpose of giving lawyers a preferred status, but for the more efficient conduct of essential Army and Naval functions? The need and places exist in Army and Navy into which the lawyer, as the doctor, should be immediately and directly fitted. Is it efficient to waste time, and need-

ed skill, to fill the place with personnel not trained therefor or efficient therein, until by accident the special talents of the lawyer in the ranks may or may not be discovered, and he may or may not be shifted into that place?

Your committee has given you three ideas with illustrations:

> First, the lawyer in community service; Second, a campaign of professional group advertising; and Third, a recognized military and naval status for the lawyer.

Your committee realizes that in this state public relations in its application to the legal profession is in but the formative stage. We have not yet scratched the surface. The field has many different and diversified ramifications. Your committee, however, felt that a few ideas at this time would suffice in order to ascertain whether you desire to enter this most interesting and fertile field.

Your committee recommends further exploration of this subject; that any committee appointed from time to time report its findings and conclusions in the field of public relations.

PRES. THOMAS: I will appoint a committee on that; L. E. Glennon, Everett Taylor, Glenn Coughlan, Emery Knudsen and O. A. Johanesen.

MR. GRIFFIN: Mr. Smith of the program committee this year did a little public relations work of his own. In addition to the notices to lawyers and the various letters that you got there was sent a special invitation to attend this meeting to the Idaho Congressional Delegation, the State Officers, State Chamber of Commerce, Idaho Title Association, State Medical Association, Realtors, Advertising Men's Association, State Bankers Association, State Bars of Wyoming, Montana, Utah, Nevada, California, Oregon and Washington, to various individuals and the Idaho Editorial Association. While we probably won't have very many from those associations or individuals, I know we will have one or two and I have already several letters expressing their appreciation, and pleased surprise. I think the public reaction to such an invitation is going to be very good.

PRES. THOMAS: It is a good start that we have made.

The next subject is "Inheritance Tax Problems and Trends," by Darwin Thomas, and on that committee I will appoint Judge Sutphen, Darwin Thomas and William Dunbar. Mr. Thomas, as you know, is attorney for the Inheritance Tax Division.

MR. DARWIN THOMAS: Mr. President and members of the Idaho Bar. Idaho has had upon its statute book, a transfer and inheritance tax act, since 1907, and during the course of some thirty-five years, no major changes in the Act have been experienced, except in 1929 when the earlier Act was repealed and the present law, which in the main was taken from the California Act, was placed upon our statute books.

Not until 1935, did we give much thought to the enforcement of this legislation but since then, more and more attention has been directed towards its proper and adequate administration and yet there is much room for improvement.

Today inheritance, transfer, estate and gift taxation is a lively subject as is well illustrated by the ever increasing litigation, the tightening of rates and the certain elimination of loopholes, the recurring of double or multiple taxation, the increase in revenues from this source and the present threat for greater revenues by reduced exemption, higher rates, a broadening of the basic field, the interest in insurance to reduce such taxes and many other similar items.

In modern times, the inheritance or estate tax finds a definite place in the fiscal systems of most of the important countries of the world and the revenue demands resulting from economic troubles and world conflict have operated to stimulate the development of this form of taxation, which was first imposed in Pennslyvania in 1826, as never before. It is only natural to expect more revenues from this taxation in the future, both through legislative changes and more diligent administration. This taxation is with us to stay.

The generally recognized appropriateness of inheritance or estate taxation in any form it may take, is made manifest by its general use and persistence throughout many years. Of all forms of taxation levied today, this type of tax, in my opinion, kept within reasonable limitations and impartially and effectively enforced, more nearly satisfies the instincts of justice and the prejudices with which mankind regards the obligations of a tax than any other general exaction. Hence the importance, in Idaho, of giving it organized thought. Only in this way can we hope to minimize real injury to the taxpayer.

I have experienced, in my brief administration of the Act, many and varied disturbing yet practical and in-

teresting problems and the Bar of Idaho has given me whole-hearted and valuable cooperation.

Perhaps no problem connected with the administration of the Act is of more practical importance than the proper valuation of the assets, particularly the real property, for no return can be properly prepared unless sincere and real attention is given to fair market value, which is the basis upon which the tax structure is erected. I have found it necessary, all too often, to file objections to the appraised value of the property returned but on the whole, the matter has been properly adjusted. without the necessity of a formal hearing and the delay and expenses incident thereto. The extreme practical importance of valuation as limiting the amount of the tax is too often overlooked and when this is done, either haphazard or grossly incorrect values are returned. The initial impulse rests with the estate, to make the appraisal, which of course is of great advantage because the estate can carefully determine value and be prepared to support it with adequate data, involving a matter generally, purely local and circumstantial, requiring the aid of no experts. The State only wants what is fair value in the light of well known factors, neither asking nor expecting excessively high nor extremely low values but in all cases, a fair, or mesne level should be established thereby dealing justly with the State and the particular county and with the estate.

It is the practice of the State and most attorneys to reconcile the question of fair values before either a formal objection is filed or a formal hearing had; this practice should be encouraged and continued in the interest of everyone concerned and as time goes on that there will continually be less occasion to question the values set forth in the Inventory and Appraisement. If the estate is successful in setting up extremely low values, thereby reducing or perhaps defeating the tax, other and far more serious problems may subsequently arise by the exaction of both a federal and a state income tax on the profit realized and determined by computing the difference between the appraised value and the sale price. Income tax acts, unlike inheritance tax acts are constantly experiencing amendments, often of a retroactive nature, increasing the rates and lowering the exemptions. Such is definitely the present day trend and hence the real hazard of a heavy tax from this source following a successful effort to unreasonably hold down the appraised value of the assets of an estate.

Another problem which occasionally arises is the amount of interest or penalty and the right of the Probate Court to remit a portion or all thereof. This matter is definitely governed by Section 14-409. The Court only

possesses the power to remit or forgive or reduce the interest penalty, to the extent and in the manner provided by the Act; if the tax is paid within six months of death, which is the date the tax accrues, a discount of five percent is allowed; if paid within one year of death no interest is chargeable; if not paid within one year of death, and no grounds for the delay can be established as set forth in the statute, interest at ten percent from death until paid, is a definite statutory exaction and the Court is without the power to reduce the rate or remit the interest in whole or in part. On the other hand, if delay in payment beyond the year is occasioned by one of the reasons set forth in the statute (14-409) and no others to-wit: (a) by reason of claims made upon the estate: (b) necessary litigation: (c) other unavoidable cause of delay, then interest is not chargeable for the first year and thereafter until the statutory cause of delay is removed, at seven percent per annum; if not paid when the cause of the delay is removed, interest is again exacted at the rate of ten percent from the date of the removal of the cause until the tax is paid; you can appreciate that an estate may be subjected to both a seven percent interest rate followed by a ten percent interest rate. There is no Court which possesses the power to waive the interest.

What is the effect upon the tax where the provisions of a Will are compromised, as distinguished from a renunciation of a legacy. There is a conflict of authority but the majority holds that compromise agreements do not affect the tax due and payable, even though the property does not pass according to the terms of the Will; that in case of compromise the beneficiary, for tax purposes, takes under the Will, which speaks as of the date of death and not under the terms of the compromise. Keep this in mind when you have a Will contest case which you are compromising; take the proper steps to protect your client in the payment of such a tax before the property is distributed under the compromise.

Texas, New York, Iowa, California, Illinois, Nebraska, Massachusetts and Tennessee, have embraced the views above set forth while Minnesota, Maryland, Colorado and Pennslyvania impose the tax in accordance with the actual disposition of the property rather than according to the terms of the will. The inheritance tax division of Idaho has adhered to the prevailing view, with full realization that it could result in either increase or decrease in the amount of taxes collected and that our position is not binding on anyone.

The trend towards double or even multiple taxation, which has recently received the "green light" by the United

States Supreme Court on April 27, 1942, is cause for the greatest anxiety and I shall set forth the historical course and the implications and practical problems which must grow out of this decision .

At the time Idaho first adopted the inheritance tax Act, the Supreme Court of the United States in Blackstone vs Miller, (1903) 188 US 189 had sanctioned the double tax theory of intangibles, such as stocks, bonds, mortgages and money, either held in checking or time deposits, but later the Court evolved the single death tax theory, and held in the following five cases that the right to levy the tax was fixed at the domicile of the owner, at the time of his death:

1. Blodgett vs. Silberman (1928) 277 U. S. 1, announced that bonds and certificates of stock located in a safety deposit box in another state are nevertheless intangible property subject to tax in the state of decedent's domicile.

2. Farmers Loan & Trust Company vs Minn. (1930) 280 U. S.204, holding that bonds issued by a state and cerifficates of indebtedness of cities within the state are not subject to the state inheritance tax when owned by a nonresident decedent and located without the state.

3. Baldwin vs. Mo. (1930) 281 U. S. 586, held that a state may not impose a transfer or inheritance tax upon such intangible personal property owned by a nonresident as credits for cash deposited in local banks, coupon bonds issued by the United States and promissory notes constituting debts from residents to nonresidents, the bonds and notes being physically present in the state, but not having obtained a business situs there.

4. Beidler vs South Carolina (1930) 282 U. S. 1, held that a state may not levy an inheritance tax upon the intangible assets of a nonresident estate consisting of indebtedness for advances and unpaid dividends owed the non resident estate by a domestic corporation. The assertion that the indebtedness had a business situs within the taxing state must be supported by evidence, and that requirement is not met by a mere showing that the indebtedness was an open unsecured account, or that the nonresident decedent was the chief stockholder and largely interested in the company's affairs.

5. First National Bank of Boston vs Me. (1932), 284 U. S. 312, held that shares of stock, like other intangibles, constitutionally can be subjected to a death transfer tax by one state only—the state of domicile.

This latter case was decided after we passed our present inheritance tax act wherein in section 14-403, Idaho expressly taxes stock of a domestic corporation owned by a nonresident decedent. However, in the Boston case the Court expressly reserved the question whether a business situs would take away the power to impose the single death tax from the state of domicile and vest it in the state wherein the business situs obtained but up to this time the court left little or no doubt that double taxation of intangibles would offend the constitution.

Later in 1939, the question of "situs" was fairly presented to the United States Supreme Court in two companion cases of Curry vs. McCanless, 307 U. S. 357 and Graves vs Elliot, 307 U. S. 383, wherein the court dealt a death blow to the single tax theory which had a calm life for about ten years. True, in these latter two cases, the expresion of the court to the effect that stocks of a domestic corporation owned by a nonresident decedent may be taxed both in the state of domicile of the owner and in the state of the domicile of the corporation, was dicta but it was at least a forecast then. and since the recent case of State Tax Commissioner of Utah vs Aldrich, 62 S. Ct. 1008, 86 L. Ed. 911, hereinafter explained, there is now no doubt that the double theory of the taxation of intangibles offends no constitutional provisions, at least if such intangibles of a nonresident decedent, are even partially protected by direct contact with the laws of another state, which is often, if not always, the case.

The celebrated case of State Tax Commissioner of Utah vs Aldrich, commands the study and best thought of members of the Idaho Bar, if we are to intelligently counsel and advise our clients in the matter of estate planning and investments. Particularly should we familiarize ourselves with the kindred laws of adjacent and contiguous states where many of our clients have checking or savings accounts.

In the Utah case, the decedent, resident of New York, owned stock in the Union Pacific Railroad Company, a Utah corporation, and the Supreme Court of the United States, held that such stock was taxable in the State of Utah even though the State of New York exacted a like tax, because Utah, the home of the corporation had afforded some measure of protection to the decedent's right and was hence entitled to a contribution for such protection. This has opened wide the field where a state might constitutionally exact a tax on the intangibles of a decedent who never resided within the boundaries of such taxing state and before the full import of that decision becomes

crystallized, many difficulties and disappointments will arise.

One clear cut solution is the so-called uniform reciprocal legislation by all states. Most states already have such legislation, varying from complete exemption of intangibles of nonresidents to reciprocal exemption, complete or partial. Idaho has reciprocity as to all intangibles of nonresident decedents (14-408) except stocks of domestic corporations owned by nonresident decedent's (14-403). This may or may not be the soundest plan; I believe it is, realizing that there is room for disagreement. Our act, provides that we will not exact a tax on the intangibles of a nonresident decedent, if the State of his residence, either does not tax intangibles of nonresidents or offers reciprocity; there is one exception to this, as I have pointed out, and that is, stocks of corporations of Idaho, owned by a nonresident decedent. We must not amend our law to expressly remove the imposition of a tax on intangibles of nonresidents because we do not know what other states may do towards taxing the intangibles of residents of Idaho, hence I believe our law is in form to meet the situation fairly; at most, if you are not in accord, you would repeal section 14-403 and place stocks of Idaho corporations in the same category as all other intangibles and perhaps extend reciprocity to foreign countries, as some states have done, but which the Federal has failed to do. The entire question is primarily one of economic desirability. It may be advisable to think in terms of the laws of other states in which your client may have a time deposit, a checking account, a mortgage, or may hold valuable stocks and securities in corporations organized under the laws of another state.

For instance, Utah has no reciprocity and taxes all intangibles over which it can justify its jurisdiction to tax; if your client owns stocks in Utah corporations, has a checking account and a savings account in a Utah bank, upon his death, as a resident of Idaho, his estate would be subject to a tax on all these intangibles in both Idaho and Utah. You may expect this to happen in so far as residents of Southern and Southeastern Idaho are concerned until some appropriate legislation is enacted, hence you should advise your clients accordingly, otherwise there will be many pathetic disappointments ahead for heirs and beneficiaries which could be prevented. They must again be told that when a person extends his activities with respect to his intangibles, so as to avail himself of the protection and benefits of the laws of another state, a single place of taxation no longer obtains and he must keep himself at all times informed as to the law in the state

where he employs his intangibles and in whose securities he invests.

The same practical problem which confronts clients who employ their intangibles in Utah, applies in Montana which likewise fails to offer reciprocity, while in Washington, Oregon and Wyoming, we find reciprocity except that these states would likely tax stocks of corporations organized under their laws, owned by residents of Idaho because we tax the stocks of Idaho corporations owned by nonresidents who may be residents of those states. As for instance, if a resident of Idaho dies owning stock in the Washington Water Power Co., his estate would be obliged to answer for a tax in both Washington and Idaho, because though both states have reciprocity as to intangibles, Idaho's reciprocity is partial and not complete; hence Washington will only grant reciprocity to the extent that Idaho grants it.

Nevada, has no inheritance and transfer act and for the present no problem in this connection presents itself.

California recently enacted a reciprocal statute but due to the peculiar provisions of its statute before it enacted the reciprocal provision, some entertain a doubt as to the status of the matter and we can only await a clarification through adjudication or legislation.

It is conservative to state that the Aldrich case has created perplexing and important problems for the security investor and his counsel, because he is not assured that when he dies inheritance tax exactions will be confined to not more than one State and the Federal Government. We may expect a stampede to tax the same securities by several states, and then in self-defense the investor will obviously take refuge in the schemes which were popular before 1932. Before 1932, the date of the decision in Bank of Boston vs Me. the states enjoyed a free-for-all when a security holder died. Of course his home state was the first to exact and collect an inheritance tax, based and justified on domicile. In addition, the respective states in which the corporation, whose stock he owned, were incorporated called upon his estate for a like tax, upon the ground of domicile of the corporation; then the state in which the transfer officer of the corporations was located, which so often is a state other than the home state of the corporation, wanted to be paid off, too. Again the stocks and other securities might have been located and employed in still another state in such a manner as to gain and acquire a "business situs" there and so this state also exacted a tax on such securities.

To get away from such multiple taxes before 1932 investors followed several courses. Many set up corporations for themselves at home and had the corporation own the securities. When they died, the estate consisted not of their securities, but stock in the personal home state corporation. That meant only the home state was entitled to a tax. We can expect a rebirth of these personal corporations until something is done through legislation to correct the situation, unless after a careful study it is determined that excise taxes such as income tax and franchise or corporation taxes are so burdensome under present day laws, as to make this course economically unwise.

Some investors will resort to the old practice of entering into trusts or custody arrangements or put their securities in secret or nominee's names—all to the end that in the event of death no transfer of certificates would be necessary outside of the state. The revival of any or all of these programs or others of a similar import is an admonition that something is wrong and its inequities command correction with all dispatch. The salutory plan would be for all of the states to enact uniform reciprocal laws, eliminating duplicate taxation on the securities of their residents.

PRES. THOMAS: The next subject is: "Interference or Prevention of Contract Performance by War," by Ben Johnson of Preston.

MR. BEN JOHNSON: The subject deals principally with persons in military service. We must of necessity refer to the 1918 and 1940 Soldiers' and Sailors' Civil Relief Act which is broader in scope than a strictly moratory law, for the reason that it is not confined in its operation to debtors or obligators but is applicable in all cases where a soldier or sailor is a defendant. The Act was passed to protect Soldiers or Sailors in "any action", and is applicable only "if there shall be a default of any appearance by the defendant". The language is comprehensive and seems to embrace clearly actions at law and equity, and all classes of special proceedings.

Moratory statutes have been passed when emergencies arise resulting from a depression. An emergency may exist with respect to housing warranting emergency rent statutes.

The greatest of all emergencies, however, calling for such extraordinary legislation as moratory statutes or stay laws, is the existence of a state of war. Clark vs. Mechanics American National Bank, 282 Federal 589.

The purpose of the Soldiers and Sailors Civil Relief Enactment is to relieve persons in military service from mental distress occasioned by being in service and resulting inability to function with freedom of action possessed prior to induction, and inability to meet financial and other obligations and commitments; mental distress resulting from inability to protect legal rights adequately or to defend suits. Hunt vs. Jacobsen, 33 N. Y. S. (2) 661, 178 Misc. 201.

The 1940 Act is designed to protect property interests, legal as well as equitable, of persons called into military service. Twitchell vs. Home Owners Loan Corporation, 122 Pac. (2) 210.

The provisions of the Act giving the court discretionary power to stay an action against "sureties, guarantors, endorsers and others subject to the obligation or liability", refers to primary as well as secondary obligations since although guarantors and indorsers are subject to a secondary liability, the liability of a surety is primary. Modern Industrial Bank vs. Zaentz, 29 N Y S (2) 969.

We may conclude that it is the purpose and the intent of the Act of 1940, which is based upon the Act of 1918, to protect those in military service, and to prevent injury to their civil rights during their term of service, naturally arising from judicial proceedings conducted against them in their absence. The protection applies to executory contracts and provides for restraining the foreclosure of mortgages, trusts, deeds, and all sales of property under the powers granted by contract, or under a warrant of attorney in the enforcement of any of which judicial proceedings are necessary. Taylor vs. McGreggor State Bank, 174 N. W. 893, 144 Minn. 249.

The act provides that 'court' shall include any court of competent jurisdiction, United States or state, whether or not a court of record."

The Act supercedes state laws even though more favorable to soldiers and sailors than federal laws. No case has come to my attention under the 1940 statute as to whether or not a state law was in conflict therewith.

These moratory or stay laws can only operate upon the remedy; but they may not impair the obligation of contract. It is sometimes difficult to say whether a particular act creates a right or merely gives a remedy.

The Acts of 1918 and of 1940 providing "that the period of military service shall not be included in computing any period now or hereafter to be limited by any law

for the bringing of an action by or against any persons in military service" is held to suspend a contractual as well as statutory period of limitation.

The reason underlying suspension of the statute of limitations is that such statutes are remedial and that suspension operates on the remedy.

Under the Act a statute of limitations does not run during the period when a soldier is in the army, nor during the period thereafter when a beneficiary in an insurance policy does not know, and has no means of knowing, that the insured soldier had been killed in action.

There can be no eviction of one in the military service, nor of his dependents unless the court grants leave therefor, upon an application, in an action or proceeding affecting the right of possession, provided the rent of the premises does not exceed the sum of $80 per month and is occupied chiefly for dwelling purposes by the wife, children, or other dependents of the person in military service. Where the rent exceeds $80 per month, the act has no application to eviction or proceedings therefor.

Where the seller of real or personal property, or his assignor, has received under a contract of purchase, or lease or bailment with a view to purchase a deposit or installment of the purchase price from a person, or his assignor, who after the date of payment thereof has entered the military service, the seller or his assignee is prohibited from exercising any option under such contract to rescind or terminate, or resume possession for nonpayment of any installment falling due during the period of service, except in accordance with the order or judgment of a court of competent jurisdiction.

However, upon the hearing of an action to repossess the court may order the repayment of part or all prior installments or deposits as a condition of terminating and resuming the possession by the seller, or the court may upon its own motion, or upon application of the person in military service, or someone on his behalf, order a stay of the proceedings, unless in the opinion of the court the ability of the person in military service to comply is not materially affected by reason of such service, or the court may make such other disposition of the case as may be equitable to conserve the interest of all parties. But if the property in question is a motor vehicle, tractor, or the accessories of either, it seems that there is no right in the person in military service for reimbursement of payments or deposits theretofore made, or for stay of proceedings unless the court shall find that 50 per cent or more of the purchase price of said property has been paid. But where less than 50 percent has been paid, the court may require a bond by the plaintiff to indemnify the defendant in military service against any loss or damages that he may suffer by reason of any judgment or order, should either be set aside in whole or in part. The court, no doubt, could require a bond if more than 50 percent of the contract price had been paid and the seller were allowed to repossess the tractor, or other motor vehicle. Legal Status of Soldiers and Sailors under Civil Relief Acts, by W. H. Anderson, page 89.

It seems that Section 303 of the Act of 1940 originated with that act; that is the provision for finding of the payment of 50 percent of the purchase price before the soldier or sailor would be entitled to repayment of any part of the repayment of any part of the money theretofore paid by him, or stay of proceedings.

Soldiers' and Sailors Civil Relief Act, 1940, 200 (1).

Any person who repossesses property from another in military service in violation of the Act is guilty of a misdemeanor, and is subject to be imprisoned, or to a fine, or both.

Soldiers' and Sailors' Civil Relief Act, 1940, 301 (2), see also Appendix 50 U. S. C. A. 122 (la)."

Let me add a recent case where relief was granted under general law, and not by reason of the Act. In this case the lease of an automobile salesroom was held terminated, where it could not be carried out because of governmental orders or decrees. A summary proceeding was instituted by a landlord against a tenant for non-payment of rent for December, 1941, January and February, 1942, predicated upon a lease dated in 1937 for a term expiring in 1943, the premises to be used "only for a showroom for automobiles and automobile accessories." The Municipal Court of the City of New York, ruled in favor of the tenant, upon a defense to the effect that about January 1, 1942 the Office of Production Management, under authority granted by Congress had ordered the prohibition of the sale of passenger automobiles and had later issued an order prohibiting their manufacture. "The rule may be stated thus", said the court, "that if a statute is adopted after the making of the lease and it deprives the tenant of the beneficial use of the property—that is, prevents him from using it for the primary and principal purpose for which it was rendered—the lease is terminated, although other incidental uses might still be made of it. (Kaiser v. Ziegler, 115 Misc., page 286.) To say that the lease continued for some other use of the premises would be to make

a new contract. Since the original lease cannot be carried out because of governmental orders or decrees, the Court should adjudge that it is terminated. This Court therefore concludes that the tenant (a) was prevented by action of the Federal Government from occupying the premises for the purposes for which it leased them; (b) the contract became impossible of performance by operation of law; (c) the tenant is entitled to a dismissal of the petition herein and the return of the security deposit of $500 with interest." Colonial Operating Corp. v. Hannon Sales & Service, Inc. The Corporation Journal, May 1942, pages 177-178.

JUDGE HUNT: Isn't it a fact, if you put up a bond which satisfies the court you may proceed? There is no absolute prohibition?

MR. JOHNSON: There seems not to be except where an injustice might occur.

JUDGE HUNT: Many draft boards have told soldiers and sailors that the Act absolutely prohibits anyone from taking the property of a soldier or sailor. I find that if you put up a bond to satisfy the court and get by him you may go ahead.

MR. JOHNSON: Some draft boards have made some erroneous statements. In those instances considerable injustice has been done.

PRES. THOMAS: The subject: "The Lawyer's Office and Streamlined Human Relations" will be given by Paul Davis of Boise who has been interested in public relations actively for the past twenty years.

MR. PAUL DAVIS: Mr. Chairman and members of the Idaho Bar: It is amazing how some one from outside a profession can come in and tell how to run the business. Please understand that is not my aim nor purpose, by any means. It may be that you won't agree with some of my observations, but that won't hurt my feelings.

I have no system nor book to sell, or even recommend. My few remarks will concern you and your profession, principally you, and the advantages that will accrue to you personally if you will adopt or use some or all of the ideas advocated.

I am going to handle my subject machine gun fashion, so to speak. I am going to wander all over your office, touching subjects that I think will be of interest to you and to the profession as a whole. My subject is so big I can merely scratch the surface in the time allotted me.

All your other speakers will shoot a rifle in developing their subjects or theories—I am merely going to scatter my fire, hoping that some of my bullets will hit near you. If they do, my time will be well spent.

Streamlining is a modern word, meaning nothing more nor less than modernization of your office routine and how it can be utilized by lawyers in developing the human approach. It will be my aim to give you some practical suggestions accumulated over the years, which I hope will be of value to you in securing more clients and possibly put some more mazuma in the bank for you. That accomplishment will depend on you. I can't, and no one else can, do it for you.

Inasmuch as I am going to streamline your office from the human relations angle, first I will take up correspondence.

Every letter that goes out of your office is a contact between you and the reader. That contact may be agreeable or unpleasant. Your letters can be made messengers of good will.

Your letter is just you—reaching out across space—giving the reader the message that you would give him in the same way if he were seated at your desk.

What difference does it make whether he is a thousand miles away or only a few feet? You are talking in either case.

Most lawyers' letters sound like tax reports or legal documents—unnatural, stiff, formal, conventional. Streamlined letters are not cut to pattern—they flow from the heart.

In any letter you must realize that, while you are trying to accomplish something for yourself, it is to help the reader also.

Large concerns have tried thousands of experiments on the effectiveness of letters by actual tests in starting their messages with the words "I", or "we", and with "you" and "yours". Those starting with the words "you" and yours were 33 1/3 per cent more effective on actual returns than those using "I" or "we". So; from actual experience, by trial and error, we prove that "you" and "yours" are powerful words.

Lawyers' letters are always too long. Anyway, the ones I have examined and received have been. I have received lots of them—wasted paper and labor—three and four pages of wind. I suppose you have all heard the fam-

ous expression of Pascal. He said "I didn't have time to write a short letter, so I wrote a long one." Don't be a babbling brook that runs on forever. Know what you want to say. Say it! Stop!

I once remained in Seattle two days at considerable expense to hear an expert deliver a talk on correspondence. I expected him to speak an hour or two. Here is what he said—"The only way to write a good letter is to know what you want to say—say it—and stop." Then he sat down.

Another successful authority was asked about his technique on successful letter writing, and he merely stated "Be yourself and seal the envelope."

I have received letters from lawyers and others, strangers, that were cold, meaningless, and too long. Then, upon entering their offices, I have found them human —totally different. I'll bet every one of you have had the same experience. All your letters should be human and natural. Its personality should be your personality.

Here is a copy of a letter written by a lawyer. Here is what he said—word for word: "I sincerely regret to advise that I do not feel I am in just the position at the present time to make you the report as to the enclosed, for certain reasons. However, it may be at some future time I may be in the position to make such a report, and, as aforesaid, I regret indeed just at the present time I really do not feel in the position to give you the requested information for certain reasons that I would prefer not to state just at the present time."

How in the name of Heaven could such a man pass the bar examination and write such an assinine letter?

Letters can be devils to plague you, or angels to help you. Think it over.

You know how all this conventional letter writing started? Well, way back in Merrie England, years before our Revolutionary War, you will recall that only the upper class was educated. The lower class did the heavy work, and the middle class were the merchants. These merchants looked to the nobility for most of their business. When a merchant addressed a Lord he was supposed to "spread it on thick". So the business man would begin "I have the honor to address your Lordship". Then he would end, "I beg to remain, your obedient servant." So; briefly, I have described the reason for our present antiquated system, and for our being three hundred years behind the times.

Now, if you want to get radical, I'll ask you what the devil "Dear Mr." or "Dear John" amounts to in starting out a letter. Then, too, what does "sincerely yours", "Yours truly", and the like mean. I don't know, and have never been able to find out.

It is custom and convention, so what?

We all wear neckties, which are unnecessary. I'll stop wearing them, and using "Dear". if the rest of you will. I don't want to be conspicuous, and neither do you. However, I am trying to give you some practical suggestions that will assist you in handling human relations, which means more clients and friends,—and not be radical. You don't need to be.

You use too many rubber stamp phrases. "I am in receipt of your letter of the 17th instant, and beg to state", etc.

Here you have taken two lines, and what have you said? Ye gods!

Start off! "Your problem!" "Your deal!" In other words—"tell 'em".

Certainly you dont talk that way, do you? You don't say to your friends in the office, at home, or on the street, "I wish to advise that I will be over to see you tonight." You don't say to your wife, "Darling, I now beg to state that it is time to go."

Then why do you put such folderol in your letters?

Look over the letters you have written in the past, and resolve to start on a new path.

My suggestion would be to throw away those rubber stamps. Let your letters talk as you would talk.

Regarding these rubber stamp phrases, here are one or two that sound funny to me—

"I beg to advise you, and wish to state, that yours arrived of recent date,"—"I have before me, its contents noted regarding the matter", and "due to the fact", "I beg to remain yours very truly", etc.

It is going to be hard work to break this habit, but I think you will find it's a lot of fun.

People—your clients—have certain instincts—they know what they like and what they don't like. Study the advertisements in our magazines, and you will note their

appeal. Basic instincts, hunger, pride, love, fear, social ability, ambition and many others. Study them if you will.

Positive appeals are better than negative. Appeal to hope, not fear; to desire, not dread; to prosperity, not panic; to love, not hate.

I have heard lawyers say hundreds of times "It is a loss of time and postage to send letters." However, from a personal standpoint, haven't you sometimes talked to a man several times to convince him on a certain point. Yet they expect a letter to do more than a personal visit. There is no substitute for a man to man conversation.

Remember that a letter cannot answer some objection raised. Also, most specialties are sold after the 5th and 6th sales talk and demonstration. So, if one letter does not get results, follow it by others with different appeal.

A suggestion—start a collection of letters you have received—good and bad. To some of you it will develop into a hobby. Study those letters and profit by them.

Here is an angle on mailing that should be interesting and worth while to you. Never mail a letter that will be received Saturday, Sunday or Monday. That is, if you want it to receive attention. And I'll tell you why. On Saturday people are busy closing the week's business. In town most of them are closing up at noon, maybe going on a weekend trip or playing golf—starting on their vacation. In the country they are coming into town.

Sunday they receive no mail.

On Monday did you ever notice the large amount of mail you receive. Tuesday is the low day for receiving mail, and is really the best day for getting action. Personally, I may write a letter on Friday, but I date and mail it on Monday.

Monday is the worst day in the week for attention. Sunday, is a day of rest, yet people as a rule stay up later on Sunday than on any other day of the week. Then, too, most people are organizing their week's work—well named Blue Monday.

Special delivery letters, preferably air mail, received on Tuesday or Wednesday, are more effective than telegrams. I had occasion three years ago to write the Presidents of several million dollar concerns, and received return personal letters from every one of them. Such men as Prentiss of Armstrong Cork, who was also President of the U. S. Chamber of Commerce, Simon Guggenheim, and others.

No letter or any other kind of communication should

ever leave your office without your signature. Also, you should type your name at the bottom of your letter. I have seen thousands of signatures that you could not decipher. Even though your signature is good, make it a practice to write in your name with a typewriter.

It is so easy to scatter friendship, build good will, which will grow into a profit—fees if you please. However, you must feel like doing it. You must be tolerant, friendly and broad minded about it.

There are hundreds of ways to build good will—here are a few suggestions. A friend or client has a boy appointed as an officer in the Army or in some Association or company, or is honored in some other way; a baby boy has arrived; this friend or client has been elected to some office; write them to show you are happy too because of their success.

Any number of professional men send greetings to anyone who moves into his territory. If you attend a good meeting, send the speaker a letter. Christmas cards or letters are an unlimited field, but it is better to have them original. Birthday greetings are excellent.

If you attend a meeting out of town, and like it, write a letter to the officers thanking them for the program.

Write the school teacher at the end of the school period thanking her for the treatment and attention given your children; to people confined in the hospital. If a new building or home is being erected, write the owner. Your daily or weekly newspaper will furnish you with names and events to keep you busy.

Understand, I have listed only a few possibilities,—use your ingenuity for more.

Streamline or modernize your office practice by getting out several letters a day along the line suggested. Say you would take thirty minutes each day for public relations or good will building by writing old friends or old clients. Adopt some kind of program and stick to it. You will find it will pay you in a big way to be human. You owe it to yourself and your profession. There is nothing unethical in being human.

Another phase of streamlining your office procedure is the one big point that most lawyers overlook continually. That is the other fellow—your client. When that man enters your office his problem is the most important thing in the world. You must treat it so. That other fellow is a little world unto himself, and don't you forget it.

Here is another place most lawyers fall down. A man comes in with a deed or a will, or some trivial matter. If it is small it may bore you. However, most persons have such matters to take care of only a few times during their whole life. To that man it is the most important thing in the world. You should treat it so.

Then, don't forget, if treated like a human being he may have some more business later—a divorce suit, or a probate matter, or even refer friends to you. Some one once said "take care of the little things and the big ones will take care of themselves."

Lawyers can help themselves individually and collectively by getting out any matters referred to them with more dispatch. You fellows have the name of being lackadaisical and dilatory, and I speak from the layman's viewpoint and from comments of the lawyers themselves. The very nature of a lawyer's life is the cause of this criticism. A clinic brings in a deed or contract, or, worst of all, a difficult point of law, which might require some research. It is laid aside, and, for some undefined reason, it is put off from day to day.

It would be my suggestion that you step up the tempo of your office. It will take will power on the part of some, but it will pay you dividends.

If you want to quote some law on this point, the Supreme Court once defined good will "as the disposition of the customer to return to the place where he has been well served."

I know that lawyers, most of them at least, are missing opportunities every day. Clients come into your office—it is necessary to look up some point of law. You read it to him—good. But how many persons can remember? Now hand the book to him, and let him read it for himself. Let him hold that book or paper in his own hands. Feeling and sight are powerful sales agents.

Numerous friends of mine have complained to me about the treatment received after presenting their problem to the lawyer. Most lawyers tell them "you made a mistake", "you balled up the whole thing", "you're a damn fool", "why didnt you come to me sooner', etc. Maybe so, but why rub in. That man is looking for help,—almost sick from worry. Why don't you cheer him up? I don't have to tell you how.

In passing to another feature on personal relations, it is astounding to me that lawyers and others do not realize that people, depending on their education, mode of

living, etc., forget you in from six months to two years. Startling, but true never the less, except as to very close friends .

If you don't think so, stay home, say for six months to two years. Or join the army, or go on a vacation for a year or two, or go on the bench. Of course I speak of the man who practices alone, but it holds true to a certain extent with a firm. Then come back and open your office. Try it, but I don't think you need any further proof.

Even though you are in active practice you must circulate. Maybe you have your own system. I have heard many professional and business people say that they were active in club, association or Commerce work ten, fifteen, twenty years ago, and complain that it does not bring them any business now. Well, I maintain you must keep up and renew those contracts. You might take a year's vacation from such work, but that is about all.

Along the same line, I have referred thousands of dollars worth of business to friends of mine. To illustrate my point—about six months ago I happened to be talking to a young, and I think competent, member of the bar. Within two hours of that conversation I happened to meet a friend of mine, and he asked me for the name of a good lawyer. I gave him this chap's name and location. I don't know what the fee was, but it illustrates my point that he was the last lawyer I had talked with. Anyway by talking with me that lawyer received a fee. Don't forget other people react in the same way. So; my suggestion would be to circulate, meet new people and chum with the old gang. You will find it pays.

To further prove my theory. You have had people you thought were friends of yours go to some other lawyer. Check up and find out why. You will find you took too much for granted.

I sincerely believe that every lawyer should attend all bar meetings. He would find it profitable. The Unions impose a fine for members who fail to attend their weekly meetings. Unions have the idea, and their size and influence prove their theory. Not only is new knowledge secured, but you will find that it pays big dividends. It goes back to the thought of making new contacts and renewing old acquaintances. It means money in the cash register.

In my many years as Secretary of a professional society, I know that those who attended Association meeting—regional and state—got the original investment, to-

gether with big dividends. I could give you definite figures for hours.

Every lawyer owes a certain amount of time to his community and state. This kind of activity can be undertaken in war work, Chamber of Commerce—possibly some service clubs. Please remember you have to keep in circulation. You must participate continually, because your contacts are lost after one year. Maybe you feel you have done your duty. Maybe you have to your community, but not to yourself. If you have dropped out of such work, lose no time in getting back if you desire new clients.

Why don't lawyers cultivate the younger generation? These kids, five and ten years later, might develop into clients. Anyway, they would be boosters. A case in point. During the last twenty-five years I have had young fellows working for me at different times ,and by proper treatment these boys think I am a great guy. Some of them I had really forgotten have stopped me on the street and thanked me for suggestions made five, ten and fifteen years previously.

I know a pool room operator in Boise who made a fortune just making change for news kids. Most merchants become irritated at the boys, especially when in a hurry. Whereas, this man always made them welcome regardless of how busy he might be. I have dropped in his place many times and always one half or more of the persons in the place would be old news kids.

Take Russia, for instance. The Bolshevists in the early twenties found that it was hard to convert the older people to new ideas, so they started on the young fellows, and then in the schools. Look at them today.

I find the greatest difficulty with individuals who, in planning their work and life, never plan beyond tomorrow. You take in large organizations they are planning five, ten, twenty-five and fifty years ahead, and yet it is easier for the individual to make such plans.

To me one of the greatest conclusions reached by hundreds of large concerns, by thousands of experiments over a period of years, was the appeal to pride, the employes wish for the approval of their superiors and those around them. The one most often mentioned and previously tried, and accepted until now as the paramount one—still a powerful one—was the "gain" motive in the form of an increase in salary. It might be well to remember that a kind word or a boost for the other fellow will help you—an appeal to pride.

Personal contacts—mouth to mouth—man to man—heart to heart—are the best advertising that has yet been

found. Make it a point to talk to some person who knows you slightly, or lay out a definite plan of meeting new people, either through groups or individually, every day. The field is without limit.

I am hopeful that maybe a Forum or Round Table can be inaugurated at future meetings, where ideas and short cuts, developed by Idaho lawyers in their offices, can be collected, studied and discussed in detail. I know that if I had the time I could secure some practical idea on office precedure that could be adopted by lawyers. These ideas would prove profitable, and would provide for increased efficiency of the profession.

As an illustration. Upon acceptance of the invitation to give a paper I talked to three officers of the Association, and each one offered a practical suggestion. For instance, your President told me of a system whereby he had aroused curiosity on the part of persons to whom he sent letters to call and discuss certain matters to their advantage.

Another told how he would ask a client to return in an hour or two after he looked up a point of law. Whereas, if he had given an instant answer the client would have thought he had been over charged.

Still another suggested a different system of billing clients for services rendered by keeping a date pad and render bills on an hourly basis, or at least note the number of office consultations. I know I could pick up a practical suggestion from each and every lawyer in the state. Why not pool these suggestions.

After all, what you are really trying to put over to the public is friendliness, fairness, reliability and service. You may name some others, but I think these four cover the field fairly well.

In conclusion, everything I have said can be summarized in a few words. Use your own ingenuity—circulate—serve your community, which also means your nation. And don't forget that your client is the most important person in the world—to him, at least.

You lawyers have a serious problem facing you—this war situation and the Reconstruction period. We are certainly drifting into unknown seas in governmental and economic matters. What the future holds for you, no one can predict. Under the circumstances, it behooves you to survey your personal and professional problems with deep reflection, for you are on a spot, so to speak.

Regardless of the serious situation now confronting you—use your imagination—think kindly of others—and

face life and your professional problems as a joyous adventure.

PRES. THOMAS: Thank you, Mr. Davis.

I inroduce Jess Hawley, a former President of the Bar. The organized bar today may attribute much of its welfare to his sincere efforts.

MR. JESS HAWLEY: Thank you, Mr. President. Gentlemen, I asked for this privilege. If my honored father were alive he would consider it a special honor if he could introduce the man who was his loyal true friend for over one third of a century. Born January 1st, 1864, shortly before Captain Benjamin Franklin Martin led a charge of confederate soldiers in the Battle of Pilot Knob, and there, in defense of what he thought was right, laid down his life. He had two sons, and General Martin, by the way, has two sons, Frank Jr. and Homer, a source of pride and of comfort to him and his very lovely wife.

In 1868 General Martin visited Idaho. In 1886 he settled here. In 1892 he graduated from the University of Michigan Law School in Ann Arbor, and that year, fifty years ago, was admitted to the Idaho Bar. This, then, is the year of his golden jubilee as a member of this Bar. He is in fact its Dean, for while Justice Ailshie and Judge Steele are two members who have been admitted longer than General Martin, they have diverted their abilities from time to time from the pit to the bench.

General Martin has had a varied career. A man of excellent judgment, an astute and fearless trial lawyer, a man quite in love with his profession, a true professional man, he has given much time to public affairs. In 1897 he was appointed and served with distinction as one of the Regents of the University. In 1901 he was elected and served as Attorney General. In 1912, again in 1916, he was elected as one of the Presidential Electors. He was an active member and then President of the old Idaho Bar Association. He became one of the first Commissioners under the new Act, and President of this Bar. He was elected and served as the Sovereign Grand Master of the Grand Lodge of that great American Fraternity, the Independent Order of Odd Fellows.

I have a special feeling of gratitude for General Martin, aside from the long family associations that have existed, arising out of the great service he rendered at the time we were attempting to pass the Idaho Bar Act. Chairman of the committee, men of real professional abilities assisted me and, in fact, did the greater part of the work. Ben Oppenheim, Frank Wyman, Justice Ailshie, Judge Koelsch, for a name or two, but I believe no one

rendered more service in getting that Act enacted than did General Martin.

In 1943, God willing that he and Mrs. Martin shall be with us then, they will celebrate their golden jubilee, which reminds me of an address given years ago in Boston, "To the Pilgrim Fathers." That orator said that while the Pilgrim fathers were to be honored for the hardships they had endured, for their principles, and for the greatness of their endeavors and success, one mustn't forget the Pilgrim mothers who were more to be honored than the Pilgrim fathers, for in addition to going through these hardships and standing by the side of the Pilgrim fathers, the Pilgrim mothers had to endure the Pilgrim fathers. With apologies to General Martin.

Now comes to you a man who is so well qualified by adherence for fifty years to the ethics of the profession, who has always held the honor of the profession as his own honor, to talk to you of the "Renaissance of Leadership of the Bar."

May I say to you, General Martin, that all of us admire you, hold you in deep affection and esteem, and know that you will continue until the last minute in the love and practice of your profession.

GENERAL MARTIN: Mr. President, Gentlemen, I express to my distinguished friend, Mr. Jess Hawley, my thanks and appreciation for the very kind way in which he has seen fit to refer to me in that introduction. I have known Mr. Hawley since he was a boy. I was a very warm friend of his distinguished father, and it is only natural, perhaps, that he should be partial to me and I to him. I was taught by my professors, as you have all been taught, that the profession should provide, of course, for a man's own livelihood, but that we owe a duty to the public, an especial duty to the Government under which we live, and to the people of our country to take part in every way which we may do in carrying on public burdens and public movements for the betterment of the citizens. I have tried to keep the faith during the fifty years since I was admitted to the bar. I have had, at all times, a great interest in the welfare of my profession, in the higher things which it might accomplish and the greater things that it might do to further the interest of the public generally. How well I have done that is not for me, of course, to judge.

In every nation of the earth since recorded time, the national leaders were those learned in the laws, customs, form and procedure of the governments, whether known as law givers, judges, lawyers, rulers or by other titles.

The early political authors classified all governments in form as monarchies, aristocracies or democracies. By far the greater number were monarchies. The democracies were few, weak and of comparatively short duration. These men of legal learning were versed not only in the laws and customs of their nations, but in the forms, powers, duties, intricacies and proper procedure of their governments. They were called upon to take a leading part in the governmental affairs as advisors to the Monarch or to the governing body of Aristocrats or in the most important offices of the Democracies.

In all times, ancient and modern, a liberal education was a prerequisite to legal study. The lawyers were taught not only substantive law but legal procedure, the history of, and reason for, the law. The different forms of government with the history, customs, trends, results and effects of such governments upon the business, happiness, and condition of their peoples. They were trained to efficiency in the habit of clear and incisive thinking and of accurate and definite statements so necessary in legal proclamations and edicts, having the force of law, as well as in the framing of statutes and legislative bills. The lawyers must be able to examine, approve and correlate facts as well as to give rational expression thereto.

In the 6th century, Justinian I, Emperor of the Eastern Roman Empire in which the civil law originated, appointed several commissions of lawyers headed by Tribonian, the most learned jurist of his time. These commissions prepared what was known as the Justinian Code, the Institutes, and the Digests, stating the civil law as it then existed, which were then promulgated as the only laws of the Empire. From this time the use of the civil law became general on the continent of Europe, but at no time had more than a limited application in England which had more extensively adopted what was known as the common law arising mostly from common understandings of what the law was and of long established customs and traditions or royal grants establishing the rights of individuals.

In the 16th and 17th centuries many legal writers issued pamphlets and other treatises on different aspects and branches of these laws, but no attempt was made to collect in one general body the common law of England until about the middle of the 17th century when William Blackstone, a lawyer and judge of high standing, who had served in Parliament, devoted a large part of twenty years between 1750 and 1770 in collecting and setting forth the great body of the common law of England in a work known as "Blackstone's Commentaries on the Law."

The work of the lawyer, until very recent years was known as a profession, and not a business. The lawyer is an officer of the Courts, and owes his first duty to the courts and not to his clients. Like other officers of the government, he is sworn to uphold the Constitution and laws of his country and further, never to mislead or impose upon the Courts before which he shall practice.

In the early times the duties of a lawyer were considered of such importance to the public and of such character, that his duties were discharged without any fixed compensation, but he was allowed to accept such honorariums as his clients might bestow. In England the expectation of every lawer was a seat in Parliament and later upon the bench, and so important and useful were his services to the government that this expectation was usuallly attained. In many instances, titles were bestowed by the crown for outstanding service in Parliament or upon the bench.

At the time the English colonies were established in America, the status of the lawyer as a leader in governmental affairs had become fixed through long years of service in Europe. The common and statute law of England was largely transplanted into these colonies.

When the relationship between England and the colonies became strained, it was the lawyer who led the great parade of sentiment in favor of an independent nation. It was the lawyer who advocated and brought about the spread of true democratic doctrines and the value of civil and religious liberty. It was the lawyer who brought to the people a knowledge and realization of the difference in the democracy of England—a monarchy, with limitations on the power of the king—and the democracy, which they sought to establish in America. It was the great orator and lawyer, Patrick Henry of Virginia who headed a veritable crusade for liberty. The Declaration of Independence penned by another great lawyer, Thomas Jefferson, was the highest conception of the rights and liberties of the people that had ever been expressed, and pointed the way to a new basis for government. That concept was brought into living existence in the Constitution of the United States. Mr. Gladstone said that the Constitution as finally framed was "the most wonderful work ever struck off at a given time by the brain and purpose of man." We submit it was one of the greatest steps taken in the advance of self governent.

It was the earnest efforts of the lawyers, both in and out of the army, that held the devotion of the people to the cause of liberty, and to sustaining the army of Wash-

ington during the worst period of the Revolution and finally culminated in a glorious victory and the establishment of the greatest nation the world has ever known.

After the war, the incentive for united action between the colonies had passed, jealousies between them arose and encroachments of one upon the rights of another, soon convinced the leaders of that day that if the nation born of exigencies of war was to grow strong, there must be a central government with sufficient power to direct its national existence without too great an encroachment upon the rights of the States. Many statesmen of the time thought this unattainable, but the lawyers of that generation through arguments, addresses, the writing of articles and pamphlets finally induced the Continental Congress to call a constitutional convention.

The convention assembled in Independence Hall, Philadelphia in May 1787. There was a galaxy of great men—fifty-five delegates from twelve states—all of whom had played a leading part in achieving the independence of the colonies and many of whom were destined to play brilliant parts in the national history. Washington was President of the Convention and Madison unofficial Secretary. They met behind closed doors. Several plans of government were introduced, considered and debated by the delegates. The Virginia Plan—primarily the brain child of Madison—was the one around which the Constitution was written. The Constitution was the result of several compromises without which it could not have been adopted by the convention, or ratified by the States. The ratification of the Constitution thus formed—the great charter of our liberties—was not brought about without a prolonged struggle and persistent and active support in the various colonies. This support was largely given by the lawyers in the various states, led in large measure by Madison and Hamilton through their articles published in the "Federalist."

When the Constitution was ratified and became effective, it was really a "noble experiment in Government." For the first time in world's history a government had been established whose powers came directly from the people themselves. Prior to that time every government had rested upon the will and power of a monarch or a body of aristocrats. Such liberties as the people enjoyed were given to them by the crown or by the aristocrats. The idea being that governments were owned by those in authority and that all power, all justice, all liberty and rights eminated from that central power, and such rights as the people might attain were the free gift of such central power. Here the theory was reversed, all power, right and justice resided within the people and such powers as

their central government had were derived from the people and were their gift to the government. This was putting into operation the central thought in the Declaration of Independence, to wit, "We the people hold these truths to be self evident; that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty ,and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed." In other words the people ruled themselves by "Divine Right."

The preamble to the Constitution recites: "We, the people of the United States in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and to our posterity, do ordain and establish this Constitution for the United States of America." It was the same great lawyer, Madison, who after the Constitution was ratified, guided through the first session of Congress the first ten amendments known as the "Bill of Rights," which completed this most wonderful document, the greatest experiment in self-government. The government thus formed was afterwards characteried by a lawyer, one of our greatest Americans, as "a government of the people, by the people and for the people."

We believe that our government thus established is a real Democracy. That it is divided into three distinct departments—the Legislative, the Executive, and the Judicial. The first to make the laws, the second to execute them, and the third to interpret them. That these departments are of equal value in the governmental structure and are entirely independent of each other in the exercise of their functions. It follows that our Constitution is violated when either branch of our government invades too far into the rights and prerogatives of any other branch. Democracy means law by duly elected law makers, and not laws by executive dictation, or by judicial interpretation.

The high esteem in which the leadership of lawyers was held in governmental affairs is evidenced by the fact that this government has had thirty-one men as President of the United States of which twenty-three were lawyers, five army officers, one a publisher, one a tailor, and one a mining engineer. Until within the last twenty-five years all of the great leaders in both houses of Congress were lawyers.

To name all of the great lawyers whose labors have given trend and direction to governments and the result-

ant effect upon the condition and progress of their people would be to call the roll of most of the leaders of all nations in governmental affairs. I shall for illustration, name a few.

Moses, the great leader and law-giver of the Jews, whose genius for government raised them above other nations of their time. Tribonian, who under the direction of Justinian I, assembled the fragments of law as it existed in the world of that day and rescued it from a chaotic condition, at least, into a semblance of coherency and understanding.

Blackstone, the able English jurist who devoted practically twenty years of his life to a like service in writing and reducing to an understandable condition the various documents, traditions, and customs which had by long usage become recognized as law in England, and assembling them in the great publication known as "Commentaries on the English Law."

Patrick Henry, whose great speeches upholding liberty aroused the people of the colonies to resist the power of England and finally led to the establishment of our nation.

James Madison whose fertile brain brought together in concrete form the ideas of the American people of his time and embodied them in the Constitution of our country and who led in the campaign for its ratification.

Thomas Jefferson who wrote the Declaration of Independence.

Daniel Webster, who in his speeches in the United States Senate presented in an irresistible manner the necessity for maintaining the Union.

The immortal Lincoln—the most true embodiment of the Spirit of America—who so thoroughly impressed his nation with the necessity of preserving the Union.

Wilson, who, as President of the United States, wrote those great papers of state setting forth a plan, which may yet bear fruit, to bring the blessings of democracy and self-government to all the peoples of the earth.

There are trends in public opinion which, from time to time, change the conduct of individuals, of groups, and even of nations. By this means the basic powers of our government have been changed, or expanded by interpretation of the Consitution, without amendments thereto as provided therein. The government of the United States and of all the States, each acting under a written Constitution, have been enlarged by interpretation of the Constitutions to include and authorize the exercise of powers by the government which the founding fathers and the people for many generations thereafter, never dreamed such governments to possess. These changes or enlargements have usually been brought about by the pressure of public opinion and not by the grasping for power on the part of those in the official position. The Courts, the most stable of all departments of government are the last to yield, but in a democratic government such as ours there is no department which can long resist the relentless pressure of public opinion when long and steadily applied. We have witnessed two impressive instances of this within the last few years; the fate of the President's desire to change the numbers of judges and their terms of retirement, on the Supreme Court; also the hasty retreat of the Congress upon the matter of voting a pension to themselves.

Let us now turn our attention for a moment to Idaho. After twenty-six years of territorial government in which the leaders in political affairs were mostly lawyers, we decided to seek statehood. On July 4, 1889 the Constitutional Convention assembled in Boise, composed of sixty-five delegates. Of this number, twenty six were lawyers including most of the leading members of the Bar. We are acquainted with the product of that Convention, which the people at an election on November 3, 1889 ratified. The Chairmen of the principal committees were lawyers. William H. Clagett, a lawyer, was President, and Charles H. Reed, a lawyer, was Secretary. Of the members of that convention, W. B. Heyburn and W. J. McConnell have been United States Senators; Willis Sweet and Edgar Wilson, Representatives in Congress; W. J. McConnell and Frank Steunenberg, governors; James H. Beatty, a Federal Judge; John M. Morgan, a Justice of the Supreme Court; Alex E. Mayhew, D. W. Stanrod and W. W. Woods, District Judges. Sixty four members signed the Constitution and one refused.

The lawyers were the leaders in the campaign for its adoption and the creation of the new State.

Of the work of the convention and the delegates, William J. McConnell, in his "Early Idaho History" says:

> "All questions likely to interest the people were covered, and it provided for an economical administration of State government.
>
> "They labored faithfully and arduously and the result of their effort was a constitution than which no better was ever presented to any constituency for ratifcation.

"It's various articles were discussed, section after section, by the able lawyers who were members of the Convention—not as the attorneys of certain interests, but as patriotic and loyal citizens which they were."

I express complete approval of the above statement of ex-Governor McConnell.

The government provided by the constitution was not only economical, it was simple, direct, well integrated, and ample for the state for which it was drawn and for a state three times its present population and wealth. The men who drafted it were far-sighted and well versed in the history and necessities of state government. It has been amended several times since its adoption. In a few small matters, these were beneficial, but most of the amendments adopted have lessened the value of the constitution. Several amendments were submitted and voted down. The legislature then originated the idea of amending the constitution by legislative enactment.

In 1919 the legislature passed an act creating nine new departments in the state government, the heads of which are appointed by the Governor. The intention was apparent, it was to vest the Governor with unusual powers not intended by the constitution, that had the effect of unbalancing the well arranged constitutional plan of government and largely increased the expense.

In 1939 ,the legislature again attempted to further encroach upon the constitutional powers of the other officers created by the constitution and to enlarge the powers of the Governor by creating two more departments to be filled by the Governor; this legislation was promptly taken into the Supreme Court and held to be unconstitutional. I shall not attempt to enlarge upon the farce enacted by the last legislature in voting themselves an increased compensation in the face of the plain language of the constitution. This and other detrimental legislation is the natural result of the lack of legal leadership in the legislature of our state.

About sixty years ago began what might be termed an era of mechanical and business development in the United States. Like all such movements it was at first slow in development. It was conceived by men of large business experience to bring together under one control large sums of money for the purpose of great business development, the building of large factories, railroads and other projects having the effect of increasing production and distribution. This was accomplished through the organization of corporations ,the management of which was kept within the hands of a few men while using the money of the many. These large business corporations, feeling their power, began to disregard the rights and safety of their labor in their mines, factories, railroads and other enterprises. To protect themselves labor was forced to organize and demand the recognition of their unions. Serious conflicts between this invested capital and labor continued for several years. Both sides were represented by able lawyers and these attorneys brought their respective clients to realize that if business was to grow and expand and labor was to prosper and the public to benefit, there must be compromise and cooperation between capital and labor. Plans for this cooperation were gradually worked out by these attorneys and quite generally accepted by the operators and the labor unions. The result was greatly increased prosperity and growth in commermercial and manufacturing enterprises. New railroads were built, new and larger factories established and general business developed. These forces were quick to see the advantage of having the assistance of men of legal learning, business experience and a large comprehension of governmental affairs. More and more leading lawyers of the country devoted their time and talents to business organiations, many of them becoming executive officers of large corporations or of labor unions as well as their legal advisers. They thus drifted away from their public service which had been so valuable to the country.

The public mind became perverted by this business trend of the nation. Money became the great prize for which humanity put forth its efforts. Gold became greater than right; property became greater than humanity and wealth more powerful than justice. In the public mind the so-called business man became exalted. There must be some magic about the man who had gathered to himself great wealth or the control of great wealth. These men would certainly do the same for public affairs were they placed in offices of power. Many of these men listened to this call and accepted public office and especially in the halls of legislation. The public had accepted a great fallacy as a truth, entirely overlooking the fact that the training of the average business man to get and control money, all of his study and activity having been in that direction instead of qualifying him for official service, rendered him of no value in governmental matters and especially in legislation.

The lawyers quite willingly, in a large measure, withdrew from public office and either from necessity or the trend of the times devoted themselves more assidously to private business. The lawyer who had been so useful in

office especially in the matter of legislation became absent from these positions and in his place were the so-called business men or the representative of business or of some particular group.

The public service has suffered therefrom a distressing loss. Legislation is the most important of governmental functions. It is the greatest act of supremacy that can be exercised by government over its citizens. In this work the legal learning of the lawyer, his acquaintance with government, its structure and functions, are indispensable. In every kind of pursuit a man must have knowledge training and fitness for the work he is to do, but in the public mind, legislation seems to be an exception. Each man thinks himself a born legislator. In order to properly judge of laws to be passed, the legislator must have a knowledge of existing law. He must have a knowledge of the government, its practices and its functions. In the territorial days and for a score of years after the constitution, each legislative session had a number of leading attorneys in the bodies. Legislation was well framed, clearly stated and few laws were declared unconstitutional.

Again to name all the lawyers who during this period were the leaders in political thought and of their respective parties would be to call the roll of most of the lawyers of the state. I shall, however, take the risk of naming a few:

William H. Claggett and James W. Reid were the outstanding orators of the bar and very active in public affairs. James H. Hawley, the greatest trial lawyer in the intermountain region, who swayed juries by the power of his logic and clear marshalling and analysis of facts, first candidate of his party under statehood for Congress and afterwards Governor. W. B. Heyburn, noted for his correct analysis and application of the law to his facts in hand. Willis Sweet, first Congressman under statehood; Edgar Wilson, who followed him in that office; Alex E. Mayhew, his party's second candidate for Congress after statehood, together with a score of others who came later but were active in the leadership of the political life of the state.

For several years but few lawyers have served in the legislature. The result has been a literal confusion in legislation. Every member seems to think his political prominence and success depends upon the number of bills he can introduce, regardless of the necessity for such legislation or its conflict with other laws or with the constitution.

In the last thirty years and apparently as a result of this great business development has grown up a system

of paternalism in government. Socialism or socialistic tendencies prevail. It became noticeable some thirty years ago under the appealing title of "Social Justice." Our people apparently have become wedded to this socialistic idea and instead of doing for themselves, take their every need to the national or state governments asking for financial aid. They desire to have the government do for them what they should do for themselves. The redistribution of wealth which some demand is being gradually accomplished through these large public expenditures and increased taxation.

It is difficult to suggest action for another person, but I suggest for your consideration the following:

(1) It is needless to say that as members of the Bar, we stand immovably behind those responsible for the conduct of the war in which we are now engaged and for every help to our military forces wherever they may be. That any sacrifice necessary for success not only meets our approval, but has our active support.

(2) That the members of our profession give not less to their private business affairs, but more to the consideration of public questions. That they not refuse to serve the public in positions where their peculiar qualifications are valuable. Especially is this true in legislative bodies.

(3) That they give thought to the idea that amassing of wealth qualifies a man for public service and especially as a member of the legislature. Also to the idea that a man can be a good legislator where he is elected upon the basis that he is favorable to some particular class or group of citizens.

(4) To the prevailing idea of progressive socialism in our public affairs and the growing tendency of groups to encourage paternalism in government.

(5) That the Bar stand firmly for an adherence to the constitution of the nation and the state in the administration of law, in the enactment of law, and the interpretation of law. And against the idea that almost anyone who will promise to promote the interest of some group is a good legislator and that he has no concern as to whether the legislation is needed, is beneficial, or is constitutional.

(6) But when the war is over the making of a peace is just as important as the conduct of the war. Isolationism is dead and we should frown upon any attempt to resurrect it. Those responsible for this war and its atrocities, must be punished, but vindictiveness towards the common people of a nation should not be exercised. We cannot give consent to

the principle of community, or collective, responsibility for the crimes of individuals.

(7) And lastly but more important than all, that we eternally and at all times stand against the creation or maintenance of class hatred or class distrust among our own people.

We are proud of the greatness, the progress, the wealth and the might of our America, but we prize more highly, and hold more dear, the personal liberty, the justice and the self government guaranteed to us by our Constitution. We shall hold fast to the ideals of its makers. We shall strive for that "more perfect union"—"justice"—"tranquility"—"general welfare" and "blessings of liberty"—secured to us by it.

When the war is over, we shall insist upon a return to the people, every right and every privilege guaranteed by the Constitution, which we now gladly surrender, realizing that "individual rights end when the national welfare begins."

PRES. THOMAS: General Martin, we sincerely thank you for such an outstanding address, your keen logical analysis and sound conclusions. I am sure that it is more than that to us and that we will hereafter read and reread it. On behalf of the bar and personally I extend to you and Mrs. Martin our sincere and best wishes for joy and happiness today and during the coming years.

FRIDAY, JULY 10

(Afternoon Session)

PRES. THOMAS: Gentlemen, first is a committee report. "Proposed Legislation" by Alvin Denman of Idaho Falls. I will appoint as the committee George Ambrose, H. B. Thompson, Ralph Albaugh, Alvin Denman, Jess Hawley and Marshall Chapman.

ALVIN DENMAN: It has not been my privilege to sit with the Bar legislative committee excepting once or twice during the session of the last legislature, so my report to you will necessarily reflect my own ideas on legislation, rather than that of any other members of the bar.

The public's most popular pastime during a session of the legislature is to berate the legislators, and the members of the bar usually heartily join in this sport.

Since only a few lawyers ever serve in the legislature, it may be appropriate to scrutinize this branch of our

government for a moment. The members of the legislature are restricted by section 23, article 3 of the Constitution to a maximum salary of five dollars a day and a total of $300 for any one session. Now we know that we never get something for nothing. We cannot expect to send the most representative citizens to the legislature on five dollars a day.

We ought to champion a constitutional amendment which will lift the maximum salary to at least ten dollars a day and a total of $600 for any one session. The time is most opportune. This is an era of controlled inflation. The public is in a tolerant mood toward salary increases. Since it directly affects one of the three major branches of government, the Bar could very properly advocate this change, which we all realize should have been made long ago. The public would probably be very favorable toward our advocacy of such an amendment, because we could explain that it would not benefit the lawyers. We could be the unselfish champions of a distinct improvement in our government. The governor's salary has just been increased from $5,000 to $7,500 a year. This increase was right, and it is only right to increase the legislator's salary.

A more radical but more vital change requires legislative action for effective control of speed on highways. A great lesson of this war is that we can get along at forty miles an hour, and thereby save thousands of lives. If we can get along in time of war, when time is the very essence of our existence, surely we can limit our speed in time of peace. The time will come when we shall distinguish traffic where speed is essential and that where it is not; when we shall allocate the air to speedy traffic, and reserve the highways for that which does not require high speed. That time is probably here. The Bar of this state could render no greater service than by launching a bold campaign to permanently limit highway speeds to approximately forty miles an hour.

Thoughtful people have long wondered at what point the speed of automobiles would be limited. They have seen the manufacturers step it up from twenty to forty, to and even over a hundred. They have believed that no highway could be built to stand up under such speeds; that no automobile could be trusted at a hundred miles an hour. They have been alarmed at inevitable rising traffic fatalities. Along comes war and restriction of speed, and thousands of lives are saved, and other thousands spared maimed and disfigured bodies, because the forty mile limit has taken the place of unrestricted speed.

It will not be necessary to slow down traffic; simply intelligently allot speedy traffic to the airplane, and other traffic to the automobile. There will be an abundance of airplanes at the close of the war to carry fast traffic at terrific speeds, but it will require a good many years to replace the automobiles. Those already built will be especially unreliable for high speeds.

The only one way is by requiring every car to have a governor so that the speed hounds cannot exceed the limit. Those who want to use fast driving to commit suicide should use some method of disposing of their own lives that will not endanger the lives of others.

No one can disagree with the object to be attained. That object will justify the only means by which it can be obtained. Something like this must be done to save lives; and we must not be afraid to be pioneers. All other methods have failed. Tho the Bar has never before done anything of this kind, we can for once step outside our usual scope of activity in order to help solve a national menace. We can really be useful besides being ornamental.

We must expedite the administration of justice. If we could but transplant some of the excessive speed in automobile traffic to the horse and buggy speed of our courts, we would mark this as an outstanding era in the adminstration of justice. We have made very little progress since Chief Justice Taft said that the administration of justice in this country is a disgrace. Our slow processes simply do not fit this modern era of rapid decisions and lightning speed. Business executives must make prompt decisions which are just as important as most of the legal questions presented to our courts, while we are still the poky members of our national life.

We must not be content to say that since it has always been that way, it must continue to be so, nor resign ourselves to the conclusion that nothing can be done about it. It will do little good to advertise until we can advertise positive assurance of speedy action.. Our clients question, "How long will this take?" Today we have to give an evasive answer, because we don't know; and we lose thousands of dollars worth of business because of our present helplessness. The most industrious lawyer cannot overcome delay and more delay in litigation. Some legislative changes might help. Section 57-502 I.C.A., which requires judges to file affidavits that they have decided all matters finally submitted thirty days before the affidavit as a condition precedent to getting their monthly salaries, might be made effective by providing a forfeiture of a reasonable portion of the judge's salary to the litigant injured by delay of

more than thirty days. Justices of the peace, whose offices exist for the sole purpose of quick justice, might be required to forfeit all fees to the injured party where they fail to try the issue promptly as now required. And by all means, the supreme court should be required to call in another judge where one judge is disqualified. Recently I have had to twice argue the same case before the same four judges when one deemed himself disqualified. The judgment of the district court in one of those cases stands affirmed today for the sole reason that the four judges could not agree upon a decision. And in still another case, an injunction action, where an early decision should have been given, an equal number of judges disagreed, and action was delayed another six months for another argument before the same four judges.

Minor legislative questions should receive serious attention. Although sections 11-213 and 11-216 I.C.A. require the clerk to certify on appeal exactly what papers were used by the district court, the clerk does not know what papers were used by the judge. If he makes the certificate he either does so upon hearsay or just guesses at it, and if he doesn't, the appeal will be dismissed, as in Farm Credit Corp. v. Mulliner, 48 Idaho 306. The judge should be required to make such certificate if he fails to state in his findings what papers were used by him.

The farm labor lien law should be amended to permit a farm laborer who summer fallows to foreclose his lien within a fixed time after the crop on which he labored is planted. Under the present statutes, he must foreclose within six months after filing his claim of lien. Oftimes this compels him to start action long before the crop is even planted, which brings about an absurd situation. He should have the privilege of perfecting and foreclosing a lien on the crop he has produced, the same as the farm laborer who works on an annual crop.

I voted for the 1937 amendment that reduced the six months residence requirement of divorce to three months. I wanted at that time to abolish the requirement altogether, and still believe it should be abolished. We don't require residence in any other kind of action; what has been accomplished by requiring it in divorce actions?

There is likewise little that can be said in defense of the requirement of corroborating evidence in divorce actions. It encourages perjury and produces strife among the relatives of the litigants, because the relatives are usually dragged in as corroborating witnesses.

Judge Taylor thinks the recrimination statute should be repealed. He has recently been compelled to deny

a divorce to a couple who have lived apart eleven years because both have grounds for divorce. The recrimination statute will never force them to forgive and forget. If they do they may, after divorce, immediately remarry.

Hundreds of bills contain the stereotyped section that, "Any person who violates the provisions of this act shall be guilty of a misdemeanor." This is the lazy man's way of drawing a bill. While sometimes there is no other practical way to provide a penalty, it is often possible to provide a forfeiture or a waiver of rights or multiple damages for the violation of the law. Such provisions are far more effective, because prosecuting attorneys are reluctant to charge a person with crime unless the offense involves downright dishonesty or violence.

An example of the kind of penalty which is really effective without resort to classifying violators as criminals is contained in chapter 5, title 52, I.C.A. requiring firms using assumed names to file a certificate showing the real owner. They cannot prosecute an action without alleging and proving compliance; failure to file is prima facie evidence of fraud in procuring credit. The law does make the violator guilty of a misdemeanor, but that provision may just as well have been omitted. It is seldom used. A little ingenuity will enable legal draftsmen to provide effective penalties instead of the trite and usually useless misdemeanor provision. Hundreds of such provisions ought to be repealed, and operative penalties substituted.

Chapter 46 of the 1937 Session Laws, which provides that no one but a blind person shall carry a white cane, contains a section declaring any person violating the chapter guilty of a misdemeanor. The interesting thing is that this section was stricken out in the senate(Senate Journal of January 27, page 12, January 28, pages 6 and 7, and February 4, pages 10 and 11), and the house journal, February 6 at page 2, shows concurrence. Yet it appears as section 3 of chapter 46. If any attempt is ever made to convict a person of violating this section, counsel will be able to clear him. Maybe this thing has happened before; it might be profitable for criminal lawyers to search the journals of the two houses before completing the defense of their clients.

The 1941 session sent to the governor a bill drawn by a very able lawyer establishing a state department of insurance. The bill had to be vetoed because it repealed all the laws creating the major departments, re-enacted them with the department of insurance included, but omitted the newly created departments of public assistance and charitable institutions. When the bill was drawn the author had no idea that before it could be enacted the legislature would create the last named departments and he probably was not retained to follow it from its introduction to the governor's desk. This suggests to us that attorneys who draft bills emphasize to their clients the necessity of someone being retained to follow the bill from its birth to the end, in order to avert an untimely death.

These are very unusual times, and my report makes some very unusual recommendations, but unless we adjust ourselves to the times, we become useless. I therefore unhesitatingly advocate the program as necessary legislation.

MR. OSCAR WORTHWINE: Is there a permanent committee to whom proposed legislation can be submitted at this time?

PRES. THOMAS: There will be one set up after this meeting.

MR. WORTHWINE: From personal experience of my own, I am preparing a measure to improve lien rights of the mine laborer. Under existing statutes their lien is on the mine or mining claim. While it has never been passed upon in this state, in other states such a lien reaches only the ore in place and not concentrates produced from the ores. I ran into it to the detriment of twenty-two laboring men, where practically the only assets of the mine were the concentrates which they had produced. That should be corrected.

PRES. THOMAS: Anyone else who has in mind some proposed legislation, should send it direct to the secretary, Mr. Griffin, and it will be referred to the committee.

MR. GRIFFIN: It is advisable, if you have proposed legislation, to draft what you think should be enacted and send explanations. The committee is appointed before the legislature meets and is composed primarily of Boise lawyers because they can get together; they endeavor to look over the whole field and see that they are not affecting something else. Usually they start work in December. So the earlier you get your proposed legislation in the better for the committee as they have plenty to do and they do plenty.

MR. GEORGE L. AMBROSE: With reference to increased pay of legislators. I was in the last senate. The legislature passed a bill providing funds to pay our expenses, relying upon a decision of a Washington Court under the Washington Constitution. Our Supreme Court ruled against it. Mr. Denman suggested a Constitutional

amendment. In view of the war situation it would not be advisable now for we have plenty of taxes. I know the legislators can't live on $5.00 a day but I object to the increase during the war.

PRES. THOMAS: The next subject is in line with the excellent discussion we had here last year. The title this year is: "Medical Evidence and Examination of Medical Experts."—H. B. Thompson of Pocatello.

MR. THOMPSON: I present a discussion on medical testimony. I would feel a diffidence in the presence of men as well or better qualified than I am but for the fact that it is not so that all men in a profession know the same thing in the same way. Many things I shall say will not be new to you but I hope that some may be helpful.

The examination and cross-examination of a physician is, or ought to be, a search for the truth, both factual and scientific. This requires consideration of two questions, first, preparation, and secondly, presentation, and perhaps thirdly, exploration on cross-examination.

Concerning the first point, I suggest that the lawyer first prepare not only on the law, but that he assemble and marshal all the available facts which it may be pertinent for his physician to consider, and inform himself on the medical phases of the case so far as he reasonably and conveniently can before discussing the matter with a physician. I suggest this course because it is likely that both the lawyer and physician are busy men. Many physicians are not used to expounding their subjects to laymen and they are apt to speak in terms such as one physician is accustomed to using with another physician and unless a lawyer has educated himself somewhat in advance it is a possibility, if not a probability, that some of the important things which the physician tells him will go over his head and not having registered will not be further explored and developed. Of course it must be in many cases that the facts and medical information that the lawyer has acquired before the conference will be quite incomplete and will only serve as an introduction to the development that the conference will afford. Having had the first conference with your medical expert you will proceed to further explore and develop the facts and your expert will formulate his opinion in the light of the facts as finally developed. If following this you have not finally educated yourself you may have committed a serious error because after you get into the court room and are required to meet the cross-examination of your witness or to cross-examine the opposing expert you do not have a medical interpretor at your elbow but you are on your own, and

if you are not educated on your subject you cannot expect to successfully cope with a physician who espouses a theory opposed to the theory of your case.

In the presentation of the evidence it is important to bear in mind that the physicians think and talk in the language peculiar to their particular science and that even you in the course of your conferences with them and in preparing your case may become so schooled in their terms that having sensed an answer which is intelligible to you you may conclude that your examination or cross-examination is complete. But what the doctor has been saying may be Greek both literally and figuratively to the men who may pass final judgment, the jurors. It is important therefore to see that before you are through with the examination every technical term be translated into as simple and plain laymen English as the circumstances will permit.

To a physician an ecchymosis of the orbital area is merely a black eye, but to some juror it may import total and permanent disability. To the physician static neuritis is rheumatism, an alveolar abscess is an infected tooth, and epistaxis is nose bleed. The mystification that a physician can create by the strict use of technical terms is illustrated in the advice given to a mother with respect to her child. The diagnosis of a young physician was that the child had tonsular hypertrophy, endocardytis and chorea. His senior associate told the mother that the child had infected tonsils and heart leakage resulting in St. Vitus dance, and prescribed removal of the tonsils, avoidance of overexercise and proper diet.

Next, the examination should be as brief as is consistent with clarity. The minds of many jurors are quite limited under the best of circumstances, and should not be needlessly overloaded, and if you are too prone to unneccessary exploration you may create a fog which will envelope the jury or possibly the court.

In the preparation of the defense remember that in every serious case there is a hospital record. Normally that contains something of the history of the case and the patient's preceding ailments and disabilities as given by the patient to the physician, followed by a pre-operating diagnosis, a record of what was done, often times a pathological report upon the organs affected or removed and subsequent medical history.

While under the state practice it is debatable whether a physical examination in advance of trial may be compelled by the defendant, yet it may be requested and in a

majority of cases it is acceded to because refusal to submit to a physical examination is pertinent evidence against the person so refusing. Under our proposed Practice Rules provision is made corresponding to that contained in the present Federal practice. Ordinarily as a result or part of the physical examination the hospital record and history of the case come into the picture. If access to the hospital record may not be properly secured in advance of trial it at least can be secured upon the trial. Ordinarily one of the first steps of a physician upon being employed in a case where a patient complains of a serious injury is to secure a history of the case. Almost without exception the plaintiff's version of the history of the case is recited by him, and at least a part of it, to his physician, so that harm is seldom done by inquiring from the physician what history of the case he received upon his assuming charge of the patient. That is certainly so where it is known that there is an unfavorable provable record. It is important to secure the history of the case both from the physician and the hospital record because in a large proportion of the cases the litigant has suffered from previous afflictions, some of which have become chronic and others of which have definitely impaired the health of the party, and it more frequently than not occurs that in the presentation of the plaintiff's case no elaboration is made of these matters. The hospital record may develop that the plaintiff has suffered from chronic ailments prior to the occurrence of the event upon which he predicates his suit, but upon which he would capitalize in his suit or demand if this were not uncovered.

The testimony of a chiropractor is of but slight value, except to jurors who have been converted to their worth. The average chiropractor will ordinarily admit that his so-called science proceeds primarily upon adjustment and alignment of the vertebrae, and that unless a case is chronic when he receives the patient he can cure him if the patient regularly submits to his treatment and follows his directions. Most cases concerning which he is called upon to testify are fresh injuries, or so claimed, and he will assert that such was the history given to him. He will then be forced to admit that when a cure of such a patient is not affected it must be because the patient did not continue to take treatments or did not follow directions. He must also admit that not having been educated in a regular school of medicine he does not know that either his diagnosis or treatment would have coincided with or been approved by an M.D. and that for all he knows a doctor of the regular school of medicine might have disagreed with his diagnosis and condemned his treatment. The same principles apply in a lesser degree to osteopaths.

A physical examination before trial is important for the further reason that where the examination is made between recesses or between one day and the next of the trial excuses are sometimes offered for delaying the examination to the last moment and for submitting the party to examination under circumstances and limitation of time not conducive to a thorough examination or study.

Under the Federal Practice it is provided by Rule 35 that a party may be required to submit to a physical examination in advance of trial and upon request the party examined shall be entitled to receive a copy of the physician's report, but if he shall request and receive a copy of the report he thereby waives any privilege that he may have in the action or any other involving the same controversy with respect to any physician who has at any time treated or examined him. Further by examining the party in advance of trial an opportunity is frequently, if not always, afforded to take x-ray pictures, sometimes called skiagraphs. The examining physician should inquire whether such pictures have been taken and inspect them and if he is not satisfied he should take or have taken for him by his own operator x-ray pictures which he knows to have been taken under such circumstances and in such a manner that they are reliable. While it is necessary in order to introduce such pictures that preliminary evidence be offered to establish the competency of the person who took them this ordinarily can quite readily be done but it is generally recognized that x-ray pictures may be taken in such a manner as will misrepresent or not clearly represent the true situation and thus form the basis for an unwarranted or misleading opinion. As was recently said by our own Supreme Court in Call vs. City of Burley, 57 Idaho 58:

> "The x-ray pictures are not like the man that looks in the glass * * * "for he beholds himself and goeth his way, and straightway forgeteth what manner of man he was'."
> James 1:23-24.

That opinion also recognizes that the position of the body or the part photographed and the angle of exposure may be important matters in the securing of a truly representative and fair picture.

I have heretofore adverted to the question of privilege secured by our statutes (Sec. 16-203, subd. 4 of the Idaho Code). It should be noted however that such privilege is not available to a party in workmen's compensation cases, it having been so held in Skelly vs. Sunshine Mining Company, 109 Pac. (2d) 622, at page 627.

The privilege may likewise be waived either by the written terms of a contract of employment or by the terms of an insurance policy or an application for insurance as was done in the case of Murphy vs. Mutual Life Insurance Company, 112 Pac. (2d) 993.

Nurses' testimony is not objectionable on the ground of privilege.

There has been some slight confusion in Idaho of recent times with respect to the weight or effect of the testimony of physicians or other experts.

In Evans vs. Cavanaugh, 58 Idaho 324, 73 Pac. (2d) 83, the syllabus reads:

> "Expert testimony as to his opinion is not evidence of fact in dispute, but is advisory and admissible only to assist triers of facts to understand and apply testimony of other witnesses."

This is the summation of language appearing in the opinion of which the following constitutes a part:

> "The testimony of an expert as to his opinion is not evidence of a fact in dispute but is advisory only to assist the triers to understand and apply the testimony of other witnesses."

From this it was assumed by some that whenever an expert testified whatever he may have said was only advisory. This decision was cited in some subsequent cases which were clarified in the case of Stroschein vs. Shay, 120 Pac. (2d) 267, in which physicians testified not only as experts but with reference to observation and treatment. At page 271 the previous cases were commented upon and the court said:

> "Their testimony was based upon hypothetical questions and not upon observation and treatment. * * * There is no distinction between expert testimony and evidence of other character as regards the weight to be given it in a particular case. * * In Langford vs. Jones, 18 Or. 307, 22 P. 1064, it was held that opinions of experts on questions of medical science, though based upon hypothetical statements, are entitled to the same consideration as other direct oral testimony, when such statements are found to be real. * * * A medical question being involved, the testimony of one learned in that line was proper, and his opinions amounted to competent and substantial evidence."

The last expression to the effect that the opinion of a qualified expert may constitute competent and substantial evidence is based upon sound reasoning and may frequently be the deciding factor of the case.

This phase of the subject merits weighty consideration. A situation may well arise where an undisputed and indisputable history of the case will appear and that based upon such history a physician of unquestioned reputation may testify that the cause of complaint resides in a previously well established condition with no qualified or other expert witness disputing him. In such a situation, for the court to permit the witness to successfully assert that the condition of which he complains arises from another cause and to permit the jury to base a verdict thereon presents a serious question which has been answered by many courts, which hold that under such circumstances the expert's testimony may be conclusive. To extend the jury principle to the point that such testimony may be disregarded is to establish anarchy in place of law.

The general rule with respect to hypothetical questions applies equally to the examination of physicians. It is error to inquire from the witness what his answer is, based upon the testimony of other witnesses, and the other evidence in the case, without its express recital, which possibly may have extended over several days, and some of which may have escaped him, but there should be propounded to him a definite statement of facts established by the record. It was so held in Evans vs Cavanah, 58 Idaho 324. Also it is erroneous to submit to a medical expert witness what purports to be all the facts in the case or a complete summary of the evidence and require from him an answer of the ultimate issue, such as whether in his opinion upon such facts the person was totally and permanently disabled. It was so held in U. S. vs. Stephens, 73 Fed. (2d) 695, and in U. S. vs. Spaulding, 293 U. S. 498.

In a medical case, as in any other, the plaintiff must establish his case not by possibilities, but by probabilities, and evidence which leads as reasonably to one hypothesis as to another tends to establish neither. This principle was discussed and applied by Judge Cavanah in Roberts vs. United States, 17 Fed. Sup. 641.

I have the temptation to discuss a subject of frequent litigation—traumatic neurosis, but I shall refrain because it would unduly prolong my presentation, and because it belongs more properly within a doctor's presentation, which I would like to hear. Most any physician in Idaho will give you a lucid explanation of compensation neurosis

together with the magic remedy. One physician defined it to be a lively expectation of benefits to come.

PRES. THOMAS: I am sorry to announce that Dr. Pittinger cannot be here. At the last moment one of his associates has been called to the army and another one is out of town. As you know, the doctor has been examined in hundreds of cases and his testimony treated as extremely reliable, and the man himself above all reproach. We are very sorry the doctor couldn't be here. Perhaps in some future meeting we will have him and again take up the medical and legal discussions that we commenced last year.

We are continuing our program on abstracts of title. The first discussion is from one well qualified, the Chairman of the Washington Committee on Real Estate Titles and it gives me great pleasure at this time to introduce to you, Mr. H. M. Hamblen.

MR. H. M. HAMBLEN: Mr. President and members of the bench and bar in Idaho, I bring to you the greetings and best wishes of the members of the bar of the State of Washington and from the President of the Washington Bar, Mr. James P. Dillard his personal greetings. He very much appreciates the invitation which was extended to him to be present at this meeting and he regrets that government business makes it impossible for him to be here.

May I also inform you of the annual bar convention of the State of Washington to be held at Spokane, September 25th and 26th. I hope some of you will be there. We would very much like to have you. Our hospitality will be as genuine as yours has been and I invite you to attend.

With reference to title examinations and the work of the Washington State Bar, it is a privilege to share a place on your program with Mr. Van de Steeg. In fact, I am a little embarassed. When it was first mentioned to me I thought we were doing something in Washington that might be of interest to you gentlemen. Our committee exists for the first time this year and in my ignorance I thought possibly it would be novel to you. However, after I had accepted the invitation to come down here and report on our work your program chairman, Mr. Smith, sent me the two reports made by Mr. Van de Steeg at the meetings in 1940 and 1941, and I discovered you had been working on this problem for three years and in almost every phase of the work were considerably ahead of us. Under those circumstances there isn't very much excuse or justification for my being present except

this one thing. I hope by being here I can emphasize to you the importance of this work. To my mind it is very important; it is important not only from a bread and butter dollars and cents standpoint but from a public relations standpoint also. Possibly I can bring home to you the importance of this work your committee is doing here. Ninety-five percent of the work in the State of Washington has gone to Title Insurance Companies, and the lawyers, to my mind, have only themselves to blame. We have been more or less of a curse to ourselves and the title companies have simply furnished better service and done a better job. But don't let this thing go by default here in Idaho as we have in Washington because it isn't necessary. I think there is a way the thing can be worked out. Title examinations don't bring in big revenue in reference to the bread and butter aspect, but you know how a few examinations a week will help pay for the overhead of your office and there is no reason why you can't keep that work. Almost more important, however, to my mind is the public relations aspect. This morning a paper was read in reference to one aspect of public relations and the public relations problem. There is another angle worth mentioning. I think I can best go into that by referring to an actual examination, giving you an illustration of what happens sometimes in these title examinations. Your client, about to purchase a piece of property, gives you an abstract of title to examine. You go through it carefully and you give him an opinion certifying the title is good and merchantable and free and clear of encumbrances. A few years later your client goes to sell that property. The purchaser takes the abstract to his attorney and he discovers that back in 1915 there was a foreclosure sale where improper notice was given or finds some other minor technical defect in title and refuses to certify it and gives an opinion to his client raising that as an objection. What will your client do? He comes back with your opinion and he has the opinion from the purchaser's attorney and his first reaction is, of course, that the second attorney is somebody who doesn't know his business or is being overtechnical or is an old fuddy duddy of some sort, and you possibly step in and encourage that idea; possibly you have to, but that isn't good for public relations. We shouldn't be criticizing our fellow attorneys on things of that sort. Anyway you go ahead and try to straighten out the defect and you get affidavits or something. Whereupon possibly your client begins to wonder whether there wasn't something that you overlooked; something to that objection in the first instance and wonders why you didn't get that straightened out yourself. About that time you come dangerously close to losing a client. Finally you get the title straightened out after three or four weeks or a month

or longer and maybe even a suit to quiet title and about that time both your client and the purchaser are beginning to think—what is the matter with all the attorneys? Why can't they get together in advance and figure those things out? There is your public relations; something that has hurt the attorneys in the past. Sometimes that has driven business away from the attorney's door.

I think we have only ourselves to blame in Washington. Anyway that's been the problem in Washington. We finally secured the appointment of a committee to work on standards for examination of abstracts. The Board of Governors apparently didn't understand the problem because out of the committee of five they appointed three attorneys employed by title insurance companies. We figured we were stymied. I want to say though that those men came in and cooperated one-hundred percent and gave us the benefit of their ideas and practice and I think, as a matter of fact, it has been extremely valuable to us to have those men on our committee. Our committee went to work and we have made some progress in Washington. We have gotten out a report advising our bar association what we are trying to do. We have adopted as a committee twenty-nine standards to be used by attorneys in the examination of abstracts of title. These things may seem needless to a lot of you but they are difficulties or defects which may cause much trouble. We have tried to lay those things to rest once and for all. We have arrived at twenty-nine standards today, which follow:

"At the outset there are two fundamentals which should be kept in mind. First, an examining attorney is giving merely an opinion of the title. The law protects him if he has used the care of a reasonably prudent title examiner,—it does not require him to be 100 per cent accurate. Second, the object of examination is to ascertain if the abstract shows a marketable title, not a letter perfect title. As stated in Cummins v. Dolan (52 Wash. 496):

> "The authorities hold that to render a title marketable it is only necessary that it shall be free from reasonable doubt, in other words, that a purchaser is not entitled to demand a title free from every possible technical suspicion, he can only demand such title as a reasonably well informed and intelligent purchaser acting upon business principles would be willing to accept."

"On the first proposition if an examiner follows the standards set up by us after careful consideration and conference and after submission and acceptance by the bar,

he will almost certainly so far as those standards are involved be satisfying the care required of a reasonably prudent title examiner.

"This does not mean that the standards proposed by this Committee will necessarily conform to ultimate decisions of the courts, or that such standards have any legal effect in themselves. But this does not destroy their usefulness—as has been demonstrated by the successful working of the plan in other states. Successive committees will correct our standards if and when they prove erroneous. Until that time we can rely on them just as we rely on a court decision until it is overruled. So far as possible, controversial matters have been avoided and every effort made to avoid giving the semblance of judicial importance to any of the proposed standards.

"The method of procedure adopted by the committee follows generally the system used in other states. Actual problems taken from the experience of our members have been gathered together and after study and consideration a recommendation has been made. These represent only a start on what may eventually be done by subsequent committees. Many of the problems may seem to deal with trifles—yet it is so often the trifling defect which causes the trouble. It is hoped that these problems and answers will be approved with the acceptance of this report and that members of the bar will assist the efforts of the committee toward uniformity by following said standards and by submitting to the committee the problems which they encounter in their own abstract examinations.

"The aim of your committe has been to liberalize standards for title opinions so far as reasonably permissible. At the same time it should be pointed out that title examinations indicate many inexcusable errors made by attorneys; and it is hoped that nothing herein will encourage carelessness or lax methods on the part of the bar in connection with documents and proceedings affecting real estate titles. * * *

STANDARD NO. 1.

Problem: Most U. S. Govt. patents have been issued subject to vested and accrued water rights, the right to extract ore, and rights of way for ditches and canals. Shall we list these matters as encumbrances in our title opinions? Recommendation: It is recommended that the attorney list said matters in his title opinion, with the added statement that no objection to the marketability of the title is made on that account. See Dopps v. Alderman, 112 Wash. Dec. 90 (Jan. 17, 1942)

NO. 2.

Problem: Some U. S. Govt. patents, particularly those issued to railroads, contain a clause: "Excluding and excepting all mineral lands should any such be found. . . ." May we disregard this exception in our title opinions? Recommendation: It is recommended that no exception be listed in our title opinions on this account. Comment: The issuance of a U. S. Govt. patent (except when based on mineral claims) has been held to be a conclusive determination by the Government that the land is agricultural and non-mineral bearing and exceptions such as the foregoing are void. See Burke v. S. P. R. Co., 58 L. Ed. 1527.

NO. 3.

Problem: State deeds expressly reserve and except "all oils, gases, coal, ores, minerals and fossils . . . . and the right to explore," subject, however, to the requirement that full payment must be made to the owner for damage to his land in event the State exercises such rights. (See Rem. Rev. Stats.7797-56.) Recommendation: It is recommended that where title is derived under such a state deed, that the attorney list such exceptions and reservations in his title opinion with the added statement that no objection to the marketability of the title is made on that account.

NO. 4.

Problem: Many railroad deeds, particularly from the N. P. RR Co. and N. P. Ry. Co., contain reservations of railroad rights of way and of Coal and Iron lands. Recommendation: It is recommended that the examining attorney list such reservations in his title opinion. Comment: A floating railroad right of way is not extinguished by non-user or by ordinary adverse possession. See 142 Wash. 204.

The purchaser or mortgagee for whom an attorney is examining will ordinarily be justified in accepting the title subject to the above exceptions on the basis of a reliable affidavit or report that no railroad has been located and that the lands in question are non-coal or mineral bearing.

NO. 5.

Problem: May interlopers in the chain of title be disregarded? Recommendation: It is recommended that a conveyance or mortgage appearing in the abstract from a person who appears never to have had any connection with the property may be disregarded as not constituting any cloud on the title, except where the conveyance or mortgage is the last instrument in the chain of title. Comment: See Cummings v. Dolan, 52 Wash. 496.

NO. 6.

Problem: When may discrepancies in names or initials of parties in the chain of title be disregarded? Recommendation: (a) In identifying a grantor with a prior grantee, it is recommended that the following discrepancies be disregarded unless the abstract discloses other information creating a reasonable doubt as to the identity: (1) If the party is designated by a full Christian (given) name and a full surname (family name), discrepancies in the spelling of either or both may be disregarded so long as the pronunciation remains unchanged. e.g. Lewis Haywood and Louis Heywood. (2) If the party is designated by a full Christian and full surname plus a middle initial, discrepancies in the initials may be disregarded. e.g. Lewis E. Haywood and Lewis R. Haywood. (3) If a party is designated in one place by a full Christian name and in another place simply by initials, identity should be established by affidavit or otherwise, unless the last discrepancy is more than 10 years old, in which case the discrepancy may be disregarded if the first initial corresponds to the first letter in the Christian name. (b) Where the discrepancy appears in a court proceeding affecting the title in which process or notice is served on the owner and he does not appear, the discrepancy may not be disregarded, unless the pronunciation thereof is substantially the same within the rule of iden sonans. Comment: See generally Kelly v. Kuhnhausen, 51 Wash. 193. Carney v. Bigham, 51 Wash. 452.

NO. 7.

Problem: (1) May an examiner disregard the omission of a notarial seal on the acknowledgment of a recorded conveyance? (2) May other defects in the form of an acknowledgment of a recorded conveyance be disregarded? Recommendation: (1) It is recommended that omission of the seal be disregarded if the deed is 10 years old, or if it be shown that the notary was in fact duly commissioned at the time the acknowledgment was taken. (2) Defects in the form may be disregarded although good practice will suggest correction of the defect and re-recording wherever it is possible. Comment: See In re Deaver's Estate, 151 Wash. 454. Rem. Rev. Stats. Sec. 10599.

NO. 8.

Problem: May an examiner pass over a conveyance or a release executed by a corporation on which the cor-

porate seal is omitted? Recommendation: It is recommended that such defect be passed, if the authority of the officers to execute the instrument can be otherwise established, or if the deed is at least 10 years old. Comment: See Oldfield v. Angeles Brewing & Malting Co. 77 Wash. 158.

NO. 9.

Problem: In support of a corporation's conveyance, mortgage or release, must the resolution or other authority for the same be supplied? Recommendation: Not if the instrument is (1) Executed by the President or Vice-President and Secretary, and also (2) Is either under corporate seal or is at least 10 years old.

NO. 10.

Problem: When may a contract of sale be disregarded —title having been retained, or conveyed to someone other than the contract purchaser, and there being of record no relinquishment or quitclaim deed from the contract purchaser? Recommendation: It is recommended that if the contract contains a specific provision for consummation on or before a fixed time, that after the lapse of ten years from the expiration of the time limit, it should no longer be considered an encumbrance, provided it is shown that purchaser or others claiming under purchaser have not been in possession within the last ten years.

NO. 11.

Problem: After what period of time may an unreleased mortgage be disregarded? Recommendation: It is recommended that the title be certified in disregard of the mortgage if there has been reasonable activity in the title for a period of 30 years without recognition of the unreleased interests. Comment: "Reasonable activity" may be considered too indefinite a criterion, but this is a situation where some discretion must necessarily be exercised. Ordinarily if, spread over the 30 year period suggested, there are at least 5 instruments such as warranty deeds or mortgages which would be expected to refer to old claims if there were any substance to them, the title should be considered reasonably active.

NO. 12.

Problem: A mortgage is placed of record followed by the recording of a "correction mortgage" which corrects or revises the first instrument in some regard and contains a recital to that effect. The correction mortgage in due course is released, but the original mortgage is not.

Is it necessary to require a release of the original mortgage? Recommendation: It is recomended that the title be passed without requiring a release of the original mortgage.

NO. 13.

Problem: May the examining attorney pass a mortgage as released when the release properly describes the date and amount of the mortgage but fails to refer to the book and page of recording? Recommendation: It is recommended that such mortgage be treated as released if the abstract shows only one mortgage which fits the description as to date and amount shown in the release and if the abstracter will add a notation that there is of record no other mortgage between the same parties of the same date and amount covering this or any other property.

NO. 14.

Problem: May the examining attorney pass a mortgage as released when the release shows the correct book and page of recording but shows an incorrect date or an incorrect amount for the mortgage? Recommendation: It is recommended that the mortgage be passed as released if the abstracter will add a notation that there is no other mortgage of record between the same parties on this or any other property of the date or amount referred to in the release.

NO. 15.

Problem: May the examining attorney pass a mortgage as released when the release identifies the mortgage by correct date and amount but refers to the wrong book and page of recording? Recommendation: It is recommended that the mortgage be passed as released if the abstracter will add a notation showing that there is no other mortgage between the same parties recorded at the book and page referred to in the release, and that there is no other mortgage of record between the same parties having the same date or for the same amount.

NO. 16.

Problem: A deed runs to a grantee without showing name of grantee's wife, or grantee's marital status. Later grantee and his wife convey the property away without any recital that they were husband and wife at the time they acquired title. May an examining attorney pass the title in this condition? Recommendation: It is recommended that the title be not certified without objection on this account unless it appears from other insruments

in the abstract or from reasonable collateral inquiry that grantee had the same wife or was unmarried at the time he acquired title. Comment: Strictly speaking it is possible for the wife of a grantee to have died (or to have been divorced) after title was acquired and the grantee to have remarried before conveying so that if the first wife died leaving children the title to an undivided one-half would be vested in them (or in case of divorce in the divorced wife). As a practical matter however experience shows that it is almost impossible for this to happen without some notice thereof appearing in the records. There are thousands of conveyances which fail to name the grantee's wife and it is often impossible to secure any showing with reference thereto. This is a situation where the extent of the inquiry to be made must be determined by each examiner in the light of the particular case.

NO. 17.

Problem: A deed is given to John Smith, Trustee, without naming a beneficiary and without setting forth any trust. There is no declaration of trust or other trust instrument shown in the abstract. Thereafter, there is a conveyance from John Smith, Trustee. May the conveyance be considered sufficient? Recommendation: It is recommended that the conveyance be considered sufficient in the following circumstances: (1) If the instrument creating the trust is obtained and placed of record showing trustee's authority to convey, or (2) If the conveyance is 30 years old and John Smith's wife joined in executing the deed—no further reference to any trust being made in later instruments. (3) If (for more recent conveyances) the wife joins in the deed and satisfactory showing by affidavit is made that there were in fact no trust restrictions. See Davidson v. Mantor, 45 Wash. 660. Reilly v. Hopkins, 133 Wash. 425.

NO. 18.

Problem: There is a conveyance to A without any showing or indication of A's marital status. Later A conveys, again without any indication of marital status. An affidavit is supplied showing that A was unmarried at the time of acquiring title. May the examiner pass the conveyance on the basis of such an affidavit? Recommendation: It is recommended that the conveyance be passed. Comment: See Singer v. Guy Investment Co., 60 Wash. 674.

NO. 19.

Problem: There is a conveyance to A. Later X Y and Z convey the property by deed containing a recital that X Y and Z are the sole heirs at law of A, deceased. A disinterested affidavit is also supplied showing that X Y and Z are the sole heirs of A. May the title be passed in this condition without probate of A's estate? Recommendation: It is recommended that the title be passed if the conveyance from the heirs is 30 years old and if the affidavit establishes the death of A prior to 1901 (when the inheritance tax law was enacted) or if subsequent thereto, that waiver from the inheritance tax division be obtained. Comment: It is recognized that ordinarily an affidavit to establish heirship will not be accepted as sufficient (See Crosby v. Wynkoop, 56 Wash. 475). Nevertheless where a disinterested affidavit is supplied and the deed from the heirs is at least 30 years old, so that subsequent owners have held under color of title for a period exceeding the combined total of 21 years plus the statutory limitation period, it is thought that an examiner may reasonably consider the title marketable. Of course if there is no deed from the heirs the title cannot be passed simply on the strength of probate proceedings on the estate of A's spouse. (See France v. Freeze, 4 Wash. (2nd) 124.

NO. 20.

Problem: It appears from the abstract that a deed in the chain of title was placed of record after the grantor (or one of the grantors) died. Recommendation: It is recommended that a reliable affidavit be obtained showing when the deed was delivered and if possible the actual consideration paid. If the delivery was made prior to grantor's death the deed may be treated as a valid conveyance. If the deed was delivered within 2 years of grantor's death and the full market value was not paid therefor, an objection may be noted covering the possibility of a lien for State inheritance tax or Federal estate tax. Any deed delivered after grantor's death or conditioned for delivery upon grantor's death will not be passed as valid.

NO. 21.

Problem: May title be passed based upon a recorded statutory community contract between husband and wife? Recommendation: It is recommended that the same be approved upon proper showing of record by affidavit or otherwise that the spouse has been deceased for more than six years, that the parties were married at the time of such decease and that the property is exempt from inheritance and estate taxes, or that the same have been fully paid. (See Rem. Rev. Stats. 1368, 6894).

NO. 22.

Problem: Under what circumstances may the conveyance of a person who has been committed to a State

Institution in insanity proceedings, and subsequently discharged as recovered, be regarded as sufficient? Recommendation: It is recommended that such a conveyance be considered sufficient where an order restoring to competency has been entered in the proceedings under which such person was committed.

NO. 23.

Problem: Under what circumstances may a deed or mortgage executed by an executor under a non-intervention will be passed where the estate is in process of probate? Recommendation: It is recommended that such deed or mortgage be passed in either of the following situations: (1) Where the will contains specific authority for the conveyance in question and there are no inheritance taxes or such taxes have been paid, or (2) Where an order of solvency has been entered and a showing is made that the conveyance is for an administrative purpose and there are no inheritance taxes or such taxes have been paid; or (3) Where a petition to sell or mortgage is presented to the court showing necessity for selling or mortgaging for administrative purposes and the regular procedure followed as prescribed by statute for intestate estates.

NO. 24.

Problem: May the examining attorney pass a mortgage as released when the release is executed by the executor or administrator of the estate of the mortgagee, which is in course of probate in another county or state? Recommendation: It is recommended that such mortgage be treated as released if certified copies of the portions of the foreign probate showing due and proper appointment and qualification of such executor or adminisrator, be recorded in the county where the real property is situated and showing made that the letters have not been revoked at the time of executing the release.

NO. 25.

Problem: A mortgage held by a corporation is released by an attorney-in-fact acting under a properly executed, acknowledged and recorded power of attorney from the corporation. Is it necessary for the release to bear the corporate seal? Recommendation: It is recommended that the release be passed without the corporate seal.

NO. 26.

Problem: A, a mortgagor, conveys the real property subject to the mortgage to B, the mortgagee. Recommendation: (1) Where the deed contains the recital that is given in extinguishment of the mortgage and the debt secured thereby, such deed may be treated as extinguishing the mortgage and transferring the fee interest to the mortgagee. (2) Where the deed contains no recital of intention of extingishing the mortgage by the conveyance, there is only a presumption of merger, the ultimate effect depending upon the intention of the parties. Such deed may be given effect as an absolute conveyance, where mortgagee executes a release, or where he subsequently conveys with a warrant against the encumbrance. Comment: The vital and essential thing to the validity of a deed taken in lieu of foreclosure of a mortgage is that the debt secured by the mortgage must be cancelled. If that is not done and the relation of debtor and creditor continues, then the mortgage lien continues.

NO. 27.

Problem: The abstract shows that the patent from the United States has not been recorded there being merely a take off from the records of the U. S. Land Office. Recomendation: It is recommended that the attorney make note of this fact, and recommend that the patent, or a certified copy thereof be recorded, with the added statement that no objection to the marketability of the title is made on that account. Comment: Title by patent from the United States is title by record and neither delivery to the patentee nor recording of the patent in the office of the county auditor is necessary in order to give it validity. The patent should be recorded however in order that the evidence of title may be readily available. See Sayward v. Thompson, 11 Wash. 706.

NO. 28.

Problem: The abstract shows an unreleased claim of lien of mechanics or material men's that has been filed for a period in excess of eight calendar months. Recommendation: The treatment of such liens is largely a matter within the discretion of the examiner based on consideration of the facts of each case. If the lien notice contains no statements about the extension of credit, liens of small amount may be safely ignored after eight months from the date of filing. Liens of large amounts should be investigated before being passed, and if possible releases should be required, unless at least 2 years old. Comment: Rem. Rev. Stats. 1138 provides that no such lien shall bind the property subject to the lien for a longer period than eight calendar months after the claim has been filed, unless an action be commenced in the proper court within that time to enforce such lien; or if credit be given, then eight calendar months after the expiration of such credit. The Supreme Court has not decided whether the credit given must be stated in the lien notice in order to extend the

lien beyond eight months. If an effective extension may be given without such extension being set forth in the notice, then it cannot be determined from the records whether a lien is outlawed.

NO. 29.

Problem: Secs. 841 and 842, Rem. Rev. Stats. refer to the serving of "notice" on tenants in common in partition proceedings. Is the requirement satisfied by the serving of a summons in regular form? Recommendation: It is recommended that service of summons be considered sufficient."

We don't feel our work is completed by any means. We intend to continue the work of this committee and we are asking our fellow attorneys to submit their problems and, if possible, standards will be arrived at.

We haven't done nearly as much work as we would like to. We haven't touched the problem of cutting down or eliminating certain matters in abstracts which your committee has done. We all know what a curse it has been to have abstracts full of unnecessary proceedings. It is expensive to our clients and it is difficult for an examining attorney to go through a lot of unnecessary stuff.

In Washington we have had an unfortunate example in losing so much of this business. I think with this committee, we have got our foot in the door and I hope we can keep it there. In Idaho you are fortunate and the door is open. If you give Mr. Van de Steeg and his committee your support you will certainly keep this work in your own hands.

MR. E. B. SMITH: I would like to suggest that similar standards be distributed by the Idaho State Bar. I believe that the committee which we have appointed would have sufficient power to make those same recommendations and that they be disseminated to the various members of the bar.

PRES. THOMAS.: Next is along this same line. "Progress in Idaho," by George H. Van de Steeg of Nampa.

MR. VAN de STEEG: I want to express my appreciation to Mr. Hamblen for the talk which he has just given us.

As those of you who attended our 1940 and 1941 meetings know, or have read in the proceedings of those meetings, we started with this matter of title examinations purely as a local effort. The lawyers of Nampa became

convinced that unreasonable objections and requirements were being made by ourselves, as well as others, in our examinations of titles, which objections were in many instances, as we well knew, not well taken, and resulted only in increasing the expense to our clients and making them disgusted with the legal profession.

So we attorneys resident in Nampa found that we could agree unanimously on quite a number of matters that were common to many of our abstracts. Specifically, there were a half dozen or more estate proceedings with which we were thoroughly familiar having examined the said proceedings time and again; we knew they were sufficiently regular so that they could properly be accepted and passed. To insist that these proceedings be abstracted at length we agreed was a useless and unnecessary expense which served no useful purpose. Therefore, we said that, so far as we were concerned, we were going to pass them. Likewise, there were quite a number of judicial proceedings with which we were thoroughly familiar and satisfied, and these we agreed among ourselves we would pass without making the requirement that they be set out at length in the abstract.

The committee representing the Nampa Bar made a report to the Seventh Judicial District Association, which report embodied the views of the members of the Nampa bar. Last year I was unable to report to you that the District Association had accepted and approved that report. Today, however, I am able to tell you that our District Association has approved and adopted the recommendations contained in the report of the Nampa bar.

However, even before we had this approval, in fact, for the past two years, we lawyers at Nampa have examined our abstracts on the basis of the local agreements we had amongst ourselves. And it has worked out most satisfactorily. Now, instead of picking every little flaw and making it an objection to the the marketability of the title, instead of construing everything we can find in the abstract "against the title", we cooperate together with a view to waiving everything that isn't really serious, in an honest endeavor to find the title O. K., unless there is something seriously objectionable, or something as to which there is reasonable doubt. There isn't one single, solitary case that I know of where a question in title examination has come up between two members of the Nampa bar that hasn't been speedily and satisfactorily resolved, without bringing the client into it at all. If the two attorneys are not able to see eye to eye on the question after discussing it between them, they submit it to our local advisory committee, and it is threshed out and so far as I know there never has

been a case that wasn't mutually agreed upon and worked out by that method. Now, suppose however that there is an outside lawyer who is raising the objections to our titles, what then? Well, we have already found that if he is a Boise or Caldwell or Payette or Weiser attorney, and we are able to assure him that we members of the Nampa bar have agreed to pass the objection, in no case has the outside attorney refused to follow us. All they want to know is that we O. K. the matter in Nampa. They don't even want it in writing. I have had them call me by phone time and again to ask what we do regarding such and such a matter, and when I tell them that we do not find it objectionable anymore, that settles it and they also pass it.

At least two times during the past year I have had out of state attorneys raise objections to matters we had agreed locally to pass. In each case I wrote the attorney a nice letter telling him that his opinion had been referred to me to see what could be done about the matter, that I fully appreciated that he was quite justified in making the objections he did not being familiar with the local conditions, and then advising him that our Nampa bar knowing all about the facts had adopted a resolution that we would no longer raise any objection to the particular defect he pointed out, but would pass it without even making any comment on it. In each case I received a prompt reply advising me that, in that case, he also would pass it but would state in his letter of opinion that he was passing it upon the precedent established by the Nampa bar.

At Pocatello in 1940 and again last year at this place, I urged that our attorneys elsewhere throughout the state get together as we did at Nampa and iron out these title matters that were common to their own immediate localities. I am not able to tell you whether much progress has been made in this direction. If there has been, I have not been advised. Of course, I know that at Caldwell a committee has been working for more than a year, but they appear to be having more difficulty than we did at Nampa in agreeing among ourselves.

To date what we have been doing is endeavoring to establish and to have accepted by title examiners elsewhere certain standards of procedure as to specific matters shown upon abstracts that were of local import only.

The time has now come, it seems to me, that we should go beyond these purely local matters and establish some general standards to serve as a guide and to become a rule of practice among all title examiners. That is what is going on in other states and there would appear to be every justification for us in Idaho to help the movement

along. With that end in view your committee appointed on title examinations has met and done some preliminary work along the line of General Standards which it is thought might well be adopted in Idaho. The whole idea is to obtain uniformity amongst all the attorneys throughout the state on identical problems presented in abstracts. The adoption of Standards, will, or ought to accomplish this purpose.

In addition to the adoption of Standards, it also seems to me that we should make a study of possible curative statutes such as other states have enacted into law. I believe that a careful study of such statues would enable us to present to the Legislature proposed laws which would enable us in the future to overlook and disregard a great many matters that we now feel in duty bound to point out as defects in the record. I understand that Oregon and many other states regularly enact such curative statutes. Certainly they wouldn't do it unless it found favor with both the bar and the public. In this connection I have never understood the reason why our Legislature in 1939 repealed the statute we had which provided that after ten years a mortgage would be conclusively presumed to have been satisfied if certain conditions were made to appear. Unless there is some good reason why such a law is not a good law, I suggest that our legislative committee endeavor to have it reenacted.

In conclusion, I feel that we have made considerable progress even though it has been slow and tedious. Perhaps we haven't accomplished much in a concrete way, but I do believe that we have done the propaganda work to an extent that the members of the bar throughout the state are interested and ready now to swing into line if we but give them something definite and concrete. The General Standards your committee will submit are definite and concrete and it is hoped will be a start toward formulating other standards, from time to time, all of which taken together will make the work of the title examiner in Idaho much less hazardous and uncertain, and much more satisfactory, because it will tend toward uniformity, and at the same time we shall save our clients considerable cost and expense.

Mr. President, if it is in order I will now make the report of this committee on title examination. Your committee on Title Examinations came to the conclusion that the time had now come when it would be advantageous to the bar and to out of state examiners of our titles, to formulate certain rules of procedure or standards for abstract examinations.

The ultimate aim and object of these standards is simply to obtain uniformity throughout the entire state amongst the members of the bar in respect of identical questions or problems that arise generally in abstracts covering Idaho real property. Incidentally, the idea is to liberalize these Standards insofar as consistent with a careful, sound and conscientious examination of the title. Needless to say, there is nothing even suggested, much less recommended, that would encourage or tend to carelessness or laxity on the part of any member of the bar in making an examination of title.

With these ends in view, your committee has drafted certain General Standards for title examinations of Idaho real property, which we submit for your consideration herewith.

In selecting these standards and in the limited time we have had we have endeavored to avoid questions that are controversial among ourselves and upon which able members of this bar may take exactly opposite views. To begin with we have selected standards upon which we think and hope there may be more or less quick and general agreement. In any case, we have made only a beginning. In future years, it is probable that other standards will be prepared, until eventually we shall be able to obtain certainty and uniformity throughout the state. Many of these standards may seem to deal only with matters that are trifling and inconsequential, but hasn't it been the trifling and inconsequential questions about our abstracts that has brought about ninety percent of our trouble?

Realizing that some, at least, of the standards we are suggesting may provoke dissent and much argument, for which there is not time available at this meeting, your committee suggests and recommends that the General Standards herewith submitted be furnished to all members of the bar of this state, with a request that they be considered and that any member who disagrees with any of the standards, make known to your committee that fact, together with his reasons for such disagreement or criticism, within six months from the date he receives the Standards, for the benefit of the committee in finally proposing the adoption of specific standards at our annual bar meeting next year.

We recommend that there be a permanent standing committee on this subject with its members appointed for three years staggered term, and that all members of the bar communicate to this committee suggestions for new standards or modifications of old or existing ones as occasion arises.

We have intentionally passed by certain standards for the reason that it was considered that the particular matter might better be handled through legislative action.

Respectfully,
W. H. Davison
Dana E. Brinck
Geo. H. Van de Steeg
Chairman.

STANDARD NO. 1 Variation in names, etc.

General Rule to be applied: No variation in the names of parties in the chain of title, whether in the Christian name or the surname, shall be considered such a defect as to raise objection on the ground of marketability, if the names are idem sonans, unless there is something else in the record examined that raises a doubt as to the identity of the parties.

(a) All well known abbreviations such as Geo. for George, Chas. for Charles, Wm. for William, Jno. for John, etc. should be passed without objection.

(b) Where a corporation appears in the chain of title the fact that the word "The" appears before the name of the corporation in one place and is omitted in another, the use of "Co." in one place and "Company" in another, and of "Corp." in one place and "Corporation" in another, should not be raised as an objection or even require extrinsic evidence as to identity.

(c) Where a party is designated as "Lewis Haywood" in one place in the chain of title and as "Louis Heywood" in another, this variation may be disregarded under the general rule of idem sonans.

(d) Where inthe acknowledgment to an instrument the name is misspelled, it may be disregarded if the notary in his certificate recites that the person whose name is subscribed thereto is known to him to be the person who executed the instrument, and acknowledged that he executed the same.

(e) Any mere discrepancy in names that has gone unchallenged for a period of at least twenty-six (26) years should be passed as cured by the lapse of time.

STANDARD NO. 2. Interloping Instruments.

Where a conveyance or encumbrance appears upon an abstract to property, executed by persons who are strangers to the chain of title, and do not appear to have any interest in the property, the same shall not be deemed

to be a cloud upon the title and should be passed. See Harris v. Reed, 21 I 364.

Quere? Should not investigation be made and evidence furnished that such stranger, or his predecessors in interest, have or have not been in possession of the property within the statutory period of limitation?

STANDARD NO. 3. Mechanic's Liens.

Where an abstract shows the record of a mechanic's lien if it does not further show that an action was instituted to foreclose such lien within the period prescribed by law, no attention should be paid to it because the lien is then dead. I.C.A. 44-510 should be amended to require any extension given to be in writing and placed of record within the six months limitation period.

STANDARD NO. 4. Mortgage—Release of

Where a mortgage release fails to set forth the book and page where the mortgage is recorded, that should not be treated as a defect if the release otherwise identifies the mortgage with reasonable certainty, particularly where the abstract shows no other mortgage between the same parties than the one intended to be released.

Also where a mortgage release identifies the mortgage by the correct book and page of its recording but there is an incorrect date or an incorrect amount for the mortgage, the identification by book and page of the recorded mortgage should be deemed sufficient and the variation as to dates or amount should not be considered a defect.

Also where the release identifies the mortgage by the correct date and amount but refers to it by the wrong book and page of its recording, the release should be accepted as sufficient if it further appears that there is no other mortgage between same parties, recorded at the book and page erroneously stated and there is no other mortgage of record between the same parties having the same date or for the same amount.

STANDARD NO. 5.

Where land has been sold under a contract, with deed deposited in escrow or to be executed and delivered upon final payment of the purchase price, and this contract appears upon the abstract, and the abstract shows a conveyance of the land to someone other than the contract purchaser, or his assigns, and there is nothing of record to show a relinquishment or quit claim on the part of the contract purchaser, may such contract be disregarded or

does the same constitute a cloud upon the title rendering the same unmarketable?

It is thought that, if the contract provides a fixed time for consummation and the contract purchaser or others claming under such purchaser, have not been in possession of the property for a period of five years after such time, the contract should no longer be considered an encumbrance or a cloud. I.C.A. 5-203.

STANDARD NO. 6.

It is recommended that defects in the form of an acknowledgment, or a variance from the form set out in the statutes, should be disregarded in all cases where there is a substantial compliance with the prescribed statutory form.

STANDARD NO. 7.

Is it necessary or proper to ask for the authority for the execution of an instrument by officers of a orporation who executed the same?

It is recommended that where the instrument is executed by the president or vice-president and attested by the secretary or assistant secretary, and the corporate seal is attached, or where the instrument is more than ten years old the authority should be conclusively presumed.

STANDARD NO. 8.

The abtsract shows a conveyance to A. Later X, Y and Z convey by deed reciting that they are the sole heirs of A, deceased. An affidavit is furnished purporting to show that X, Y and Z are the sole heirs at law of A, deceased. May we pass the title in this condition?

It is recommended that, if the affidavit clearly set forth facts, not conclusions, from which it may be determined that X, Y and Z are the sole heirs at law, and the conveyance from the heirs is more than 26 years old, the title may be passed as a marketable title without insisting upon probate proceedings on the estate of A, deceased.

STANDARD NO. 9.

The abstract shows a conveyance from A to B. A died and after his death the aforesaid conveyance is placed of record. How should we pass upon such a situation?

If A and B are strangers and the consideration expressed appears to be somewhere near the value of the

property, and an affidavit is furnished to establish the fact of actual delivery of the deed, and if the delivery was a good, legal delivery made prior to the death of A, the conveyance should be passed.

If A is the husband of B, and the consideration expressed is love and affection, or a mere nominal consideration, the conveyance should not be passed unless it can be clearly established by the affidavit of some disinterested person that there actually was an unconditional delivery of said deed to grantee or to a third person for the benefit of the grantee named in such deed, without any right in the grantor to revoke the deed or his delivery thereof and get it back into his own possession.

But any deed which is not delivered until after the grantor's death, or is conditioned for delivery upon grantor's death cannot be passed as valid.

STANDARD NO. 10.

Where a person who has been committed either as insane or non compos mentis, and subsequently discharged as recovered, executes a conveyance, may such conveyance be passed as good?

If the record can be made to show that there is an order from the court having jurisdiction of the grantor restoring him to competency, his subsequent conveyance should be considered as good, but not otherwise.

STANDARD NO. 11

Where a mortgage is released by one purporting to be the executor or administrator of the estate of the mortgagee then in course of probate, is such release to be accepted as good?

If the probate proceedings are in any county of the state of Idaho, such release will be accepted as good provided it be made to appear that the Letters have not been revoked at the time the release was executed and the executor or administrator has not been discharged.

If the probate proceedings are in a foreign state, certified copies from the foreign court of probate should be required to establish the appointment and qualification of such executor or administrator and recorded in the county where the mortgaged real estate is situated, and also a showing should be required that the Letters have not been revoked at the time of the execution of the release, and that the executor or administrator has not been discharged.

STANDARD NO. 12.

The abstract does not show Patent from the U. S. recorded. The title takes off from the records of the U. S. Land Office. Is it necessary to demand that the Patent be recorded and shown on the abstract?

The fact that the Patent is not recorded is not a valid objection to the marketability of the title, but it is recommended that the examining attorney make note of the absence of the Patent and advise recording the same, or a certified copy thereof.

STANDARD NO. 13. Judgments—Liens—Revivor.

Where the abstract shows a judgment against a person in the chain of title, if the judgment is more than six years old and no execution has been issued thereon, nor any revivor action instituted, it should be disregarded entirely.

Where the judgment is more than five years old, the lien therof has expired and it is no longer an encumbrance, no execution thereon having been issued and levy made thereunder.

Where the judgment is more than five years old but no execution has been issued thereon and levy made thereunder, but an action is instituted after the fifth year and before the judgment is six years old to revive the said judgment, such revivor action does not revive the lien of the judgment which has expired as a lien and is not an encumbrance unless accompanied by levy under attachment or other proper court process. I. C. A. 5-215, 7-1109, and 8-101.

MR. E. B. SMITH: It is highly important that this committee function. In the last three years such a committee has taken some fine forward steps. I move that such a committee with the terms of office staggered as Mr. Van de Steeg recommends, be appointed. (Seconded, carried.)

FRANK MARTIN: You didn't mention anything in regard to approval of base titles as is being done in the Seventh District and the Third District. Some system should be worked out whereby we who get abstracts from outside territory should have these approvals. For instance if the Nampa Bar has approved a base title I want to know about it because I want to follow along with them. Could we have some sort of a clearing house.

MR. TOM JONES: Can't that appear in the abstract?

MR. E. B. SMITH: That is just another entry.

MR. JONES: Well it will be quite a job for the Secretary to write to all title examiners. If you had a record in the county and that could be included in the abstract only one entry as against possibly fifteen or twenty would be necessary. That is merely a suggestion.

MR. SAM S. GRIFFIN: Mr. Davison, isn't it true that the Boise committee has already prepared base abstracts up to and including the platting of the important additions and subdivisions in Ada county, and have had those examined by various Boise attorneys and their objections are being turned back into the Ada county committee, which will finally determine whether they are good or bad, and then, I believe, you plan to make a certificate and file it with the abstractors with the idea it be included in the abstract.

MR. HOWARD W. DAVISON: It seems to me that our approval of base titles was to be filed with the local secretary and with the State Secretary too. Now we have this difficulty in Boise. I don't suppose any of you can guess how many plats have been filed in Ada County, that we eventually will have to consider. There are something like fifteen hundred. To start with we have the promise of the cooperation of the two abstract companies that they will furnish us base title copies of everything up to and including the plat. We have got only a small start. We have several years ahead of us. The trouble we had, and I hope some of you people won't have, is that when we turn these abstracts over to attorneys to examine they side track them and we have a devil of a time getting them back. We finally succeeded in getting the first batch of them back, but we haven't had time to thrash out the objections raised.

MR. VAN DE STEEG: The question raised has been discussed by us but the procedure hasn't been entirely worked out. We all thought it would be the best way, if it could be worked out, to include an instrument in the abstract, but we aren't fully decided whether we could draw an instrument which could be shown in the abstract. For instance, one thing we have considered is the Taylor and Satterfield Estates. We pay no attention to them. A Spokane attorney examines that and the full proceedings are not shown. He objects. Now the only way he would know that the bar association of this state had approved that would be to include something in the abstract telling him

that. Otherwise he has to write a letter to Sam Griffin or some other lawyer, or he has got to phone. It seems to us the solution is to get it in the abstract. We are working on it.

MR. FRANK MARTIN. These abstractors are scared to death we are going to work out a solution that will eliminate the base title from the abstract. I think that would be a beautiful thing if we could get away with it, but we are not going to get their cooperation unless we can satisfy them.

PRES. THOMAS: I think the solution is the action taken in making this a permanent committee. It may be the personnel of that committe should be enlarged. The committee may make recommendations in that regard.

The next subject is "Real Estate Titles—Foreign Holding Company's Domicil in Enemy Hands." Gentlemen this is of real importance and we have a real man to discuss it, Judge Patten, who is an attorney for one or more of the large foreign domiciled companies as well as an able jurist and an attorney from Bozeman, Montana. Mr. Patten, it is a pleasure to have you with us today.

MR. PATTEN: Thank you very much; Mr. President and members of the Idaho Bar, I want to express my appreciation of the privilege of being here and meeting with the member of the Idaho Bar. I have for a good many years been a member of the Montana Bar Association. It has been very interesting for me to come over and see how you do things over here. I find you do things very well. I think the type of your program is exceedingly good. I am also glad to bring you from John E. Carrette the greetings from the Montana Bar Association and to extend to you an invitation to the next meeting to be held in Missoula, the latter part of this month or very early in August.

In the present World War even more than in the last World War we have the problem of the property in this country which belongs to individuals and corporations of those countries which have been invaded by, and are under the control of, the Nazi powers, and this is so because this time more neutral countries have been invaded and occupied.

At the outset, however, a distinction must be made between the property of those persons and corporations who are nationals of neutral occupied countries, and the property in this country of nationals of countries with which we are at war. There is also the question of trade

between the nationals of this country and nationals of enemy countries.

Under the Trading With the Enemy Act originally passed in 1917, and since amended, the property in this country of alien enemies is taken over by this Government, and is subject to the management and control of the Office of Alien Property Custodian.

There are also the Executive Orders of the President "blocking" certain nationals engaged in trade with the Axis powers.

These orders have to do with enemy property and enemy trade, and the purpose has been stated by the Government as follows:

> "These measures in effect bring all finanacial transactions in which German and Italian interests are involved under the control of the Government, and impose heavy criminal penalties upon persons failing to comply therewith. The Executive Order is designed, among other things, to prevent the use of the financial facilities of the United States in ways harmful to national defense and other American interests, to prevent the liquidation in the United States of assets looted by duress or conquest, and to curb subversive activities in the United States."

Of an entirely different character, however, is the subject that I have been asked to discuss today, which relates to the property in this country of those friendly nations which have been invaded and are now under the control of the Axis powers; and particularly has to do with what are known as the "freezing" orders issued by the President under an amendment to the Trading with the Enemy Act, under which all property in this country belonging to the nationals of neutral countries in the war zones which have been invaded and are now occupied by the Axis powers are protected and conserved.

The occasion of my being asked to come here today is the fact that I have had something to do with one of the Holland loan companies which for many years has been operating in Idaho and Montana, as well as in the State of Washington, and other States, which has been directly affected by the President's order "freezing" Holland property in this country, and has caused me to look into this subject in a way I ordinarily would not have done. Inasmuch as my knowledge has to do principally with that particular subject, I will, to a large extent, confine what

I have to say to that group of corporations, although what I shall have to say with reference to them is equally applicable and in the same way to all other neutral countries which have been invaded by the Axis powers, and have property in this country.

There are in the United States ten loan companies organized under the laws of The Netherlands in Europe, which own both loans and real estate in various states of the Union, and particularly in the states of Idaho, Montana and Washington.

By an executive order of May 10, 1940, the President of the United States "froze" all of the property and credits of these Holland companies doing business in this country. This order was one of a series of like orders which have in the same way "frozen" the property of all of the other invaded countries, both in Europe and in the Orient.

The President's order affecting Holland property in this country was followed by a Royal Decree by the Queen of The Netherlands issued from London on May 24, 1940, which had reference to the same subject, and had the same purpose. While the Royal family and the Holland Government have found it necessary to leave Holland, it is to be borne in mind that Her Majesty Queen Wilhelmina has continued in the full exercise of her royal prerogatives with her seat of government at London, and is functioning, with her foreign ambassadors and ministers, in all respects as theretofore. She is in fact exercising the full powers of her office.

These two orders, the one by the President and the other by the Queen of Holland, "froze" the Holland property in this country, but there was one further step that was taken to facilitate the business of these Holland companies doing business in the United States, and as a further measure of protection.

In anticipation of the German invasion the Netherlands Parliament enacted a law authorizing Netherlands corporations to change their "seats" which means a change of their "domicile" from the territory of the Netherlands in Europe to other Netherlands territory. Pursuant to the authority of this enactment, and after appropriate proceedings on the part of the corporations themselves, which of course were necessary, the "seats" of all these Netherlands corporations have been changed from their designated "seats" in Holland, to Curacao in the Dutch West Indies, located in the Caribbean Sea just north of Venezuela, and this has had the effect of taking these corpora-

tions entirely away from the German influence that is now dominant in Holland.

It will thus be seen that not only the "seats" of these corporations have been changed from Holland, now under the control of the Germans, to Curacao, which is Dutch territory, but the property is put beyond the reach of the German invaders; and the purpose of all of this is not by any means to bring about the confiscation of the property, or in any way to disturb the rights of the owners thereof, but, on the contrary, the purpose is one of protection, first to keep the property from falling into the hands of the Germans, and, secondly, to provide for its management and conservation pending the outcome of the war.

It may seem at first blush that the result of all this would be a pretty intricate and cumbersome procedure in dealing with the property of foreign countries located in this country, but such is not the fact. In actual practice this is what has happened.

The President's executive order "freezing" the property of the Holland companies in this country made it necessary for these corporations to report to the Treasury Department, and in the case of the company I represent, as with other companies of the same kind, the whole matter affecting its affairs was referred for direct supervision to the Federal Reserve Bank of Minneapolis. The other Holland companies in this country within other regional reserve bank districts would, of course, be assigned to their proper district reserve bank for supervision and direction. Since then, our company has reported to, and had direct dealing with, the Federal Reserve Bank of Minneapolis, but all statements and reports, and matters of importance, are referred by it to the Treasury Deparment at Washington.

After the Holland company had reported to the Treasury Department, and had been referred to the Federal Reserve Bank of Minneapolis, it was required to submit a statement of the corporation, including a short sketch of its organization under the laws of the Netherlands, and its business operations in this country, with a general statement of its present business activities. Accompanying this, of course, was a complete and accurate inventory of its property and a financial statement. A like showing was submitted to the ambassador of The Netherlands at Washington, who has been designated by his government to supervise the property of these companies in behalf of the Holland stockholders, and his approval was obtained. Without any trouble or delay, permission was given to

the Holland company here to continue its business as usual and without interruption.

The next step was to obtain a permit to make necessary routine expenditures. To obtain this the company submitted to the Federal Reserve Bank of Minneapolis a statement of its ordinary expenditures, taking as a criterion the highest month within the previous two years, and the result was an order by the Federal Reserve Bank of Minneapolis that the company could each month, without previous or special order, issue checks equal to the amount of the expenditures of the company for the highest month during the previous two years, and with no limit at all to expenditures for taxes and similar charges. If additional expenditures of an unusual or extraordinary character should at any time become necessary the facts showing such necessity may be submitted to the Federal Reserve Bank at Minneapolis, and if the expenditures appear to be proper it is certain that an order permitting them would issue with practically no trouble or delay.

The same is true of deeds, releases and similar instruments on the part of the company, and the company is, for all practical purposes, free to carry on as theretofore in that respect. In a general way it may go on making collections and conducting its business as was its custom before the war. The only difference is that each month the company is required to submit to the Federal Reserve Bank of Minneapolis a statement of receipts and expenditures and of its general business operations during the preceding month, and a copy of this is forwarded to Washington. As a matter of fact, practically everything that is done, while under the immediate supervision of the Federal Reserve Bank of Minneapolis, is also referred to Washington and is scrutinzed there.

While in practice it is found that there is some additional clerical work required to make up these reports and send them each month to Minneapolis, it is fair to say that aside from the increase in work in that respect, which is by no means a serious matter, there are no restraints or inconveniences, and the company is not at all hampered in its ordinary business operations.

So far as the titles to real estate are concerned, and the sale and deeding of land, the making of releases and similar instruments, necessary in the conduct of the business, the company is as free to act as at any time previous to the "freezing" order.

To facilitate the handling of the property of these Holland companies, and as a further measure of protection to the persons beneficially interested, it was deemed advisable to organize American corporations, and convey the property in this country to such corporations. This was done by all of The Netherlands companies with the approval of the Federal Reserve Bank and the Treasury Department on the one hand, and the Holland Government on the other.

For instance, in the case of the company I represent, we formed a Montana corporation, and fully complied with the laws of Idaho and other states where the company operates. The transfers of the property of the Holland company to the Montana company was made on the basis of the inventory of the assets of the Holland company, and the purchase price was paid by the contract obligation of the American corporation, and this obligation of the American company to the Holland company matures in twenty-five years, at which time, and not until which time, the principal and interest are due. We are optimistic enough to believe that by that time the war will be over, and, as there is no doubt as to who will win, we figure that readjustments will be very easy when the Germans have been driven from Holland.

There were also practical considerations which controlled in the organization of these domestic corporations. The general manager in the United States of the company I represent, who is also a director and one of the principal officers of the company both here and abroad, has for many years had power of attorney giving him full power to transact business in this country, with unlimited authority to execute deeds, releases and other instruments, and has been doing so for many years. This was ample for all purposes when contact with Holland by mail and cable was quick and easy, but since the invasion of Holland all contact and communication between here and there has been completely broken, and it has been impossible to communicate with Holland, or for Holland to communicate with Montana.

This situation also had to be considered: the manager here, while himself possessed of full authority, was, under elementary principles of agency not in a position to pass that authority on to anyone else, and if his car should go into a ditch, or any other untoward circumstance should take his life, there would be no way in the world of appointing a successor and continuing the business of the company, and, accordingly, it was necessary that there be a transfer of all the property of the corporation to the

Montana corporation while his authority was intact. The situation now is that the Holland company is still in existence, but is without assets of any kind; its property has passed to the hands of the Montana corporation, with monthly reports to the Federal Reserve Bank of Minneapolis.. If the Germans should today attempt to interfere with the property of the corporation it would find the Holland company merely an empty shell, with all of the property of the corporation transferred to, and controlled by, the Montana corporation.

From what has been said it will be seen that by a very simple process the property and the affairs of the Holland company have been taken over by the Montana corporation, and the property taken entirely away from any chance of the Germans obtaining control of it.

Now as to the legal phase of this matter, and the validity of transfers of real estate situated in this country.

The precise legal questions have not been directly brought before a court, so far as I am aware, and there is no decision directly in point, but there are cases which, by analogy, are in point.

One queston which has been suggested is as to whether, because of the German invasion of Holland there were "principals" in existence at the time of the transfers to give validity to the acts of the attorneys in fact in this country in making transfers of real estate. In other words, had the attorneys in fact lost their authority by losing their principals, that is, had they lost their principals. This does not seem to be a serious question in view of the fact that the transfers made by the attorneys in fact to the American corporations were made more than two years ago, shortly after the invasion of Holland, and before any assumption of control of the property of the Netherlands corporations by the Germans. In fact, up to the present time, there has never been any effort by the German Government to take over or control the property of these Netherlands corporations in this country. In any event, to affect the validity of these transfers it would seem to be elementary that two things would have to appear: first that there was a revocation of the power of attorney, and secondly, that this revocation was made by virtue of authority that would be recognized in this country. And none of these things appear.

Again, what would be the effect if we assume the chance that Germany may later acquire a "recognized" control of Holland, and Holland corporations and their

property. In other words, if Germany were successful in the war could she come over here and question titles to real estate conveyed before she acquired such control.

There have been some decisions by the Supreme Court of the United States with reference to the ownership of property of Russian corporations in this country at the time the Soviet Government took over Russia and these had to do with transfers made prior to the recognition of the Soviet Government by this country. In one case it was held that the recognition of the Soviet Government by the President, and the establishment of normal democratic relations with that government, validated, so far as this country is concerned, all acts of the Soviet Government from the commencement of its existence, (United States v Belmont et al, 57 S. Ct. 758, 301 U. S. 324), but in another case it was held that while recognition of the Soviet Government by the United States validated, for many purposes, the Soviet Government's previous acts within it own territory, it did not affect the legal consequences of actions taken in the United States prior to the later recognition. (Guaranty Trust Company of New York v. United States, 58 S. Ct., 785, 304 U. S. 126.)

The effect of these decisions seems fairly to be that a subsequent recognition of a government which has taken over control by force, does not, so far as property in this country is concerned, affect or invalidate acts done under authority of the previous government which has been displaced.

In a case from Florida the United States Supreme Court has held that while international law is a part of the law of the United States, and as such is the law of all States of the Union, these principles are concerned with international rights and duties, and not with domestic rights and duties. (Skiriotes v. State of Florida, 61 S. Ct. 924, 313 U. S. 69).

Except for the decisions of the United States Supreme Court, practically all of the decisions on this general subject have been rendered by the New York Courts for the obvious reason that international transactions are pretty well concentrated in New York, so far as this country is concerned.

In one New York case it was held that the general doctrine that recognition of a foreign country is retroactive is applied only to a limited extent, and does not have the effect of undoing the legal consequence of things

done under previous governments. (Koninkiljke etc. v. Chase National Bank, 30 N.Y.S. 2d 518). In another case it was held that since the United States has refused to recognize German military control of the invaded countries, any decrees by this unrecognized occupying force would not have the force and effect of mandates of a lawful sovereign. (Amstelbank v. Guaranty Trust Company, 31 NY. S. 2d 194.) It has also been held that laws of Germany cannot bind United States citizens who are not subject to its jurisdiction (Glenn v. United States Steel Works 289 N.Y.S. 1037).

An excellent opinion by the Supreme Court of New York was rendered in a comparatively recent case (Koninklijke etc. v. Chase National Bank, 30 N.Y.S. 2d 518, previously referred to) which perhaps comes closer to the questions considered here than any other case. That was an action at law to recover money deposited with the Chase National Bank by a Netherlands corporation, and in that particular instance the German Commissioner for the occupied Netherlands territory had purported to suspend a decree made by the Netherlands Government which, by its terms, purported to make null and void any claim by the German Government respecting assets of Netherlands corporations located outside such territory, and there was brought before the court a question of title very similar to that which is involved here. That was, however, a stronger case, because in that instance the German Government had directly intervened and attempted to take over the property of the Netherland corporation, and had served notice on the bank. The New York Court held that the effect to be given to orders by German authority with respect to the assets of a Netherlands corporation located in New York was to be determined by the law of New York, and that while New York ordinarily allows the holder of a title acquired under foreign law to come to New York and enforce it, yet since foreign law has no force in New York, neither foreign acquired titles nor foreign made contracts would be recognized or enforced in New York, except so far as New York law permits.

The foregoing cases seem pretty clearly to point to the conclusion that while ordinarily recognition of a new government is retroactive, it will not be permitted to disturb acts done in this country under the authority of the government which it has displaced, and, further, that no foreign acquired title to property in this country would be recognized except so far as the State law here would permit such recognition and enforcement. Applying this to the situation before us, it would seem that even if we regard it as a possibility that Germany will win the war,

and later attempt to take over the property of foreign corporations located in this country, any such claims would be rejected in so far as they affected property transferred under authority of the government existing at the time of the transfer.

It is noticeable that so far the decisions of the New York courts have uniformly refused to recognize claims based on orders by the invaders to funds of Netherlands corporations on deposit in New York, and these decisions are based upon, and have given full effect to, the laws and decrees of The Netherlands Government enacted for the purpose of defeating such claims.

To sum up, the primary purpose of the "freezing" orders and the practice under them has been to protect and conserve the property of the invaded countries situated in the United States, and to provide for its proper management. Specifically, the purpose very plainly has been merely to see that the money obtained from both sales of property and from operation is accounted for and carefully preserved for the benefit of its rightful owners, and there has been practically no interference with the handling and sale of real estate and other property. The conclusion also seems to be justified that the transfer of the property of the Netherlands corporations to American control has been accomplished in such a way that good titles can be conveyed, and that whatever the fortunes of war may be Germany could not at any time come into this country, and, in the face of the approval of everything that has been done by both The Netherlands and American Governments, upset any of such titles.

PRES. THOMAS: I thank you, Mr. Patten, and I know all of us feel it was worth your trip over here to give us your address.

I would like to have discussed at this meeting the subject of conventions of neighboring states. My personal opinion is that if we sent the President and Secretary of this Bar to Montana one year, and Washington one year and maybe California, one year, and Oregon one year and Nevada we would find in the long run it won't cost any more than has the President's trip to the American Bar, but that the Idaho Bar will get more out of it.

The next business is "Benefits to Dependents of Military Casualties" by Major John R. Bolinger, Base Administrative Inspector of Gowen Field. At the last moment the major was unable to come, but he has sent to us Lieutenant Patrick A. Doyle. Lieutenant Doyle is an attorney, a graduate of the University of Boston and was a practicing lawyer before he entered the army.

LIEUTENANT PATRICK A. DOYLE.

RIGHTS OF PERSONNEL OF THE ARMY OF THE UNITED STATES AND THEIR DEPENDENTS TO BENEFITS IN EVENT OF DEATH OR DISABILITY

1. The Army of the United States encompasses all military components in active federal service. These components, respectively, are the United States Army, the Regular Army Reserve, Officers Reserves Corps, Enlisted Reserve Corps, Selective Service Trainees, the National Guard, Retired Officers and Enlisted Men in active service, and special one year enlistments. The dependents of all these classes are, since declaration of war and passage of new legislation, entitled to the same benefits.

2. Automatically with a declaration of war the right of dependents of Reserve Officers and members of the Enlisted Reserve Corps to claim compensation through the United States Employees Compensation Commission for death was terminated. The law authorizing it provided specifically that the death must occur in time of peace. Compensation claims already allowed will continue and compensation claims pending or yet to be filed will be acted on provided the death occurred prior to the declaration of war and provided the claim is filed within one year from date of death. (July 15, 1939 Amendment to the U. S. Employees Compensation Commission Act—Public Law No. 267, 64th Congress).

3. The rates of pension for dependents of military personnel whose death occurs in time of war have been established by legislation approved December 19, 1941, (Public Law No. 359, 77th Congress) and are considerably higher than pension rates heretofore allowed for peace-time service.

4. The six months gratuity benefits, heretofore paid only to dependents of officers, warrant officers and enlisted men of the Regular Army are now extended to the dependents of all officers, warrant officers and enlisted men of the Army of the United States whose deaths occur while in the active military service of the United States.

PENSION

5. Almost immediately following the declaration of

war, the Congress passed a law (Public Law No. 359, 77th Congress, approved December 19, 1941) establishing special increased rates of pension to be paid to dependents of all classes of personnel of the Army of the United States, provided the death occurred subsequent to the declaration of war at 4:10 p. m., December 8, 1941. It is not necessary that deaths after declaration of war shall have resulted from armed conflict.

6. Special retroactive features of the Act, authorizing war time pension rates, allow payment of war time pension rates to dependents of deceased personnel whose death or deaths occurred prior to the declaration of war, provided the death must have occurred as a direct result of armed conflict or while engaged in extra hazardous service, including such service under conditions simulating war. Such pensions are payable, however, only from date of filing claim.

7. Pensions are effective from date of filing claim and not from date of death, therefore, filing of claim should not be delayed.

8. Claims for pension are paid by the U. S. Veterans Administration upon filing of claim on Veteran's Administration Adjudication Form No. 534. Before pensions will be allowed, the Veteran Administration must first ascertain from The Adjutant General that the death occurred in line of duty and not as the result of misconduct. In support of the claim, a widow must submit a certified copy under seal of the public record of marriage and a certified copy of the public record under seal of her birth. If either the deceased or the widow has had a previous marriage, then certified copies under seal of the divorce proceedings must be submitted. Claims for pension for children must be supported by certified copies under seal of the public records of birth.

9. Present existing law establishes the following scale of war time pensions. The amounts of pension are applicable regardless of the rank or length of service of the deceased. Death from aircraft accident does not increase the pension.

Widow under 50 years of age, $30.

Widow 50 years to 65 years of age, $35.

Widow over 65 years of age, $40.

Widow with one child, $10 additional for such child

up to ten years of age, increased to $15 from age 10 (with $8 for each additional child up to 10 years of age, increased to $13 from age 10.)

No widow but one child, $20.

No widow but two children, $33 (Equally divided).

No widow but three children, $46 (equally divided) (with $8 for each additional child: total amount to be equally divided.

Dependent mother or father, $20 (or both $15 each).

The total pension payable under this law may not exceed $75.

Where such benefits exceed $75 the amount of $75 will be apportioned.

Pensions for children are payable to age 18, except that pensions may be continued to age 21 if unmarried and attending school.

Pensions to widow are payable for life or until remarriage.

10. When a claim for pension is made which is based on war time service and it is shown that the claimant was not named as beneficiary to receive monthly installments from the National Service Life Insurance, or if named and the amount of monthly installments is insufficient to make up the difference between the scale of pensions stated in Paragraph 10 and the following table, then the rates quoted in the following table will apply. If a claimant for pension is named as beneficiary to receive monthly installments from National Service Life Insurance and the amount to be received is less than the difference between the rates quoted in Paragraph 10 and the rates in the following table, then the rates in the following table will apply, deducting therefrom the amount of monthly installments from U. S. Service Life Insurance. Claimants who may receive monthly installments from U. S. Government Life Insurance may claim the full amounts of monthly rates of pension quoted in the following table without deduction of U. S. Government Life Insurance installments.

Widow under 50 years of age, $38.

Widow 50 years of age or over, $45.

Widow with one child, $10 additional for such child up to 10 years of age, increased to $15 from age 10 (with

$8 for each additional child: total amount to be equally divided).

As to the widow, child or children, the total pension payable under this section can not exceed $83.

One dependent parent, $45.

Two dependent parents, $25 each.

Pensions for children are payable to age 18, except that pensions may be continued to age 21 if unmarried and attending school.

Pensions to widow are payable for life or until remarriage.

SIX MONTHS GRATUITY

11. Immediately upon official notification of the death from wounds or disease, not the result of his own misconduct, of any officer, warrant officer or enlisted man in the active service in the Army of the United States, the Chief of Finance, U. S. Army, shall cause to be paid to the widow or if there be no widow, to the child or children, or if there be no widow or child, to any other dependent relative of such officer, warrant officer or enlisted man previously designated by him, an amount equal to six months pay at the rate received by such officer, warrant officer or enlisted man at the time of his death. (See A. R. 35-1540).

12. Until December 10, 1941, the six months gratuity was payable only to dependents of officers, warrant officers and enlisted men of the Regular Army. Public Law No. 329, 77th Congress, approved December 10, 1941, extended this gratuity benefit to all classes of personnel of the Army of the United States. This law was retroactive to and effective as of August 27, 1940. Dependents of individuals whose death occurred subsequent to August 27, 1940, and who believe themselves entitled thereto should file a claim.

13. The six months gratuity paid to the beneficiary includes compensation of every kind such as flying pay, pay for qualification in the use of arms, increases for longevity, etc., as distinguished from allowances.

14. The gratuity will be paid only if death was not the result of misconduct as certified to by the Adjutant General. It is not required that death shall be in the line of duty.

15. As the name "gratuity" suggests, this is a gift equal to six months pay to dependents and the officer or enlisted man has no vested rights in it and cannot designate to whom it will be paid by will. As there is no vested interest or property right in this gratuity, it is not subject to claims against it, or civil or military debts or obligations.

16. The law which established the gratuity authorizes its payment only to the widow (not a surviving divorced wife) if living, otherwise to any child or children who are unmarried and under age twenty-one. Payment will be made as just mentioned, whether such dependents have been designated or not and without requiring any proof of dependency. W. D., A. G. O. Form No. 41 (Officers) or Form No. 21 (Enlistment Record) should be completed by all classes of personnel of the Army of the United States as prescribed by regulations. (See A. R. 35-1540).

17. If at the time of death no widow or unmarried child or children under the age of twenty-one survives, then the gratuity will not be paid unless a dependent relative has been designated as beneficiary. Any married child, or unmarried child over age twenty-one, or any other dependent relative must have been designated as such on Form No. 41 (Officers) or Form No. 21 (Enlistment Record)). If so designated, but proof of dependency is insufficient at time of death, payment will not be made. If no wife or unmarried child or children survive and deceased named a first and second dependent as beneficiary, then if first beneficiary fails to prove dependence, payment will not be made to second-named beneficiary.

18. Application for six months gratuity should be made on Finance Form No. 6. To expedite payment to the widow, child or children, the local disbursing officer may, unless he suspects that the death was the result of the deceased's own misconduct, forward two copies of Finance Form No. 6 to the widow, child or children with the suggestion that the accomplished voucher be submitted to the Finance Officer, U. S. Army. Washington, D. C. for payment. If the deceased was on flying status at time of death, then considerable delay may be avoided by attaching true copies of the flight certificates for the three full months prior to the month in which death occurred.

19. Payments to beneficiaries other than the widow, child or children, can not be expedited in the manner set forth in the preceding paragraph for the reason that the Finance Officer, U. S. Army, Washington, D. C., must first determine from the Adjutant General (Form No. 41 for officers or Form No. 21 Enlisted Record) what bene-

ficiary has been designated by the deceased and if the designated beneficiary was dependent. In such cases the Finance Officer, U. S. Army, will after determining eligibility, furnish claim voucher to such beneficiary.

20. In the event of death outside the continental limits of the United States the gratuity may be authorized to be paid by local disbursing officers.

ARREARS OF PAY

21. Back pay and allowances due an officer or enlisted man at the time of his death will be paid by the General Accounting Office, Washington, D. C. and only upon submission of claim on Standard Form No. 1055 which may be obtained from any Finance Officer.

22. If the amount of back pay and allowances, flying pay, unpaid mileage or per diem, plus any uncashed Government checks payable to the deceased equals or exceeds $500 then the payment is made by the General Accounting Office only to the executor or legally appointed administrator of the estate of the deceased. If the deceased left no assets subject to administration by a probate court, then application for administration must be made to the probate court, in order to administer the distribution of the arrears in pay and allowances when such amount is in excess of $500.

23. If the amount of back pay and allowances plus any uncashed government checks payable to the deceased is less than $500 then payment is made direct to the person or persons who by marriage or blood relationship would be entitled to it according to the laws of descent and inheritance of the domicile of the deceased. Payment direct, however, is made only in cases where the deceased left no assets subject to administration by probate.

24. Funeral expenses in excess of Government allowances are considered as a claim against arrears of pay. If the arrears are in excess of $500 then creditors for funeral expenses (and any other creditors) may make claim against the estate, into which the arrears of pay are paid. If the arrears are less than $500 then the General Accounting Office will first determine that all excess funeral expenses are paid and demand receipts before paying the claim for arrears of pay.

25. Claimant should obtain Standard Form No. 1055 from any Finance Officer and submit it direct to Claims Division, General Accounting Office, Washington, D. C. Much delay may be expected before approval of this claim as it is the final accounting between the deceased and the

Government and many government agencies must be consulted.

BENEFITS IN EVENT OF DISABILITY DUE TO DISEASE OR INJURY

26. Existing law (Sec. 5, Public Law No. 18, 76th Congress, passed April 3, 1939, as amended by Public Law No. 329, 77th Congress) provides that all officers, warrant officers and enlisted men of the Army of the United States, other than the officers or enlisted men of the Regular Army, if called or ordered into the active military service by the Federal Government for extended military service in excess of thirty days, and who suffer disability or death in line of duty from disease or injury, while so employed shall be deemed to have been in the active military service during such period and shall be in all respects entitled to receive the same pensions, compensations, retirement pay and hospital benefits as are now or may hereafter be provided by law or regulation for officers and enlisted men of corresponding grades and length of service of the Regular Army, including for their dependents the benefits of the Act of December 17, 1919 (Six Months Gratuity).

27. Pensions for dependents, Six Months Gratuity and Arrears of Pay, as authorized in Paragraph 27 above, have been discussed in Sections II III and IV. Hospitalization and Retirement as authorized in the law quoted in Paragraph 27 above will be discussed in this section.

28. In event of disease or injury, incurred in line of duty and not the result of misconduct, then such disabled individuals will be provided hospitalization and full medical care until declared fit for full military duty and continue to receive active service pay during such disability period.

29. When an individual becomes physically disabled in line of duty and not the result of misconduct and is found by proper military authority to be unfit to be returned to military duty, then in the discretion of the War Department he may be retired and awarded retirement pay at the rate of three-fourths of the active service pay allowed for the individual's permanent grade or rank. Temportary promotions in the Army of the United States and consequent pay increases are not the basis for determining retirement pay. Officers and enlisted men who are retired for disability shall thereafter be entitled to certain hospitalization and treatment in government hospitals.

30. From the foregoing it may be seen that the amount of retired pay received is determined by a percentage of the active service pay at time of retirement and not the

degree of disability. When the amount of retirement pay is established it then is payable for life and is not subject to adjustment in amount due to improving or failing condition of health.

31. Public Law No. 359, 77th Congress, approved December 19, 1941, amended the existing pension laws to permit the payment of pension for service incurred disability from disease or injury at the same rates allowed to disabled veterans of the Spanish American War and World War I provided the disability shall have resulted from an injury or disease received in line of duty (1) as a direct result of armed conflict or (2) while engaged in extra hazardous service, including such service under conditions simulating war or (3) while the United States is engaged in war.

32. Payment of pension for disability and the determination of disability and the degree thereof is vested in the U. S. Veterans Administration. The amount of pension to be allowed may be from $10 to $100 depending on the degree and may be raised or lowered from time to time based on periodic physical examination. In addition there are special rates payable for certain specific disabilities such as anatomical loss or loss of use, helplessness, blindness and so forth, ranging a high as $250 per month. It may be seen that the rate of pensions allowed bears no relationship to the amount of active service pay drawn at time of discharge.

33. As previously stated, application for retirement for disability and authorization of retirement pay is approved or disapproved solely by the War Department. Claims for pension for service incurred disability are allowed by the U. S. Veterans Administration. The law does not allow any individual to collect retirement pay and disability pension both, but a choice may be made whether to accept one or the other. Pension may be better for one in a low pay status. To the contrary, retirement may be more advantageous to one in a high pay status. Once an election is made it may not be revoked.

34. Claims for pension at war-time rates may be filed by individuals who were disabled prior to the declaration of war but to substantiate such claims it must be shown that the disability resulted from injury or disease received in line of duty (1) as a direct result of armed conflict or (2) while engaged in extra hazardous service, including such service under conditions simulating war.

I have not considered recent legislation which is of great benefit to the personnel of the army, such as Army Emergency Relief and the new allowance allotment act of

1942. Under the provisions of these acts benefits of great magnitude are conferred on the soldiers and their dependents, but feeling that the legislation concerning them is constantly changing, I have left these matters for future consideration.

It has been a pleasure for me to be present at this meeting of the Idaho Bar and I shall always treasure the memory of the many fine men that I was privileged to meet.

PRES. THOMAS: Reverting to title examinations I am requesting Mr. Parry of Twin Falls to state his special form of certificate. We know that many abstracts are passed for loans which might not be passed for sales. Yet many purchasers rely upon the loan opinion and then complain if later objection to title is made.

MR. R. P. PARRY: The particular statement you refer to was a matter of self protection. Years ago we had clients who were making real estate loans and we found they were interested only in whether or not their mortgage was a valid lien that could be enforced and were not interested in the intricacies of a perfect title. We were willing to pass many objections which we knew could be raised by other lawyers but which we thought would not affect our clients interested. We adopted the policy of passing those. Then we were confronted with the problem that on a subsequent sale some other lawyer would raise question, so we adopted the policy which we have followed for years. At the end we say: "This opinion is given to the XYZ Company solely for the purpose of a loan to be made by them and not to or for any purchaser." Then we state in our opinion that we are waiving many of these matters which Mr. Hamblen says the bar is now agreeing away. Time after time there is a subsequent sale and a man comes running in and we point to our certificate. It has worked very satisfactorily for us. It has assisted our clients engaged in the loan business and has cut down much time and work.

PRES. THOMAS: Thank you.

SATURDAY, JULY 11

(Morning Session)

PRES. THOMAS: The report of the committee that we set up about a year ago consisting of local bar presidents will be given by Mr. Weldon Schimke of Moscow.

MR. WELDON SCHIMKE: Mr. Chairman and members of the bar:

Last October, the Bar Commission called a meeting of the Presidents of all local bar associations. The meeting was held at Boise, and of the eight local bar associations six were represented. A copy of the minutes of that meeting, which contained a rather full review of the discussion, was sent to each local bar association President and were by him (presumably) submitted to and discussed by each local association.

Several districts reported extensive activity upon real estate titles, and discussion of the practice of attorneys entering the armed forces. Further, it appears that the Boise bar is extending substantial legal assistance to the members of the armed forces of the United States quartered in the vicinity. Tax schools have been held in Boise and Southeastern Idaho.

Summarizing the action taken by the President's Committee, it is recommended:

I. UNLAWFUL PRACTICE

That all investigation of unlawful practice be made locally, that cases deemed to warrant prosecution be prosecuted by outside counsel, and that each local association confer with its local abstractors, bankers and real estate men to reach a friendly understanding wherever possible. That the voluntary cooperation of Federal agencies be solicited to the end that Idaho practice be reserved to the Idaho lawyer, and that further study be made of the problems of insurance adjusters, and, as you will recall from the paper of Mr. Ware, such investigation is being made, with the ultimate object that all adjustments of third party claims be handled exclusively by members of the Bar.

II. PUBLICITY

That businesses which profit directly or indirectly from the legal profession be encouraged by the local associations to give such publicity and advertising to the bar as they can, in somewhat the fashion the pharmaceutical firms advertise the medical profession. That radio time be employed wherever legitimate publicity for the bar can be secured thereby.

III. REAL ESTATE TITLES

That the local associations check base titles of importance, and cause to be recorded a certificate, signed by all local members of the bar indicating the state of the title to a given tract as of a given date. That old court proceedings be omitted, except for the decree. That the legislative committee investigate the feasibility of an "ancient titles law" such as now exists in many states, whereby any title older than a specified period, such as thirty years, shall be deemed conclusive against all claims or encumbrance other than those having a constitutional basis.

IV. FEE SCHEDULES

That this matter be left with the local associations to handle in whatever manner will work effectively under local conditions.

V. NEW CODE

That compilation of a new Idaho code be postponed until such time as action has been taken or it appears that action never will be taken upon the proposed rules of procedure.

VI.BAR EXAMINATIONS

That the Bar Commission draft the services of practicing attorneys in giving and grading bar examinations, and that the commission spend less time upon the same, and spend more time upon the problems of the existing bar. That the examination fees be increased to cover more adequately the cost of giving the examination as follows: $25.00 where the applicant is a graduate of the Law School of the University of Idaho and has not practiced in any such jurisdiction; $50.00 where he is a graduate of any other law school and has not been admitted to practice or engaged in practice in any other jurisdiction, and $100.00 in all other cases, without refund in any case, for failure to pass or otherwise.

VII. RECLAMATION

That each local association appoint a reclamation committee to work with the State Bar Committee on this subject.

VIII. MINOR COURTS

That the abolition of probate and justice courts, or modifications of our minor court structure, be considered by the local associations, with the object of future action by the State Association.

IX. TECHNICALITIES

That lawyers and courts avoid procedure and technical questions as much as is consistent with a fair review of the substantive rights of the litigants, to the end that

contested matters may be decided speedily, and upon the merits.

X. LAWYERS IN SERVICE

That local bar associations consider with care possible steps which may be taken to preserve the practice of lawyers in the armed services, and to rehabilitate their professional position after the war is over.

XI. SCHOOLS FOR LAWYERS

That local bar associations sponsor schools to acquaint the bar more generally with new legal fields, particularly in the field of federal regulation. If the bar as a whole does not know these things, and makes no effort to find out, some other group, board or organization will take over this business.

XII. LOCAL BAR ASSOCIATIONS

That local bar associations do not undertake to do too much, but confine their efforts to that which they can handle. One functioning committee is worth ten non-functioning committees. That regular meetings of each district association be held each month if practical, but not less than once each quarter.

XIII. PRESIDENTS' COMMITTEE

That the Committee of Local Bar Association Presidents be continued as a functioning organization, and that it meet twice a year. In event that transportation difficulties make it difficult or impossible to hold future State Bar Association meetings for the duration, the Bar Presidents' Committee may become the most effective liason agent to transmit ideas and proposals between the members of the bar as a whole and the state bar commission.

XIV. DISTRICT BAR MEETINGS

That in event it becomes impractical to hold future State Bar Association meetings, district or regional meetings be held at the call of the Commissioners.

XV. THE LAWYER IN THE POST-WAR WORLD

That the members of the Idaho bar as a whole begin to think seriously about the position of the legal profession as a whole in the post war world, to the end that the private and independent practice of law will be preserved as an American institution, and the prestige of the bar resuscitated. That it is perhaps yet too early to begin a formulation of concrete proposals, but that it is a time for

thinking and discussion out of which concrete proposals may emerge later. That nobody is going to save the lawyer but himself, and if we don't do it, it won't be done. That salvation cannot be attained by simple resistance to social or economic forces of irresistible power, and that when we cannot lick a given problem into a shape that is satisfactory to us, we must find a way to adapt ourselves to the changed society in which we may live.

That as a sample of the kind of thinking that may be necessary, the following is offered: The post-war world may find us involved in closer governmental regulation, particularly Federal regulation, of our everyday affairs on a scale completely beyond pre-war experience, and the situation may be such that a relaxation of such controls would result in general economic collapse. These regulations in various fields may be so numerous and so complex that it may be beyond the capacity of one man to absorb any considerable proportion of them, and yet, if the lawyer is not in a position to assist his clients in the interpretation of such provisions, the bar as a group will lose a large field of business essentially legal in character.

The remedy may lie in specialization, even in small communities, and closer cooperation between members of the bar. This may be done informally, or by more specific understanding. In Lewiston, or Blackfoot, or Bonners Ferry, the lawyers might determine among themselves that one of their number would become the local expert on social security, another on Federal taxation, another on labor problems. In time, business would tend to flow toward the man qualified in that field. And if one lawyer had a problem in the field of another, he could either refer the business outright, or confer with the local expert on that question. The client need not necessarily know that another attorney had been consulted. Problems of fee division would have to be worked out.

We repeat that this is not offered as a specific suggestion, but only as an illustration of the kind of thinking that it will take to save the independent practice of law. And the time for taking serious thought has arrived.

MR. KARL PAINE: You spoke of liens and encumbrances having a constitutional basis. I don't know what kind of a lien or encumbrance that is.

MR. SCHIMKE: What I have in mind is the State Land Board. The Constitutional question arises out of the State Land Act; we couldn't pass a statute that would affect matters of that sort. As I recall a case held that the statute of limitations does not run against particular

claims, by reason of certain constitutional limitations and limitations contained in the Idaho Admission Bill.

MR. FRANK MARTIN: As one of the retiring members of this President's Committee I feel very keenly about this committee. I think it's probably one of the most important, if not the most important that the State Bar has set up. It's just starting. This past year a lot of work was done in that committee and a lot of wonderful ideas started. This year, in all the districts will probably be a new president. I want to particularly recommend to these men that they take this thing seriously; that they get that report of the last meeting; find out what the ideas were and what was done; really make this committee function and see that their local bar associations act. Nobody can do that but the presidents.

Start out now at the beginning of the new year, have meetings and actually get the bar together and put these problems up to them. Have the fellows thinking about these things, getting familiar with them and they are going to have at least a knowledge of what is going on. If the members don't go ahead with them it is their fault. If the officers don't call meetings they are never going to be able to put anything before their group for them to work on.

In our bar we had a meeting on these new rules. We didn't accomplish anything by way of formal resolutions but every member got a good idea as to the reason for having them. We found out what someone didn't like about them and what somebody else did like.

We can't have a strong State Bar without having strong local associations, and if you don't get together and don't meet you are not going to keep up the good work we have been doing.

PRES. THOMAS: This committee of local bar presidents met for three days and discussed the problems the Commission presented to them; some were their ideas and some were ours. They did a nice job, and the committee, no doubt, should be continued.

I am going to tell you of a situation upon which I tread a little lightly. Frankness is necessary. The Commission had heretofore recommended to the Supreme Court a rule in regard to examinations. The examinations have heretofore been given by the Bar Commissioners. Once or twice this Bar has said clearly: "Go ahead and get an examining committee set up." We presented that to the Supreme Court and they disapproved. As Chairman of the

Commission this year I set up a committee. I am not doing that in disregard or disrepect of the Supreme Court, but I think the Court doesn't appreciate the problem. We are practicing lawyers and we have our own business to attend to. We have set up an examining committee to assist the Commission. I think we have that authority and if we don't have that authority we may as well quit. It is the very basis of the integrated bar. The Commission, however, will keep close control over their work.

You will find that the President's Committee is the most important committee that exists in the organization. Should it develop that we have to forego the annual meeting that committee can still function and report back from the Commission to the local bars and it will be the most important thing we have. A wonderful foundation has been laid. If it should develop we don't have to forego our meeting then they will still be important.

This examining committee will give the Bar Commission an opportunity to function with this committee. I haven't had an opportunity to do that this past year. It has taken from sixty to ninety days of my time this last year and the thought is that this committee plus the examining committee will afford an opportunity to carry on on behalf of the whole bar and reach the things we have been struggling for. I hope no one resents the action taken and that it will prove its worth.

MR. L. E. GLENNON: With respect to the Idaho Code. I haven't any idea we should try to get a new code in the near future, but it might be advisable that we give consideration to the subject during the coming year with the idea that when a new code is produced it will be a better code than we have now. We ought to get our ideas as to the kind of code we do want when we do get it. There is a possibility of many improvements. We should direct the commission to give some thought to that, and particularly refer it to the local associations with the idea of bringing out discussion.

I move that this convention instruct the commission to appoint a committee and take such other steps as it sees fit, including referring it to the local associations for discussion, during the coming year, to obtain suggestions for improvements that may be made in a new code when the time comes for providing a new code. (Seconded-carried).

MR. KARL PAINE: Mr. President, I arise to congratulate you upon appointing that examining committee. Ever since I attended the meeting of the Bar at Couer d'Alene and had to go to the defense of our able secretary

and Mr. Eberle and whoever the other men were who passed upon the applicants' papers that year denying some attorneys' sons admission, my sympathy has gone out to all of you who had to give those examinations. I don't know what authority you had, but whether you had any authority or not I am glad you assumed you had. I think the Commission has been imposed upon long enough. It is work that should be distributed over the bar. All of us should participate in that work.

PRES. THOMAS: Thank you. I appreciate that.

MR. FRANK MARTIN: If there is any question about what power the Commission has let's get busy right now. For that purpose I move that this Bar go on record as approving the action of the president and that we further instruct the commission to appoint such committee members as may be necessary and give them the power that the commission may consider necessary, to go on and conduct these examinations, to the end that the commissioners may spend more of their time with actual problems of the lawyers and have to spend less time in conducting these examinations. (Seconded, carried).

PRES. THOMAS: The next on the program is: "Trading With the Enemy Act," by R. P. Parry from Twin Falls.

MR. R. P. PARRY: Mr. President and gentlemen. When we think of the far away enemy lands to the East and the West of us, geographically speaking, we are as far from an enemy as almost any part of the world today. Hence it occurred to me that the Trading With The Enemy Act was rather a strange subject to be discussed at a meeting of our Idaho Bar. But a slight study of that act does indicate that it contains many provisions, and is susceptible of many applications, which make it of interest to Idaho lawyers.

There are quite a few provisions of our Federal Statute applying to aliens and to aliens' rights in war time. And in the first instance, it should be kept in mind that Trading With the Enemy Act is not intended so much for the control of the alien himself but toward control of all persons, associations or corporations who are doing or might do business with the enemy alien; and in that indirect way, control the enemy alien. Other provisions of the Federal statute, such as sections 21 to 24, inclusive, Title 50 U. S. Code, under the general title of "War" apply to the control of the aliens themselves.

The Trading With the Enemy Act covers a separate unique phase of enemy control. It has not been passed

hurriedly, nor come into existence solely because of the present conflict. It dates back to World War I. During that war, it was soon realized that this country was lacking in effective control of matters having to do with the property of, and business dealings with, enemy aliens. Accordingly, this act was passed. It has been the law of the land continuously since that time. The Act, with very full annotations, appears as an appendix under Title 50, War, U. S. Code Annotated. It has been applied numerous times and there are many decisions construing it. When the blanket resolution was passed March 3, 1921 declaring that certain acts of Congress, joint resolutions, proclamations, etc., enacted during World War I should be construed as though the World War had ended and the emergency expired, the Trading with the Enemy Act was expressly excepted, and continued in force and effect. In fact, it was under this act that the President issued some of his orders and took some of the steps required during the days of the bank closings and other arbitrary actions in 1933.

I shall not attempt to give you any definitive statement as to everything that the law covers, or attempt to state exhaustively all of its provisions. But it might be of interest to consider for a moment the general subjects covered by the Act, and to give thought as to whether or not any of its applications would affect those of us practising law in Idaho in our ordinary daily lives. All I shall attempt is to arouse your curiosity and place you upon your warning as to when and under what conditions the Act might apply.

The Act in its essence is pointed toward those who are doing, or might do business, with an enemy alien, defined as any individual, partnership or other body of individuals, of any nationality resident within the territory of any nation with which we are at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within the territory of the nation at war with us, or in any other nation and doing business with a nation with which we are at war, and, by proclamation of the President, all individuals who are natives, citizens or subjects of any nation with which we are at war, wherever resident or doing business, and also the allies of such enemies, on the same broad general terms. It applies directly to every citizen of Italy, Germany or Japan or their allied countries at war with us, even though they may be residing in the State of Idaho. The act vests broad powers in the President and in practical application, during the time of war, the exact terms of the various prohibitions and the man-

ner and method of the application of the act are to be found in the various presidential proclamations and executive orders.

The philosophy of the act is that no one can do any business with anyone falling within its terms, after the declaration of war, or after proclamation of the President, without a license. In theory, a separate license could be required for every transaction of any kind that any person could have with any citizen of an enemy country. The terms of the act are extremely broad. It prohibits, among other things, that any person should, in dealings with an enemy alien, pay, satisfy, compromise or secure any debt or obligation; draw, accept, pay or endorse any negotiable instrument; Enter into, carry on, keep or perform any contract or agreement; Buy, sell, loan or extend credit, trade, deal with, transfer, or assign or receive any property of any kind; and even to have any form of business or commercial communication or intercourse with them.

The terms of the act are so broad that an attorney could not even represent in any manner an enemy alien unless he had a license to do so. Without such a license, even a mere oral agreement between an attorney and such client is not only void, but subjects both parties to severe penalties.

For some period prior to the war, the president had, by executive orders, frozen foreign funds and tied up business with practically every European and Asiatic nation except Great Britain. During that time, a general license was issued, allowing limited business transactions with the nationals of certain nations and much of the work of enforcing the prohibitions of the Act as then applicable, was entrusted to the Treasury Department, and through it to the Federal Reserve Banks. And there much of the power and actual control still remains.

After Dec. 7th many proclamations and executive orders were issued.

Immediately after December 7, a general license was issued to Japanese nationals, limiting their right to withdraw funds to $100.00 per month, and giving them certain other rights. Since that time, changes and modifications have been made in that license and certain other general license provisions are now in force. The Federal Reserve Bank keeps all banks and financial institutions advised as to these matters. And, at any given time, the orders and regulations currently in force are about the only guide that a lawyer has, for the reason that they are changing rapidly. sometimes from day to day.

For instance on Tuesday of this week, President Roosevelt issued a new executive order dividing the powers under this act between the Alien Property Custodian and the Secretary of the Treasury. The Custodian will have charge of all enemy owned or controlled businesses and all patents, copyrights, trade marks, foreign ships, and all forms of property and the claims of enemy nationals involved in estates, trusts, and receivership proceedings.

The Treasury will continue to handle all banking matters and all transactions or businesses dealing with the countries affected, and all trade and commercial communications with the enemy controlled nations.

At any given time, the lawyer must study the current executive orders and rules and regulations.

As an example of the far reaching effect of the act I noted yesterday that many firms doing export and import business are considerably concerned because they cannot even answer letters received from long time business associates who are now listed, under the provisions of this act, in the "Proclaimed List of Blocked Nationals." The individuals and firms who are "blocked," fill booklets of many pages which have been compiled and issued by our Government.

Another provision is Section 7 providing that every corporation in the United States shall, when required transmit to the Alien Property Custodian, a sworn list of every officer, director or stockholder believed to be an enemy or an ally of an enemy.

And the act provides many other provisions relating to the confiscation and control of property by the Alien Property Custodian. In short, under this act, and executive orders and proclamations made in connection therewith, about all commercial transactions, except those of the very limited character which are covered by the so called general licenses, are prohibited with enemy aliens. They can't transfer property, they can't do business of any kind; and any one who is the other party to the transaction, becomes equally guilty with them.

Of interest to lawyers is that the act expressly states that no person shall be held liable in any Court for, or in respect to, anything done or omitted in pursuance of any order, rule or regulation made by the President under the authority of the act. In other words, no person need have any fear of suit for damages, or for breach of contract, or any liability of any kind, for failure to do business with an enemy alien.

The question, of course, naturally arises then, How much, and how far, must a person investigate those with whom he is doing business to ascertain whether or not he is an enemy alien? Of course, if one knows that the other person is an enemy alien, the act immediately applies with full force. The exact terms of the act are that it applies to one dealing with an enemy alien with "knowledge or reasonable cause to believe" that a person is an enemy alien. There exists a strong presumption of such knowledge; or even more than a presumption, because a definite responsibility rests upon a person who deals with an enemy, and he cannot avoid liability by claiming that he had no reason to believe that the party he dealt with was an enemy.

In dealing with any person, known to be of Italian, German or Japanese descent one is at once put on notice to investigate as to the birthplace or naturalization record of such person.

And, at any rate, it is certainly true that in all business dealings during time of war, everyone when dealing with persons or corporations not personally known, should keep in mind that there is a possibility that the other person is an enemy alien. And if there is anything to raise the slightest doubt in his mind, then the obligation falls upon him to ascertain the true situation. If he is an enemy alien, there is practically no character of business that can be transacted with safety. The act applies to banking transactions, money transfers, buying and selling of real estate and all other property, and the whole endless variety of business transactions which make up our entire life.

One real concrete evidence of our Government's handling of enemy aliens in Idaho is the Japanese Relocation Center being constructed north of Eden. The Government is there building, working feverishly day and night, a location for 10,000 Japanese who have been ordered out of the Pacific Coast region. From a legal point of view, the most interesting phase of this transaction is that a large percentage of the people who are going to be moved by compulsion into Idaho are not aliens at all, but are American citizens, even as you and I. The cause and reason for the removal is that they happen to belong to a race with whom we are at war. And the way that this has been done furnishes a concrete example of the vast and startling powers possessed by our Government during war times.

The steps by which all of these people of the race, whether aliens or American citizens, were forced to move is as follows:

On February 19, 1942, the President, by executive order empowered the Secretary of War to designate military areas from which could be excluded any or all persons. This first order did not even mention the Japanese. Pursuant to this, Lt. General DeWitt, commanding the Western Defense Command, by proclamation, defined military areas on the Coast and ordered the exclusion of Japanese, aliens and citizens alike; and other aliens. Then the War-time Civil Control Administration was established under the army to supervise the evacuation and coordinate the assistance of numerous Federal agencies. Then the President, by executive order, created the War Relocation Authority to formulate a plan for permanent relocation and the management of the relocation areas.

The Japanese are first taken to assembly centers which are near the Coast. Then they are moved to relocation centers such as the one being built in Idaho. This particular one is designed to accomodate 10,000 Japanese with the necessary guards, attaches, administrative officers, etc. It is located in what is defined as a relocation area, which in this case comprises about 17,000 acres of land owned by the Federal Government and possessing water rights under a canal built by the Federal Bureau of Reclamation, commonly known as the Milner-Shoshone canal.

As announced, it is the plan to provide work in the area for all Japanese there. The group moved includes farm laborers, business men, tradesmen, professional men, and many with good educations or high type of ability. As I understand it, the thought is to make the community as self supporting as possible. If any of these Japanese work, they do so voluntarily. They are called Enlistees in the War Relocation Work Corps, enlisting for the duration of the war and 14 days after; swear loyalty to the United States and obedience; and will be paid wages, it being provided that the maximum cash advance shall not exceed the basic minimum wage of the American soldier.

These workers may receive furloughs in order to take private employment. The Japanese who have taken such furlough have assisted in some of the preliminary beet work in Idaho. They are allowed to do this only on the following conditions:

1. The local community must assume the responsibility of protecting them and maintaining law and order.

2. The Japanese must volunteer.

3. They must be transported to and from their place of work by the private interests.

4. They must be paid prevailing wages and not displace other labor, and have suitable living accommodations.

5. And during the time they work, must repay the Government for the expense of dependents who remain in relocation areas.

Here we have a concrete example of the extent of power of the Government in times of war in taking charge of a whole race, even though many of them are citizens of our land. When such control can be taken in a perfectly regular and legal manner; it is realized how extensive the control of our Government is as to the property of enemy aliens under the Trading with the Enemy Act.

All I have been able to do in a brief paper is to indicate that there is a Trading with the Enemy Act; that it is extremely broad in its application; and that it could apply with terrific force to one doing business with a citizen of an enemy country resident in, or doing business in, this state. There is almost a presumption of knowledge of such enemy character; so much so that safety's sake requires one to carefully investigate any one with whom he is doing business, of whom there is the slightest ground for suspicion. And every corporation or business house client should know of the general character and broad application of this act. I hope that I have aroused the curiosity and interest of those who may not be familiar with its terms to the extent that they will read it and advise themselves of its contents and application.

PRES. THOMAS: Next is: "Remedies by and Against Enemy Aliens," by Judge Hunt.

MR. EVERETT E. HUNT: Mr. President. A state of war always creates much confusion and much difference of opinion concerning the rights of aliens during time of war. In Idaho the most common and vexing question arising for our attorneys to deal with concerns the right of alien enemies to take real and personal property situated in Idaho through inheritance or by will.

It has always been the custom for foreign consuls to represent alien heirs living abroad and we have, as a rule, made settlement through foreign consuls in cases where we could not locate the foreign heirs and deal direct with them. Settlement could always be made with foreign

consuls and their receipt was sufficient to discharge our executors and administrators and attorneys from further liability. Notwithstanding these treaties, the Trading With the Enemy Act now provides that such settlements cannot be made with alien enemies. Settlement can, however, be made and our liability discharged in two ways. First, by payment to the alien property custodian and second, by depositing in any national bank funds due enemy aliens in their names and taking a deposit slip therefore. The receipt of the bank filed in Probate Court is sufficient to discharge the administrators, executors, and attorneys from further liability. It is, of course, also necessary that the alien property custodian be advised concerning these deposits.

The rule appears to be that an alien enemy may take land by devise and hold the same subject to the will of the Government in which the land is situated. In other words, the devise is not void except as against the Government, whose will must be manifested by appropriate action. The same rule holds true for personal property. The right of the Government to land devised to an alien enemy does not arise out of the state of war, but results from mere municipal legislation. It has been held that, "A declaration of war is not in itself an act of confiscation of the property of alien enemies within the territory of the belligerent power. An alien enemy holds his property legally against all the world but the sovereign. The power to confiscate is discretionary, and not to be exercised in the interest of private citizens. The modern tendency is to withhold the property of the alien enemy, if necessary, and restore it to him at the termination of the war." The tremendous costs of the present war leads us all to believe that a new and different rule will be adopted after the conclusion of the present hostilities for it is apparent that only by the seizure of alien property within the United States can any reparations be secured from those nations that initiated the present war.

EFFECT OF WAR ON LITIGATION PENDING AT THE TIME OF ITS OUTBREAK.

The general rule is that an alien enemy, resident in his own country, may not prosecute an action instituted before the commencement of the war in the country of the forum. The main reason for this rule seems to be that the restrictions of the right to sue does not result from the incapacity of the foreigner, but from the fact that the enemy country will profit by executing a judgment in his favor. In some cases an enemy plaintiff is recognized to the extent that the courts will permit him to take such action as may be necessary to preserve his rights, although he may

not enforce them where the effect will be to augment the enemy resources. The Trading with the Enemy Act has been recognized as precluding non-resident subjects of a nation with which the United States is at war from further prosecuting any suits in our courts during the continuance of the war. The act, in this respect, apparently being a recognition of the general common-law rule. It naturally follows that if the enemy alien himself cannot maintain a suit, neither can his agent or trustee maintain such an action. The weight of authority is to the effect that where an action has been commenced before the war, the proceeding is only suspended because of the temporary incapacity of the plaintiff to go on with the action and that it will remain in abeyance until the impediment is removed by the termination of the war, unless the action itself ought not to be maintained.

In bankruptcy proceedings, an alien enemy may make a claim against the bankrupt estate although dividends thereon will be withheld until the conclusion of peace, but an enemy alien, resident in the enemy's country, cannot be heard during the war to complain of the rejection of a claim filed by him against a bankrupt estate. The reason for this rule, is undoubtedly, the fact that, if by filing such claims, bankruptcy proceedings could be held up during the duration of the war, much injury and loss in all such cases would inevitably be sustained by our own people.

If an enemy plaintiff is resident in a neutral or allied country, our courts differ in their rulings as to whether or not this alien may maintain a suit. The majority rule, however, is to the effect that in such cases the suit cannot be maintained for if permitted to take his recovery to a neutral ocuntry, he could then transfer his recovery to the enemy country. An enemy alien resident in this country may maintain his action subject to the same rules and regulations in effect in time of peace.

War conditions are legitimate grounds for continuance in litigation commenced prior to a declaration of war, the reason being that such litigants should have an opportunity to come into the court with their claims and offer their testimony in support thereof. The duration of any such continuance is a matter purely within the discretion of the court.

Non-resident aliens are not allowed to institute or prosecute actions in our courts during the continuance of the war. The Trading With the Enemy Act is authority for this rule. The only exceptions are in cases involving patents, trade marks, and copyrights.

SUITS AND REMEDIES AGAINST ENEMY ALIENS

During a state of war our citizens may prosecute suits against enemy aliens. The reason for suspending the right of action of an alien enemy is the possibility that any funds or property recovered by him will inure to the benefit of the enemy—does not apply where the suit is by a citizens to recover property or funds. This liability of an alien enemy to be sued carries the right to be heard in defense, to use all the means and appliances of defense, and to appear by attorney and present his defense. He may also have his time to answer extended until after the completion of hostilities and the reopening of communications between the two countries. The provision that a non-resident alien enemy may be sued and may defend does not, however, give him the right to prosecute a counter claim although he may interpose a set-off. It naturally follows that a defendant's privilege of being sued in the country where he resides ceases when he voluntarily becomes an alien enemy. The great difficulty encountered in suits against enemy aliens naturally is the matter of acquiring jurisdiction of the action. Service of summons and complaint by publication is generally necessary and of course, jurisdiction can not always be obtained in this way. The remedy of attachment is always available against alien enemies. This remedy is complicated by the fact that the plaintiff is subject to regulation by Federal statutes such as the Trading with the Enemy Act. Suits to foreclose mortgages and other liens upon real property are permissable against alien enemies.

CONCLUSION

We would be fortunate if we could go to the reports and not be confronted by majority and minority rules. Like every other subject, our courts have differed in their interpretation of the law and in matters purely concerned with public policy. Fortunately, some publishers have gone to great pains to make the law readily available. Short and complete briefs concerning various phases of this subject may be found in the following citations:

Selective Service and Training Acts, 129 ALR 1171, 137 ALR 1183.

Soldiers and Sailors Civil Relief Acts, 130 ALR 774, 137 ALR 451.

Change of domicile by persons in military or naval service, 129 ALR 1383.

Civil and criminal liability of soldiers, sailors and militiamen, 135 ALR 10.

Officers or privates in military service as "officers" or "employees" within statute waiving state's immunity from liability for torts, 129 ALR 911.

Liability for injury or damage resulting from traffic accident on highway involving vehicle operated in military service, 133 ALR 1298.

Incompatability of offices or positions in the military, and in the civil service, 132 ALR 254.

Constitutionality, construction, and application of statutes concerning status and rights, as regards governmental bodies ,of public officers or employees in civil service, while performing military or naval duty, 134 ALR 919.

Liability for injury to person or damage to property as result of "blackout," 136 ALR 1327.

See also all encyclopedias under "Alien Enemies," and "War."

PRES. THOMAS: The next order is "Price Fixing Problems and Procedures," by Richard B. Hefelbower of Denver, Acting Price Executive for the O. P. A. for the State of Idaho. Mr. Heflebower is peculiarly qualified not alone by training but by experience.

MR. RICHARD B. HEFLEBOWER: Mr. Chairman, members of the Idaho Bar. The gist of a discussion by members, overheard by me, was that there would be no profits in the legal business and they ought to join the bar tenders' union. Possibly I was not mistaken when I decided not to study law. I did study economics. Unfortunately we don't have any admission to the bar as you attorneys do, so anyone can style himself an economist. The best expression of what an economist is was in the Skeezix column. Before Skeezix was able to work, he asked Uncle Walt for a quarter; Uncle Walt's balance was very dim and he tried to explain to Skeezix and tell him he should economize. Skeezix said: "What is an economist?" Uncle Walt scratched what was left on his pate and said: "Skeezix, an economist is a financier without funds."

War and inflation have always gone side by side. The last war was no exception though in this country the cost of living only doubled; in France it increased six times.

The effects of war time inflation are known to all who experienced even the mild inflation of 1917-1920 and the disastrous collapse thereafter, but even more keenly to those who experienced the inflation suffered by the continental countries of Europe. Inflation redistributes incomes. It wrecks business, but above all it contributes to social demoralization by seriously reducing the status of the middle class.

This time, we as well as most of the belligerents have decided to control this side of our fate. The cause of war time inflation is well-known. There is no disagreement among economists on this well known formula. Furthermore, the means of control are well-known and can be effected provided we have the courage to apply them. Not only do we have a well worked out body of thought, but theoretical and statistical data to support us in our campaign to control the cost of living. We have also the several years' experience of the other belligerents to guide us.

It had been hoped, at least prior to Pearl Harbor, that we would be able to control the cost of living through the method of financing the war. After all, inflation arises because purchasing power coming into the market exceeds the supply of goods. The shifts in production and the increase of the total production of the war period inevitably increases purchasing power more rapidly than goods. If, however, the government were willing to finance itself exclusively from taxes and from bonds bought out of the current savings of the people, a balance would be struck between the remaining purchasing power of the people and the supply of goods available to satisfy their demand.

Unfortunately, our tax program and bond sales have lagged far behind. It appears that during the coming fiscal year, the American people will have about twenty billion dollars of purchasing power (after taxes, savings, etc.) in excess of the available supply of consumers goods and services valued in 1941 prices. This inflation gap is the reason for the Emergency Price Control Act of 1942 and the regulations issued thereunder.

On April 27 the Office of Price Administration announced the General Maximum Price Regulation. Before and since that date this has been supplemented by regulations dealing with the particular problems of individual commodities and industries.

The best way to understand the General Maximum Price Regulation is to see the major principle, namely, to preserve as a maximum the price structure of March. This, refers to all goods and services except those specifically exempted. Two large exempt classes are direct personal services and raw agricultural products. By maintaining the March price structure, the Office of Price Administration means that the practices with respect to dis-

counts, allowances and different prices for different classes of buyers shall be maintained.

In connection with the carrying out of this plan, all retailers are asked to post the prices of a group of items called "cost of living" and which form the essentials of a family budget. By this means, the consumer is shown that his "cost of living" is under control. At the same time, sellers of all sorts are expected to prepare and keep in their offices a basic price list which gives their ceiling prices on all covered commodities and services sold by their businesses. This is the businessman's protection. It provides a list prepared shortly after the effective date of the ceiling regulation which shows the businessman's prices. If at a later date, he is called upon to quote his ceiling prices he will have this book for reference. Though the preparation of this price list will involve a great deal of work, businessmen will find it a valuable instrument for their own use.

Of course, in issuing such an over-all ceiling-freezing prices at a maximum as of a certain month, a number of injustices will be imposed, therefore, a definite procedure for adjustment is provided. For the retailer, the adjustment procedural Regulation No. 2 is relatively simple. This is particularly true where his problem is a horizontal one, namely, a problem where his prices in March were abnormally low compared to his competitors. If, however, the problem is that retailers generally have low prices as compared to wholesalers and manufacturers, the plan of the OPA is to solve these difficulties as far as possible by the "roll back" which is a reduction of manufacturer's prices.

For manufacturers and wholesalers, the procedure of adjustment is more involved. They are called upon to use Procedural Regulation No. 1 and demonstrate the effects on them of the General Maximum Price Regulation. Copies of these procedural regulations as well as other information, regulations and bulletins can be obtained from the state office of the OPA in Boise.

In addition to the General Maximum Price Regulation, there is a growing list of special regulations to deal with particular commodities, such as farm machinery, summer seasonal commodities, tires and tubes, etc. The task of keeping up with these regulations is a tremendous one and until a filing system and methods of analysis have been developed, even the OPA offices are not fully informed or they cannot always supply answers on short notice.

Each state organization under the Office of Price Administration has a gigantic task of acquainting retailers and other businessmen with the provisions of the general maximum— their duties, their procedure and their rights. With the very limited staff now available this educational program is far from complete, but it is being pushed as rapidly as the staff will permit. It is known that businessmen are anxious to cooperate with the campaign to hold down the cost of living once they know the method that has been adopted and how to proceed under it . Surely, if there is violation at the present time it is largely on the basis of ignorance, though as the state OPA attorney can tell you, willful violation will be subject to heavy penalty.

You men are frequently called upon in your communities for advice. You are supposed to know anything. We will be glad to answer your questions and I have with me pamphlets which I will be glad to distribute to you, which may help you in your O. P. A. problems.

PRES. THOMAS: Next is a discussion by James H. Hawley on this same subject.

MR. JAMES H. HAWLEY: Mr. Chairman. The real arrangement between Chairman Smith of the program committee and myself was that perhaps Dr. Heflebower would not be able to be here; if so I was going to pinch hit. The Doctor spoke of enforcement. I will not go into those details at all. I will say that the enforcement of O. P. A. is going to be primarily a campaign of education. The attitude is so very fine in so far as it has been tested; the public generally seems to realize that this is a program in which they are as much interested as anyone connected with O. P. A. They desire to know what they should do and hence we say this is a campaign of education rather than of enforcement. The law obviously has very sharp teeth in it. My conception is that enforcement in Idaho will be measured by the number of cases we keep out, rather than the number we bring into, the courts.

Mr. Parry mentioned the startling war power of the government under war conditions. The operation of the O. P. A. is, of course, one that startles people generally in their concept of government operation and the extent of war power it has. I am going to read to you a part of a decision of the Supreme Court of the United States, written in 1931, which will bring before you the extreme power and the tremendous change in government under war conditions and the authority exercised by the government

under those conditions. United States vs. Macintosh. Justice Sutherland wrote as follows:

"From its very nature the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law. In the words of John Quincy Adams, 'This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life.' To the end that war may not result in defeat, freedom of speech may, by the act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictments or trial by jury; ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government; and other drastic powers, wholly inadmissble in time of peace, exercised to meet the emergencies of war."

PRES. THOMAS: The next order of business is "Your Clients' War Transportation Problem," by Maurice H. Greene of Boise, Field Manager of the Office of Defense Transportation.

MR. MAURICE H. GREENE: For seventeen long weary years I applied myself assidiously to the study of the law, hoping, dreaming and fully expecting that some day the great talents which I was positive I possessed would be recognized by my fellow members of the Bar and that I would be called upon to appear before one of these annual conventions to impress upon you my profound knowledge of any subject I might choose to talk upon. For seventeen years my efforts fell upon barren soil. Yet less than thirty days after having accepted employment in a more or less menial position with the Federal Government and still being wholly unable to acquaint myself with the official duties of my office, I find the honor which I so long hoped and prayed for suddenly thrust upon me, not because of those seventeen years of untiring effort, but apparently because of the length of the official title which I may now attach to my name. To add to my discomfiture, I must talk upon a subject about which I am not only little versed but upon which no text book has been written

or court decision rendered. Therefore, you must accept my remarks as flowing from the old but familiar maxim that: "Necessity knoweth no law", for today truly I am the living personification of the maxim.

Pearl Harbor, Singapore, the Dutch East Indies and the Philippines suddenly focused the attention of the American people upon the fact that, in the operation of some thirty-five million rubber-tired vehicles upon the streets and highways of this nation, we have lost the source of 98% of our ordinary rubber supply. It brought to the attention of 135 million residents of this country the realization that our businesses and even our private lives have in the past few years become absolutely dependent upon the use of the self-propelled vehicle. But mankind is still unfortunately possessed in some measure of the trait of selfishness and inclined to protect his own business, even his own pleasures, although knowing that in so doing he may be injuring, not only his neighbor, but his country at war as well. Within thirty days after this country entered the war, in order to prevent buying raids upon and rapid exhaustion of supplies of then existing rubber, it became necessary for our Government to freeze supplies of new tires and thereafter regulate, through a system of rationing, the method by which they may be sold to private consumers. The regulations have been extended to cover recapping or retreading of used tires. Likewise, within three months after the entry of this nation into the present conflict, because of conversion of motor vehicle producing plants to the manufacture of war equipment and supplies, it became necessary to freeze existing supplies of automobiles and trucks, truck tractors and trailers and provide a similar system of rationing.

In less than two weeks after entry of the nation into war, the President, as Commander-in-Chief of the Army and Navy, deemed it necessary to create an Office of Defense Transportation, the Director of which was directed to consolidate transportation policies and activities of the Federal Government, the states and private transportation groups into a national domestic transportation policy necessary for the successful prosecution of the war. The primary purpose of the Office, as originally created, was advisory only and not compulsory. No single transportation system in the country, rail, motor truck, or airline, could predetermine the load of traffic it might be called upon from time to time to bear during the course of the war, nor could it determine how to prevent war materials piling up at any single port of debarkation, piling up far beyond the existing shipping facilities to move and storage facilities to store. No single transportation system could predeter-

mine for the entire nation the existence of car shortages at widely scattered points throughout the country, of mass military movements, or, and perhaps most pointedly, what quantities of intercoastal shipping must be diverted to overseas work or lost through the activities of enemy submarines close to our shores. The province of the Office of Defense Transportation was not limited to any one particular transportation agency but was directed to coordinate all systems of transportation, railroads, motor trucks, inland waterways, pipelines, air transport lines and all forms of coastwise and intercoastal shipping. One problem with which it has been faced, of which you are all aware, is the shortage of transportation facilities needed to handle shipments of gasoline from the Texas and Louisiana oil fields to New England and the east coast. Other similar shortages, less prominently featured in the day's news, have been encountered and, in the main, successfully solved. No blockades have as yet occurred at interior central shipping points and few, if any, blockades are anticipated at ports of debarkation. However, we in Idaho know what would happen if cars were not available to move our farm products, our ores or our lumber. Why produce more for the war effort if it must rot in a storage cellar or deteriorate in a warehouse.

Notwithstanding the rationing of motor vehicles and tires and the pleas of the Director and of other associated war agencies a great majority of the members of John Q. Public have continued to use the transportation facilities of the country, both public and private, exactly the same in wartime as in peacetime. Long and wasteful movements by motor truck and countless local daily deliveries, given birth by our system of competitive wholesale and retail merchandising, of which we have been so proud, continued in full measure after our entry into the war so that, with the ever increasing output of our war plants, all of our transportation facilities were rapidly reaching the breaking point. On May 2, 1942, the President, taking cognizance of the fact that the public, whether knowingly or not, was a party to causing a transportation crisis, added to the powers of the Office of Defense Transportation the right to determine what shall constitute for the duration of the war essential and non-essential civilian use of rubber borne transportation facilities and to limit the use of such facilities in non-essential activities and regulate their use or distribution among essential activities. There is no question but that action was necessary to prevent a complete breakdown of our transportation facilities, a fact which many of you will recall did occur early in the first World War and resulted in Government management or perhaps better stated Government "mismanagement" of the railroads.

Mere words cannot express the enormity of the task which confronts our carrier systems today. In 1941 more tonnage was handled by the railroads than ever before and handled with a much smaller number of freight cars than would have been required a few years ago. Freight traffic had increased terrifically during the first six months of the year, to an extent that I predict an increase of not less than thirty per cent over 1941. In addition to a heavy increase in passenger traffic, the railroads transported over 4,500,000 troop passengers during the five months just ended.

If the railroads handled such great quantities of freight in 1941, of what use are the motor trucks? For every five tons of freight handled by rail in that year, approximately one ton was handled by trucks. The vast quantities of freight handled by the rails could never have been handled with precision and dispatch except by the use of motor trucks at rail terminals. There are between six and seven million trucks in use in the country today. About 600,000 new trucks were placed in service in 1941 and about 50,000 were relegated to the scrap heap. When truck rationing commenced there were about 150,000 vehicles, or a normal three months supply available. Three months of rationing has seen some 35,000 placed in commercial service. There are now some 70,000 applications pending before rationing boards throughout the country. By the end of the year, at the present rate of rationing, the supply will be nearly exhausted. Can the railroads stand, not only the demands of increased war production, but demands which must result as the facilities for truck transportation wear out? Can the passenger facilities of the railroads and the commercial bus lines absorb the demands of the traveling public as private automobiles fall by the wayside? Necessarily, unless American ingenuity can solve this problem, the answer is "No". Rationing of movements of freight by rail and truck will necessarily result in eliminating the transportation of many commodities deemed nonessential to the war effort or to the health, welfare and safety of the civil population. What the effect of such action would be on private enterprise already struggling to continue business under the load of price ceilings, increased taxation and higher operating costs is difficult of imagination and impossible of precise analysis.

You may well state this information is all very interesting, but how does it affect the lawyer and his client? To my mind the time has come when the lawyer, whether he desires to do so or not, is going to be forced to take more of an active interest in transportation problems, the same as he is going to be required to know the functions of the War Production Board, the Office of Price Administration and other war born agencies. Perhaps none of you de-

sire to become conversant with the Federal Motor Carrier Act, the seemingly endless and complicated rules and regulations of the Interstate Commerce Commission, state statutes and regulations, but you are going to be called upon by your client, the butcher, the baker, and the candlestick maker to figure out ways and means of those businesses having some form of transportation to reach their customers. Visualize, if you can, the prospects of the downtown grocery store without a delivery system, staying in business when there is a community grocery store within a block of the housewife's door; or the future of the livestock industry in the State if trucks are not available for shipping from and to ranges and to railroad loading points; or the lumbering industry without logging trucks or the mines without ore trucks. Some people feel the government must make tires and trucks available to industries engaged in the production of food, ore and lumber. These industries are eligible to apply to rationing boards for tires and for trucks, but, the tire boards will tell you the answer—the rationing quotas are about fifty per cent sufficient to supply present demands, demands which will continue to constantly increase.

Some lawyers will tell their clients there is nothing a lawyer can do to help them. The lawyer who takes that attitude is not performing his duty as a citizen, let alone a lawyer.

Tire rationing boards and truck rationing boards operate under regulations adopted by the Office of Price Administration, the War Production Board and the Office of Defense Transportation. The proper drafting of applications often determines whether rationing boards approve or deny them. If the client is not eligible for new trucks or tires, then the conscientious lawyer will turn to the most advisable method of conservation of existing equipment. Many new methods of conservation of equipment have been and will be suggested by the Office of Defense Transportation, most of which are, however, of a practical nature and of no interest to the average lawyer.

However, the method which gives greatest promise of equipment and rubber conservation is through various forms of pooling agreements, the form and contents of which must essentially be legal. Through such devices one delivery system may supplant four or five existing systems without injury to any business, a community can be districted so that duplicate services by motor truck are absolutely eliminated. The preparation of such pooling agreements will of necessity force the lawyer to interpret the orders of the Office of Defense Transportation under which

the pooling agreements will be drawn. He will of necessity be required to know whether the interchange or pooling of truck operations will violate the Federal Motor Carrier Act, the state regulatory laws and the Federal anti-trust act.

I do not believe there is a member of the Bar before me who has not been solicited many times for information concerning the Federal Motor Carrier Act. When it is recalled that the Federal Motor Carrier Act applies only to motor truck operations for compensation in interstate commerce, does not apply to interstate operations of a motor truck engaged in hauling its owner's goods or to a farm truck engaged in hauling farm produce, you may readily perceive how frequently your services will be called upon because presently existing regulations of the Federal Government apply to all types of motor truck operations, interstate as well as intrastate, to the delivery truck, the milk truck, the coal truck and the garbage truck. For every question you have been called upon to answer in the past in connection with the regulation of public motor carrier, you will be called upon to answer a hundred questions in the operations of all types of carriers, public or private, interstate or intrastate, including many common uses now made of passenger vehicles, designed for pleasure, but used in a limited sense in furtherance of a business enterprise. Restrictions on the use of motor vehicles in our ordinary businesses are just beginning. Some proposed restrictions are not yet in force and effect because time is required to permit private business to absorb the shock of the necessary readjustments to meet the new requirements. But whether you represent a truck line, a commercial enterprise which uses trucks in furtherance of its business, or a farmer whose truck is his only means of moving fruit to market, you, as lawyers, as leaders in your community, owe it to your country to undertake wholeheartedly the task of educating each and every member of the public of the necessity, irrespective of financial losses, of conserving and protecting every pound of rubber and every type of rubber tired vehicle until this conflict in which we are now engaged has ended.

This task of education will be one from which you generally will not reap compensation or reward. It flows from your position as a leader in your community, as a man fully informed on public affairs. The public must be impressed with the fact that nonessential passenger travel must stop. Rationing of passenger transportation offers the only alternative. Supplies for business establishments must be purchased locally if possible. Long hauls by motor truck of commodities that can be more conveniently handled by railroad, such as lumber, coal, livestock and the like must

be stopped entirely. No truck should ever return empty until it has exhausted every resource to find a return load. No business establishment should offer more than a single delivery service daily. Duplicate services of all kinds should be eliminated. The use of farm trucks and passenger cars should be pooled and no farmer should go to town until he has called up his neighbors to see if he can bring a load back. Circuitous routes must be avoided.

The foregoing is but a brief general analysis of some of the orders and requests made by the Office of Defense Transportation to the public. The orders are mandatory. The requests are not. Failure to abide by the requests can only bring about more orders. Failure to abide by the orders may, among other things, result in tire rationing boards denying applications for new tires and new trucks and be made the basis of criminal prosecutions. Such action may sound arbitrary, dictatorial, unconstitutional. However, when the public has been made to understand that, because of the rubber shortage, the army has arbitrarily reduced by twenty-five per cent the quantity of new rubber it has been using and by so doing has deliberately reduced the efficiency of the fighting machines our soldiers are using in battle, then the problem of enforcement will solve itself.

In conclusion, let me say that the lawyer who takes it upon himself to study his client's transportation problems, to assist the client in living up to the orders in conservation of tires and vehicle equipment; who sets an example in the conservation of rubber for the community in which he resides to follow, that lawyer is living up to the ideals of the legal profession. The lawyer who counsels the continuance of wasteful transportation practices by a client is slowly but surely driving the government to taking more drastic action to curb commercial enterprise not indispensable to the prosecution of the war. America has never been faced with the transportation crisis of today. The lawyer can and I am sure will do his part in seeing that crisis safely past. To "Keep 'em Flying" we must "Keep 'em Rolling."

MR. L. E. GLENNON: In response to an invitation sent out by the Secretary, Mr. Theo Turner, President of the State Title Association is present this morning.

PRES. THOMAS: We will be glad to hear from Mr. Turner, of Pocatello.

MR. THEO TURNER: Mr. President and members of the Bar, it was indeed a pleasure when I received your

gracious invitation, but I wrote your Secretary I thought it would be impossible for me to attend, having just returned from Colorado Springs where the convention was held on the 29 and 30th of June and the 1st of July. I was quite impressed by the similarity of the titles and topic discussed at the two conventions, as evidenced by your program. I regret I was unable to attend yesterday. Your invitation certainly merited somebody appearing before this group. I thank you for the courtesy. There are a good many things in which we could be mutually helpful. I trust we can work together to solve mutual problems. We are going to try to conduct regional meetings in the state and hold a state meeting within the next few weeks and we will certainly keep you people in mind.

PRES. THOMAS: Thank you, Mr. Turner. We have a committee with sufficient power to cooperate with you. George Van de Stegg of Nampa is chairman of that committee.

Gentlemen, we will now call the roll of district bar associations and we will have a five minute speaker from each association. Are any such here?

MR. GEORGE C. HUEBENER, President of the Seventh Judicial District Bar. My attendance here during the past few days has convinced me that the honor of Presidency of a local association carries tremendous tasks.. Not within the lives of any of us here have we felt the tremendous impact of war and the responsibility thrust upon the legal profession as now. In a recent review of history I came to realize that even into the Sixteenth Century the English people were still classed as barbarians. The papers we have listened to, particularly this morning, bring home to me more forcibly than ever and the regulations that are imposed upon us emphasizes the fact, that other nations struggle for the things which we have and which we need and which may be taken away from us, by the same spirit of barbarism. We, as leaders of thought in our communities, must exert every ounce of our power in preserving local government and the Constitution and the Bill of Rights.

You can see in the Office of Civil Defense problems that are going to meet us. One occurred to me just a few moments ago. So many of our men and women have enlisted in civilian defense. Congress is about to pass some legislation compensating those who may be injured in the line of duty. In this state it merits our investigation as to where the legal responsibility, the legal liability for civilian defense injuries may be placed. Should it be the state or the municipality in which the air raid may have

taken place? Upon what agency, should the legal liability be placed for someone injured? It should be looked into and legislation prepared so that those men who are giving their time in local defense work may know that if they are injured there is going to be a recompense.

MR. THORNTON WYMAN, President of the Third Bar Association. I am impressed with the idea the annual meeting should not be dropped except in dire emergency. It ought to be continued. The responsibility should be upon local bar associations to continue our efforts to make the State Bar a tighter professional association.

MR. R. P. PARRY: Mr. James who was directed to report for the Eleventh District Bar Association received a 'phone call that his army son had arrived home this morning and he asks to be excused.

MR. EVERETT E. HUNT: In the Eighth District there are four counties; three are represented here. We come farther than any other district represented. I sincerely hope that if Maurice Green lets us have a tire or two the boys from our district will be here next year.

MR. WELDON L. SCHIMKE: The ideas and conclusions of the Clear Water Bar Association have been expressed in the report of the President's Committee, with the exception that there has been some differences as to examination fees.

PRES. THOMAS: The next order of business is the report of the Canvassing Committee for the Southern Division.

MR. THORNTON WYMAN: We have canvassed the returns of the votes. There were fifty-nine ballots cast, of which fifty-eight were cast for Earl B. Smith and I take pleasure in presenting to you Mr. Earl B. Smith as your new Commissioner.

PRES. THOMAS: The next committee report is on the Code of Evidence. The Chairman was Laurel Elam.

REPORT OF SPECIAL COMMITTEE ON THE NEW CODE OF EVIDENCE

We recommend that the State Committee of the Bar be continued with instructions and authority to appoint sub-committees in each Judicial District. These committees are to furnish copies of the Code to members of the Bar and to encourage study of same. Each Judicial District

shall report to the State Committee which in turn shall report to the State Bar next year with definite recommendations.

It is apparent that under this code more powers will be given the trial judges. There will be a higher responsibility on the part of both Judges and Juries. We recommend that a special committee be appointed to study and report on improved methods of selection of Judges and Juries.

Laurel E. Elam, Chairman, Karl Paine, O. O. Haga

Adoption of the report, moved, seconded and carried.

PRES. THOMAS: The next report is the Divorce committee. Tom Jones.

MR. TOM JONES: Our committee approves the report and recommendations given here by the State Committee on Divorce Laws and I move its adoption and that it be referred to the Legislative Committee for action. (Seconded and Carried).

PRES. THOMAS: Now the Report of the Committee on Insurance Adjusters. Mr. Lawrence Huff.

MR. LAWRENCE HUFF: We have the problem of the company adjuster, the independent adjuster and of the indemnity companies. There are a number of angles to it. We are insufficiently informed. The State Association of Insurance Agents meets in Boise on August 24th. We move that a committee be appointed to confer with the State Association of Insurance Agents and with the Western Conference of Casualty Companies and the Non-Conference Companies, and see if something can be arrived at with the representatives of those companies. We suggest the members be lawyers from Boise because they can be in Boise more conveniently at the time the conference meets. (Seconded and carried).

PRES. THOMAS: Committee on Public Relations.

MR. L. E. GLENNON: This is a very important subject in which we are all deeply concerned. This committee reports.

Your committee begs leave to report the following recommendations:

1. That every member of the Idaho Bar give freely, and without charge, legal advice to any volunteer or draf-

tee in the military forces of the United States, or who is about to enter or be called for such service, or his dependents; and thus we offer our services in any other capacity in which our services may aid in carrying the war to a successful conclusion.

2. That the Bar Commission continue a standing committee to make further study of the subject of public relations, and the discussions and suggestions offered by the speakers on that subject at this convention. And that the committee continue its study of the subject, collect such data as it may and make a comprehensive report thereon to the Idaho Bar at its next annual convention.

PRES. THOMAS: Do you mean folks who can't pay for legal services at that particular moment?

MR. L. E. GLENNON: The thought of the members of the committee was that as a public service and with the idea of improving our public relations, we as lawyers, should freely offer our services. I don't think any of these persons to whom we render this service should be people who are able to pay for it. We assume they would not expect the free service but the thought in mind was that we make public announcement to those who do need it, as a part of our service in our profession.

I move the adoption of the report. (Seconded).

MR. SAM S. GRIFFIN: That report should be made direct to the Commission so that if, for any reason, we can't have a meeting that work could be carried on and also the Commission could act much more quickly than the convention could on some practical situations. What's your thought on that?

MR. L. E. GLENNON: We assumed it would be reported back to the Commission. We found ourselves in a broad field, one too broad to be covered by this report. There are many other things in public relations we want to work on this year and particularly through the local bar associations. The committee's thought and my own as a member of the Commission, was to get a committee to work throughout the year in arousing interest and getting suggestions from the local bar associations. (Motion carried).

PRES. THOMAS: We will have the Prosecuting Attorneys Section Report. Mr. Johnson.

MR. BEN JOHNSON: The Prosecuting Attorneys Section held their meeting this morning and election of

officers. It was recommended that the State Bar appoint two Prosecuting Attorneys on the legislative committee. I move the adoption of that recommendation. (Seconded and carried).

The Prosecuting Attorneys Section adopted the following resolution:

"Whereas, the prosecuting attorneys and sheriffs of the State of Idaho diligently investigate and prosecute criminal actions for the best interests and welfare of the citizens of the Gem state, and

Whereas, the expense to the taxpayers of the State of Idaho in effecting law enforcement is a heavy burden, and

Whereas, diligence is exercised on the part of the juries and the District Judges prior to any judgment of conviction and sentencing of criminals, and

Whereas, under the present pardoning system repeated prosecutions of habitual criminals burden the people with considerable unnecessary expense by having numerous hardened criminals released for depredation upon the public, and

Whereas, there is a great laxity on the part of the state board of pardons in granting pardons, paroles and releases especially to habitual violators, and those criminals who have committed heinous crimes;

Now, therefore, we recommend and suggest that the pardoning power be taken from the elective state officers constituting the pardon board and that a separate board having charge of prisons, pardons, and paroles be set up with qualifications requiring law enforcement knowledge and experience; so that the work of the prosecuting attorneys, sheriffs, juries and judges be not nullified by the arbitrary, ex parte, action of a political non-judiciary pardon board, as now constituted."

That resolution is just a part of our report and requires no action by this meeting.

PRES. THOMAS: The next committee to report is the Inheritance Tax Committee.

JUDGE DORAN H. SUTPHEN: There seems to be considerable uncertainty as to the situation in view of the Supreme Court's recent decision, and what other states may do to prevent double taxation. The recommendation

of this committee is that the legislative committee keep on the alert and watch developments in other states and bear this subject in mind.

MR. MARSHALL CHAPMAN: The committee appointed this morning has a resolution to present.

I do not believe there is a member of the legal profession in Idaho who wants to slack his duties, whether he enters the armed services as a private or in any capacity, but I believe that there is a peculiar place for lawyers in performing service for this country in the armed forces during this emergency. If you happen to be a member of the medical profession or the engineering profession you enter the army with proper rank comparable to the ability and training and experience you have; there is a great need for lawyers in the armed forces. In order to maintain a personnel of nine million men there must necessarily be a large administrative organization and in that administrative organization are duties which the members of this profession are suitably and peculiarly fitted to perform. The armed forces of this country seem not to recognize that peculiar and needed ability. I believe the time has come when the legal profession should, in aid of the armed forces of the United States, make available our peculiar ability and thereby give to them a greater degree of efficiency.

It is not urged and I don't believe it can be construed to be urged that the lawyers are asking special privileges. We are merely trying to make available to the Government the peculiar training, education and experience which we have, just as the American Medical Association has so successfully, and I believe, justifiably made available to the members of their profession and it is in that light that this suggestion is being presented.

GENERAL MARTIN: We are not seeking positions for ourselves but positions to help where we can do the most good in the armed forces of the United States, but there seems to be no place for the lawyer. I was impressed with remarks yesterday wherein was pointed out the need for men trained as are lawyers on matters in connection with the interpretation of orders and regulations to officers, and aids to army personnel as to their rights, wills, civil contracts, dependents care, etc. We have inducted a young man who had not had his internship in medicine, but was commissioned as an officer and taken into the army; another who was trained in law had to go in just as an ordinary private and work his way up as best he could. Yet as a lawyer he could have been placed, as was the young doctor, where his training could have been efficiently used. The army does not appreciate its own need. I asked General Hershey when he was here if there wasn't a place for the members of the legal profession and he said that: "So far as I know there is no place in the army for lawyers except just as ordinary privates." It does seem to me that there is a lack of knowledge that the services of lawyers has as definite and efficient a place in army organization as those of doctors or engineers. I think this matter can properly be called to the attention of the military authorities.

MR. MARSHALL CHAPMAN: The remarks yesterday were made because of the fact that lawyer officers have seen how it works. I feel there has been no deliberate discrimination but rather a lack of interest and analysis of the peculiar training of lawyers to fit into army organizational requirements and needs. There are various places that a lawyer might probably fill better than any other individual. For instance, the personnel service has no provision for men of legal training, yet eighty per cent of the work in that office is essentially legal and in order to take care of that work properly it is essential to have legal training. One of the superior officers in that service has indicated that he is going to get in touch with Washington and suggest they must have somebody with legal training. He has seen the falsity of not having men with legal training and he has seen the necessity of legal training in answering questions from income taxes on down. The army doesn't have such a legal department. In camps of one hundred and fifty thousand men, it would not only be a benefit to the army but would make them much more effective. Men of legal training who read the written word can give a feasible answer as to what orders mean. Other men can't do that. Take the Adjutants of every post. He has more regulations thrown at him than he can possibly cope with, unless he has the help of experienced men to talk it over with. So many men who go into the service have no such experience. The Adjutant in every post is probably the most important man there. I have often wondered why the American Bar Association couldn't have forseen that before this time and brought it to the attention of the War Department. It is not a matter of getting into the service to get jobs. Every single day at these posts are requests for legal services. Lawyers have a quality the army is looking for today; that is leadership. I have seen lawyers, who were commanding officers of a squadron who did an excellent job because they could understand the orders. They were men who were trained to think on their feet. They were men who, when they were asked to go out and speak to the men, could do it well. That's what we need. If no one tells them about us, then don't be disappointed if they

pay no attention. The army will not suffer if the legal profession is given its rightful place in the armed forces.

MR. RALPH NELSON: As I understand the situation there is a need in the army of lawyers. We know it is true that the bar has always performed its duty and taken active part. I think it would be a serious mistake for the bar to make demands for commissions or preference over others. I think we ought to ask the army through the bar associations, state and national and through the members of Congress, that it use lawyers in the army; they can put us in some place. There is a need for us, but let's not be in the position of asking for a preference or asking for a commission.

PRES. THOMAS: I think that is well taken.

MR. BRANCH BIRD: You may be interested to know that Mr. James' son is just out of law school and he entered the service and was immediately put in as Adjutant. I entered the last war and within a reasonably short time was given work in the Adjutant's office that was more or less in line with my training. I fully believe the army knows where we are and what we can do, and when they need us they will call us. Practically all of us are registered and in registering we gave our qualifications. It seems to me this action will be open to interpretation by the general public that we are asking for a soft place. The government knows what we can do and will call us when it needs us. Those who are anxious to get into the service will find out what they can do and will be given recognition, accordingly.

GENERAL MARTIN: It does seem to me that if there is a place in the army where they need legal talent that then we have the right to call attention to the fact that this profession is not being treated as other professions. We all know that medical doctors and dentists and machinists and others have arranged, and they do take those men into the army immediately commissioned. They call a doctor whether he has had any previous military training or not, or a dentist, and also machinists and engineers; they are immediately commissioned. Now I find a young lawyer who is called has to go in the army and work his way up. Many of them work up, just as my friend says. They recognize their talents after they are in, but why shouldn't they be taken in, immediately given whatever training is necessary, and give them commissions if they pass the examinations required. In calling attention to the fact that there is a discrimination, we shouldn't demand anything in the way of preference from the Government,

but we should call the army's attention to the fact that there is a need for men in this profession, and our young men are qualified for that and that they should receive recognition in regard to the service they are peculiarly qualified to do, the same as men in other professions are receiving when they enter the army. This matter should be placed squarely on the basis that these men can help the government; that they are in a position to do this work that the government needs and render such professional services, and that we think we should have the same recognition that others have.

MR. FRED M. TAYLOR: Mr. President, I agree as to what lawyers can do. I am opposed to a demand. I believe the army and the navy recognizes the situation and recognizes the use of lawyers in both services. It might be well to have the American Bar Association call attention to the value of lawyers, but not to demand a place. If they don't want to use us why that's too bad, we are here for them.

MR. MARSHALL CHAPMAN: It is not the intention of the committee to demand. The bar association or any group has no right to make any demands of any kind.

It is true that we have a group of young lawyers who are able to enter the services of the army and work their way up. But there are a large group of the bar who are of an age and have dependents who would be available and valuable for service to their country if they could be called upon to perform services in their particular line. We have a number of doctors with families, who have gone. They are able to perform that service for their country because they have been commissioned in the armed forces, and by being so commissioned it will support their families and provide for them. And I say that the purpose is merely to present the proposition that the legal profession has a peculiar service to perform just the same as the medical and other professions.

MR. JESS HAWLEY: What my brother attorneys have said is too important for us to overlook. If we are going to be of benefit to the country and have a careful and intelligent analysis made of the qualifications so that the army can have more cogently brought to it those qualifications we should do so. I offer this resolution: That we instruct the Bar Commissioners to vigorously present to the American Bar Association, and in their discretion to other Bar Associations, or otherwise, that there be an analysis and due study and a clear presentation to the proper authorities in the Army, of the qualifications and peculiar ability of the legal profession, to the end that they be given

more attention as they enlist, to the end that better service be rendered by our profession to our country.

Now, Mr. Chairman, Mrs. Hawley and I have a very proud and possibly anxious situation. We have three sons who have enlisted. One of my boys was booked in the most menial of all of the army service. Fortunately when it was ascertained that he was an attorney with a great many years of schooling and some legal experience he was then given the type of work that a lawyer can do. He was called upon to lecture on the Soldiers' and Sailors' Relief Act, and he makes wills and lectures on current events. In that way the army does recognize that lawyers have certain abilities, but why shouldn't they give commensurate rank. Of course, my boy happens now to have been selected for officers training and maybe that is the answer. I think the matter should be covered but I will move the adoption of the resolution.

MR. RALPH NELSON: Would you consent to an amendment that it be left to the bar commission to present it to our congressional delegation?

MR. JESS HAWLEY: I said nothing about presenting it to the congressional delegation. My opinion is that when we present it to Senators and Congressmen you don't get anywhere. I think we ought to tell the gentlemen running the American Bar Association to get busy and lay their plans well and intelligently and get off their seats.

MR. MARSHALL CHAPMAN: The committee desires to favor Mr. Hawley's resolution.

(Motion seconded and carried).

PRES: THOMAS: Next is the report of the committee on proposed legislation.

GEO. AMBROSE: The committee on legislation hereby expresses appreciation for the report of the committee on proposed Legislation as made to your meeting on this date, urges its further study and a report to the Bar Commission with its recommendations.

(Adoption of the report was moved, seconded and carried).

PRES. THOMAS: Is there any other committee to report?

Is there anything else to come before this meeting before I proceed to the next order of business?

Mr. E. B. Smith, will you please stand? I would like to introduce you to the gentlemen present. E. B. Smith, your new Commissioner.

MR. E. B. SMITH: Thank you, Mr. President.

PRES. THOMAS: And now it becomes my pleasant task to relinquish this position. In doing so I wish to thank every member of the bar and particularly every committee that has worked with me. I also want to thank the other Commissioners with whom I have served. Little have I accomplished but if I have carried forth the spirit of this organization I am well pleased. Mr. Glennon, will you please approach the Chair?

Gentlemen, this is your newly elected President, Mr. L. E. Glennon.

MR. L. E. GLENNON: I sincerely appreciate this honor and I am going to try my best to merit it. As indicated during this meeting we hope the members of the Commission will have more time to devote to things pertaining to the welfare of those who are already members of the bar instead of devoting nearly all our time in bringing in new members. Let me say this to you; please, when you go back home, don't just forget about the important things you have discussed here.

I urge upon all of you to take a more active part in your local bar associations. We are going to send a lot of things down to you this year and don't pigeon-hole them, but let us know what you think about them. Report to us what you want us to do and what you are willing to do to help us and I can assure you the Commission is going to do its best to function along the lines it should function.

I have certainly enjoyed serving with Mr. Thomas on the Commission. He has made an excellent president and I hope I can do as well as he has done. I believe I am going to have a better opportunity along that particular line, but gentlemen, we have to have support. We need all the support you can give us and I assure you the Commission will do its part.

PRES. GLENNON: What is your pleasure with respect to next year's meeting?

MR. MARSHALL CHAPMAN: I move that the matter of next year's meeting be left within the discretion of

the Commissioners of the Idaho State Bar. (Seconded and carried).

MR. FRANK MARTIN: I move that the bar by a rising vote express to Commissioner Thomas our appreciation for the splendid work he has done the past three years.

MEMBER: Second the motion.

(REPORTER'S NOTE: Whereupon all members stood).

MR. CLARENCE THOMAS: Thank you very much, and may the record also indicate a motion thanking those who have taken part in our program.

PRES. GLENNON: Yes.

The meeting is adjourned.

Name	Address
Adams, Lloyd	Rexburg
Ailshie, James F.	Boise
Ailshie, Robert	Boise
Albaugh, Ralph L.	Idaho Falls
Allen, J. A.	Spokane, Wash.
Ambrose, Geo. L.	Mackey
Anderson Eugene H.	Boise
Anderson, J. H.	Blackfoot
Babcock, Edward	Twin Falls
Batter, C. J.	Washington D. C.
Baum, O. R.	Pocatello
Bellwood, Sherman J.	Hailey
Benson, Frank L.	Boise
Bird, Branch	Gooding
Bistline, R. Don	Pocatello
Blaine, James W.	Boise
Blandford, J. H.	Twin Falls
Bowler, W. B.	Boise
Budge, Alfred	Boise
Brinck, Dana E.	Spokane, Wash.
Burke, Carl A.	Boise
Callahan, Donald A.	Wallace
Coughlan, Glenn A.	Montpelier
Chapman, Marshall	Twin Falls
Davison, Frank H.	Boise
Davison, W. H.	Boise
Denman, Alvin	Idaho Falls
Doyle, Lt. Patrick A.	Gowen Field
Dunbar, Wm. C.	Boise
Elam, Laurel E.	Boise
Ennis, Paul B.	Boise
Evans, P. J.	Preston
Furchner, H. W.	Blackfoot
Gillespie, Conroy R.	Hailey
Glennon, L. E.	Pocatello
Gray, Gordon	Twin Falls
Greene, Maurice H.	Boise
Griffin, Sam S.	Boise
Hagd, Oliver O.	Boise
Hall, Henry M.	Jerome
Hamblen, H. M.	Spokane, Wash.
Hamilton, S. T.	Twin Falls
Harrison, B. F.	Hailey
Hawkins, Wm. S.	Coeur d'Alene
Hawley, James H.	Boise
Hawley, Jess	Boise
Herndon, Charles	Salmon
Higer, C. H.	Emmett
Huebener, Geo. C.	Emmett
Huff, Laurence	Moscow
Hunt, Everett E.	Sandpoint
Hyatt, Paul W.	Lewiston
Jackson, John	Boise
James, A. F.	Gooding
Jeppesen, V. K.	Nampa
Johannesen, O. A.	Idaho Falls
Johnson, Ben B.	Preston
Jones, T. D.	Pocatello
Kenward, John T.	Payette
Koelsch, Charles F.	Boise
Koelsch, Clay	Boise
Knudson, Emery T.	Coeur d'Alene
Martin, Frank, Jr.	Boise
Martin, Frank	Boise
McDonald, T. E.	Idaho City
McDougall, Isaac E.	Pocatello
McNaughton, W. F.	Couer d'Alene
Moffat, Willis C.	Boise
Nelson, Ralph S.	Coeur d'Alene
Nelson, Spencer	Boise
Nixon, Carey	Boise
Oros, Walter	Boise
Paine, Karl	Boise
Parry, R. P.	Twin Falls
Patten, Geo. Y.	Bozeman, Mont.
Peterson, Paul T.	Idaho Falls
Poole, C. W.	Rexburg
Racine, L. F.	Mountain Home
Rathbun, D. E.	Idaho Falls
Schimke, Weldon L.	Moscow
Scoggin, Charles O.	Fairfield
Seeley, R. H.	Jerome
Sheneberger, F. C.	Twin Falls
Smith, E. B.	Boise
Smith, Vernon K.	Boise
Snook, Fred H.	Salmon
Stout, Charles	Glenns Ferry
Sutphen, D. H.	Gooding
Taylor, Everett B.	Sun Valley
Taylor, Fred M.	Boise
Thoman, J. P.	Twin Falls
Thomas, C. W.	Burley
Thomas, Darwin W.	Boise
Thompson, H. B.	Pocatello
Towles, Therrett	Spokane, Wash
Van de Steeg, George H.	Nampa
Wallis, Randall	Cascade
Ware, Marcus J.	Lewiston
Weston, Eli A.	Boise
Wilson, Asher B.	Twin Falls
Wilson, O. C.	Bonners Ferry
Worthwine, Oscar W.	Boise
Wyman, Thornton	Boise
Zener, Milton	Pocatello

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