IDAHO STATE BAR COMMISSION

By_____,Secretary

PROCEEDINGS

of the

Idaho State Bar

VOLUME XXI, 1947

TWENTY-FIRST ANNUAL MEETING

SUN VALLEY, IDAHO

June 27 and 28, 1947

PAST COMMISSIONERS

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JOHN C. RICE, Caldwell, 1923-25.
FRANK MARTIN, Boise, 1925-27.
JESS HAWLEY, Boise, 1927-30.
Wm. HEALY, Boise, 1930-33.
JOHN W. GRAHAM, Twin Falls, 1933-36.
J. L. EBERLE, Boise, 1936-39.
C. W. THOMAS, Burley, 1939-42.
E. B. SMITH, Boise, 1942-48.

EASTERN DIVISION

N. D. JACKSON, St. Anthony, 1923-25.
A. L. MERRILL, Pocatello, 1925-28.
E. A. OWEN, Idaho Falls, 1928-34.
WALTER H. ANDERSON, Pocatello, 1934-40.
L. E. GLENNON, Pocatello, 1940-43.
PAUL T. PETERSON, Idaho Falls, 1943-46.
R. D. MERRILL, Pocatello, 1946-49.

NORTHERN DIVISION

ROB'T. D. LEEPER, Lewiston, 1923-26.
C. H. POTTS, Coeur d'Alene, 1926-28.
WARREN TRUITT, Moscow, 1928-32.
JAMES F. AILSHIE, Coeur d'Alene, 1932-35.
ABE GOFF, Moscow, 1938-41.
PAUL W. HYATT, Lewiston, 1941-44.
E. T. KNUDSON, Coeur d'Alene, 1944-47.
E. E. HUNT, Sandpoint, 1947-50.

A. L. Morgan, 1935-8

PRESENT COMMISSIONERS AND OFFICERS

E. B. SMITH, Boise, (1942-48), President
R. D. MERRILL, Pocatello, (1946-49)
E. E. HUNT, Sandpoint, (1947-50)
SAM S. GRIFFIN, Boise, Secretary

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Clearwater (2nd and 10th Jud. Dists.)—Earl Morgan, President, Lewiston; Edward T. Johnson, Secretary, Lewiston.

Third Judicial District— Dale Clemons, President, Boise; Jess Hawley, Jr., Secretary, Boise.

Fifth District (5th and 6th Dists.)—Louis Racine, President, Pocatello; Don Bistline, Secretary, Pocatello.

Seventh District—Frank Estabrook, President, Nampa; V. K. Jeppeson, Secretary, Nampa.

Eighth District—W. J. Nixon, President, Bonners Ferry; Clay V. Spear, Secretary, Coeur d'Alene.

Ninth District—Errol H. Hillman, President, Idaho Falls; Louise Keefer, Secretary, Idaho Falls.

Eleventh District (11th and 4th)—J. R. Keenan, President, Twin Falls; John Daly, Secretary, Twin Falls.

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Vol. XXI

TWENTY FIRST ANNUAL MEETING

of the

IDAHO STATE BAR

1947

COMMISSIONERS OF THE IDAHO STATE BAR

E. T. KNUDSON, President, Coeur d'Alene
E. B. SMITH, Vice President, Boise
R. D. MERRILL, Pocatello
SAM S. GRIFFIN, Secretary, Boise

FRIDAY, JUNE 27, 1947
10:30 A. M.

PRESIDENT KNUDSON: Members of the Idaho State Bar, the 21st annual meeting will come to order.

The first order of business is the report of the Secretary. Our Secretary, Sam S. Griffin, will not be here. He told me that this is the first convention he has missed in 33 years of practice in Idaho. Our Vice President, E. B. Smith, will make his report for him.

SECRETARY'S REPORT

For the first time since 1923 when the Idaho State Bar was organized and integrated by legislative act, and I became it's Secretary—24 years ago—I shall not personally deliver the Secretary's report. For the first time since I was admitted to practice in Idaho, in September, 1914, nearly 33 years ago, I shall miss a meeting of the lawyers of Idaho, either as the old voluntary Bar Association or as the integrated Bar. To say that I am sad is to express mildly my regret that I cannot this year see your faces, shake your hands, take part in your deliberations, and by your decisions have proof that, slowly as it may seem to have been, the members of our profession year by year have seen and see more clearly the value to the public and to themselves of such organization, of laying aside individual minority differences, and, despite them, of working together for accomplishment of objectives set by the majority. The profession of law, the organized Bar, the individual lawyer, is immeasurably of greater public stature in Idaho today than a quarter of a century ago.

The meeting this year, gives unique opportunity to the Bar and the Courts to render distinguished service to the State of Idaho, and for themselves collectively and individually, an opportunity which may not again arise, as will be explained to you by those who take part in the program. I have faith that the members of the Courts and the Bar now have the long range vision, and integrity of mind, and desire for the general good of us all to grasp that opportunity, and forgetting minor individual inconveniences or prejudices or merely present and temporary advantages, work unitedly together for the preservation of independent courts, and for dispensation by them of impartial, speedy justice.

E. T. Knudson, Coeur d'Alene, has been President, E. B. Smith, Boise, Vice President, and Ruell D. Merrill, Commissioner for the Eastern Division, during the past year.

Five meetings of the Board were held, three at Boise, one at Lewiston and Moscow, and one at Coeur d'Alene.

Five formal complaints against the professional conduct of Idaho lawyers received attention; two were dismissed because investigation disclosed no cause of complaint; one was dismissed because the Board was without jurisdiction; one was satisfactorily adjusted and one is still pending. Investigation of a complaint of illegal practice by a laymen disclosed that he apparently was acting as a scrivener in drawing mortgages and was within the protection of the decision of our Supreme Court in In re Mathews, 58 Idaho 772.

Final action upon the June, 1946 examination was taken: Nine of the thirteen failed, four passed. Of these nine failures, six subsequently passed upon re-examination in December, 1946, two did not appear for re-examination, and one failed a second time. The net result was admission of 10 of the original 13. At the December, 1946, examination 11 were examined (six repeaters from the June examination) 8 passed; three failed. At the June, 1947, examination 15 applicants appeared; the results had not been determined at the time this was written.

As always, the Examining Committee (consisting of Marcus Ware, Lewiston, Frank F. Kibler, Nampa, and Milton Zener, Pocatello) and the Board perform a large task each year in formulating and reviewing questions, supervising examinations, grading papers, reviewing grading, investigating character and educational qualifications of applicants, and recommending admissions by the Supreme Court.

Consideration was given, and is continuing, to admission requirements. The present rule permitting a special examination to show that an applicant, who does not have college credits in general subjects for two years of college study, has "equivalent" education, has been most unsatisfactory, does not conform to the recommendations of the American Bar Association, nor the Association of American Law Schools, nor requirements of the College of Law, University of Idaho, nor the standards of many of the more progressive states.

The Board has conferred with the faculty of the College of Law, University of Idaho respecting curricula, student attendance, veterans, and other matters. Beginning in 1949 the College will require pre-legal education before admission to the College of Law, as follows:

"REQUIREMENTS"

(1) He must have completed 100 semester credits of acceptable courses of college grade or complied with the requirements of the combined arts and law course or the combined business and law course, or

(2) He must have completed 4 credits in acceptable courses of college grade among which must be included

(a) 10 credits in English (excluding sub-freshman English) with a grade point average of 2.5 for all English courses taken, and

(b) 15 credits in economics, history, political science, philosophy, psychology, and sociology."

"RECOMMENDATIONS"

"It is recommended that credits be spread over many of the fields indicated rather than concentrated in one. Among the subjects listed above, it is recommended that sufficient courses in economics and political science be taken to introduce the student to modern business and governmental problems and practice and in addition that courses in criminology, English, Constitutional history, labor economics and logic be taken.

Outside of the subjects listed above, that courses in the following be taken: accounting, either French or Latin, mathematics (up to and including trigonometry) and sufficient introductory courses in the physical sciences to give the student an appreciation of the important role that these sciences play in modern life."

These new standards of pre-legal college education are in line with recommendations of this Bar, the Bar Commission, the American Bar Association, the Association of American Law Schools, the requirements resulting from complexities of modern living, business and law practice. Conceding existence of isolated and exceptional cases of ability in self or "equivalent" educated applicants it seems not even douhtful but that it is no kindness to permit veterans or other applicants to be admitted by waiver of standards of education and thus be thrown into competition with those better prepared; the result is likely to be poor returns to such a lawyer, a temptation to lower standards of ethics to the injury of the Bar as a whole and the standing of the Courts, poor legal service to the clients, and a hinderance, rather than aid, in the administration of justice by the judges.

Students of the College of Law have recommended changes of rules to increase examination fees from $15.00 to $25.00 (even that amount is far less than the cost to the Bar of giving examinations) and changing the dates of examination from December and June to February and June. Study is being given to these proposals. Rule 111 has been amended so that the Supreme Court may more speedily admit acceptable and successful applicants.

You will doubtless recall that for a number of years admissions on motion or by reason of reciprocity have not been permitted in Idaho, and that every applicant is required to take and pass examination.

The Board has had several conferences with the Supreme Court respecting rules for admission to practice; the establishment of a Judicial Council under present law as suggested by Judge Winstead at the 1946 annual meeting; the promulgation of rules of procedure as urged by the Bar; the requesting by the Court from the Legislature of such appropriation as the Court might need for that purpose. A financing plan of the Board and 1947 Code Commission in conjunction with preparation and publication of the 1947 Idaho Code turned out to be of no avail inasmuch as promulgation of rules of procedure for District, Probate and Justice Courts had been too long delayed to be included in the new Code.

As has now become accepted practice, the 1947 Legislature acted favorably upon almost every legislative act proposed or supported by the Bar and its Legislative Committee. Incidentally the Bar outside of Boise should recognize the tremendous amount of time and labor given by the Legislative Committee before and during Legislative sessious in drafting, correcting, checking, redrafting, and presenting Bar sponsored legislation. The membership of that committee is naturally almost exclusively from Boise, though there are notable exceptions.

The Board, or its members, has also conferred with the College of Law, the Governor, and the 1947 Code Commission. The Board, as required by the law, recommended to the Governor names of seven members of the Bar as Code Commissioners, and the Governor appointed the three Commissioners therefrom, namely, Oscar W. Worthwine, Ralph R. Breshears, and Carey H. Nixon, all of Boise.

In addition the Board and its members have performed many routine matters. I hope I may be permitted here to express my appreciation of the many members of

the Bar who gave assistance to me in the performance of Secretarial duties. I know that they will not resent my not naming them, nor my expressing especial gratitude to Commissioner and Vice President, E. B. Smith who not only attended to his own duties and largely built up the program for this meeting, but in addition supervised the Secretary's office and performed much of the Secretary's duties.

The delay in publication of the 1946 Proceedings, while in some measure due to my illness, was largely caused by the tremendous rise in the cost of publication. The first bids were over twice any previous costs, and beyond the capacity of the Bar to pay. A suggestion that members of the Bar be asked to donate $1.00 each to cover the deficiency was abandoned when finally a lower bid was secured. The lack of interest by printers was also marked, only two were willing to bid, one of whom (the high bidder) expressed a hope that he be not awarded the contract.

Like conditions and finances have delayed other publications, and may delay the 1947 Proceedings.

The following have been noted as deceased since the 1946 meeting:

James F. Ailshie, Boise.
Clare A. Bailey, Twin Falls.
Finis Bentley, Pocatello.
N. Eugene Brasie, Boise.
Thomas A. Feeney, Cascade.
Oliver C. Hall, Twin Falls.
T. D. Jones, Pocatello.
Otto E. McCutcheon, Idaho Falls.
J. J. McFadden, Hailey.
John L. Phillips, Lewiston.

Licensed attorneys and Judges as of June 20, 1947, are

Northern Division	95
Western Division	240
Eastern Division	95
Out of State	23
Total	453

A number of practicing attorneys are now delinquent and subject to disciplinary proceeding for so practicing. A final notice has been sent them and thereafter disciplinary proceedings will be instituted by the Board against those who continue unpaid.

RECEIPTS, July 1, 1946, to June 1, 1947

July 1, 1946, balance in fund	$ 5,063.49
June 1, 1947, licenses paid	4,400.00
Examination fees	563.00
June 1, 1947, total balance and receipts	$10,026.49

EXPENDITURES, July 1, 1946, to June 1, 1947

Personal Services (Secretary, stenographer, readers, etc.)	$ 2,349.76
Travel expense	757.08
Other expense (Express, Postage, Telephone and Telegraph, Printing Bar Proceedings, Office Supplies, Insurance, Nat'l. Conference Bar Examiners and Subscriptions	658.61
Total Expense	$ 3,765.45
June 1, 1947, Fund Balance	$ 6,261.04

E. B. SMITH: I move the adoption of the Secretary's report.

(Whereupon the motion was duly seconded and carried unanimously.)

PRES. KNUDSON: I will appoint the Canvassing Committee to canvass the election in the Northern Division: Frank Martin, Jr., Boise, Chairman, Ralph Litton, Idaho Falls, and Don Bistline, Pocatello. The committee will report during the afternoon of today.

The chair appoints on the Resolutions Committee, Judge Hugh Baker, Rupert, Chairman, Francis Bistline, Pocatello, George Ambrose, Mackay, Tom Madden, Lewiston, Wm. S. Hawkins, Coeur d'Alene and Joe McFadden, Hailey, who will act as Secretary of that committee.

The Program Committee referred to the remarks that I will make as "musts." I assumed that they hoped that I would mention something that was of current importance to this body, and I will try to refer briefly to a few of those subjects at any rate.

The bench and the bar are aware of the need of procedural reform and have urged it. Reforms in most instances must be secured from legislative bodies. Too often those bodies, under the urge of a particular problem, have adopted substitutes rather than removal of the source of judicial procedural difficulties. Too often procedural reforms have failed because of a lack of public understanding and public urge of the indicated changes. Our problems require comprehensive and co-operative action on the part of judges, lawyers, legislators, and laymen, and all four mean the public.

The people are entitled to a speedy, inexpensive, sensible, just trial and determination of their problems. They have confidence in the judicial process, in the supremacy of the law, and in its proper administration. They desire the maintenance of their constitutional rights and safeguards, and any discontent goes not to substance, but to the means of achieving that end. The causes of discontent must be removed. It is our job to lead the way.

RULE MAKING POWER.

Some 15 years ago and from time to time studies were presented to the Idaho State Bar relating to the exercise of rule making power by our courts. This Bar, at its 1940 convention, recommended the exercise of such power by our Supreme Court, and requested that a study be made. The committee appointed reported in substance that, because of the lack of any system of unification of our courts, grave question existed as to the power of the Supreme Court to promulgate rules which would bind any court other than the Supreme Court. The committee recommended an amendment to the constitution of our State, vesting permanent power in the Supreme Court to promulgate rules of procedure from time to time, but, since the constitution did not inhibit the exercise of rule making power and, recognizing the inherent power of courts to exercise that power, further recommendaed a legislative enactment recognizing the inherent power of the Supreme Court to promulgate rules of procedure for all of our courts. Such a law was enacted by our legislature at its 1941 session.

That law authorized the Supreme Court to request the assistance of members of the bar and judiciary in the formulation of rules. A committee of some dozen members appointed were divided in their opinion as to whether there should be any rules at all promulated. So far as I have been able to ascertain there may have been a misunderstanding at that time with respect to the question whether Idaho should

adopt the Federal Rules of Procedure. The essential question actually was, or ought to have been, whether Idaho should adopt laws of procedure in keeping with its own problems and systems of law.

The majority of the committee appointed, however, did present specific rules of procedure designed to govern district court procedure.

Again, this Bar, at its 1946 convention, recommended the promulgation of such rules.

The question of whether the courts should control their own procedure, or whether the legislature should do so, has long since been settled, so far as our Bar is concerned. We, in convention, have in effect expressed the opinion that the courts should at least have power equal to their responsibility, and be at least equal to the administrative boards in the executive department, such as the Public Utilities Commission and the Industrial Accident Board, which make their own rules of procedure without the intervention of the legislative department.

Quoting from Hon. Robert G. Simmons, Chief Justice of the Supreme Court of Nebraska (Dec. 7, 1946):

> "Since the adoption of the Federal Rules, 9 states have adopted codes of procedure modeled thereon, (the Federal Rules of Procedure) and 16 states now have similar projects actively under way."
>
> "These rules recognize that courts exist for the benefit, not of lawyers and judges, but of litigants between whom justice must be administered. The American Bar and state bar associations, and lawyers and judges active in their affairs, have vigorously supported and promoted these programs. It has not been without the expenditure of time and effort, nor without opposition, for in the legal profession there are those content with the status quo, and also those who view with concern the evidences of discontent with our procedure and the growth of extra-judicial bodies, and yet see no need for change."

We should not be divided from the main project of improving rules of procedure by the side issue of whether or not the Idaho rules shall follow Federal rules. The main point is that we should have rules made by the courts which enforce the rules with the aid and assistance of the bar which practice them and, that the rules, no matter what model is followed, should be such as to procure in Idaho the most efficient operation of the courts and the dispatch of judicial business.

So far as this phase of my subject matter is concerned, I cannot see where the Bar or the courts need anything further to activate them.

A JUDICIAL COUNCIL.

A volnntary judicial council, members of our bar, served during the year 1929-32, and made recommendations to the 1932 bar convention. The excellent and valuable work of that voluntary council, which will be reviewed by others appearing on our program will well illustrate the value of a permanent judicial council.

Last year at our annual meeting, Judge Winstead made suggestions relating to the organization and financing of a permanent jndicial council, under Idaho laws as now existing.

NECESSITY AND THE OPPORTUNITY FOR IMMEDIATE ACTION:

In a bar commissioners' letter to the members of the bar relating to the program to be presented at this meeting, the statement was made to the effect that a unique

situation exists at this time with reference to our judiciary, which perhaps may never again occur in our judicial history and that it was therefore essential that at this meeting and the one next year, prior to the legislative session of 1949, the bar take definite action concerning various phases of improvement of the administration of justice and procedure. This includes: Selection, compensation and retirement of judges and reorganization and unification of our court systems.

The uniqueness referred to arises out of the retirement bill enacted by the 1947 legislature. Under such law it seems a certainty that more than half of the 21 members of our judiciary will be changed within the next 3½ years. In the light of the number of judges who are likely to retire, it should be expected that a bitter contest will be experienced relating to a carefully designed plan for reducing the number of judicial districts and the number of judges. If nothing is done for the next two years and successive judges under the presently existing system of judicial districts are either elected or appointed, much of the opportunity for any improvement which may be made in these respects now, may be lost.

SELECTION OF JUDGES.

The plan of the Idaho non-partisan judiciary, in use since the year 1933, has resulted in large measure in creating life tenure for our district and supreme court judges. The retirement law may have the effect of tenure from the time of appointment, or election, until attainment of the age of 70 years. That means that under our present system, the Governor must appoint a successor and that our judges will become largely in the first instance appointees of the Chief Executive.

COMPENSATION AND RETIREMENT OF JUDGES.

Our Bar long has entertained the view that the compensation paid our judges is inadequate. Notwithstanding the 1945 legislative increase the take-home pay (to use a present day expression) of judges is less than it was in 1907. Economic data relating to existing economic factors of increased costs of living support me in that statement. The ultimate objective, of course, is a scale of salaries commensurate to those paid hy States comparable to our own, with due consideration given to the needs of living, the dignity of the office, and professional standards of compensation.

The Judicial Council in its reports of 1929-32, recommended increases far beyond the measure of increases granted by the 1945 legislature. The ultimate goal ought to be salaries approximating $10,000 to $12,000 a year.

A plan of redistricting the judicial districts, reducing the number of judges and redefinition of probate jurisdiction and of justices courts would result in such a substantial saving that increases in judges salaries and our goal of full retirement pay perhaps would be fully justified.

REORGANIZATION AND UNIFICATION OF COURTS.

The subject of proposed reorganization of our court systems will be presented by speakers as fully as presently available studies will permit.

In Idaho there does not exist a system of coordination, unification or supervision of the court offices except as is furnished by the rules of procedure formulated by the legislature. The Judicial Council of 1929-32 recognized this and made recommendations which were approved by the Bar.

SUGGESTIONS:

It is my hope that from this convention will issue suggestions whereby committees which may be appointed will give prompt, serious and studied consideration to the problems which I have briefly touched upon, with which we are all much concerned and having to do with our practice and our judicial system.

PRES. KNUDSON: We are honored by the presence of our Governor. Judge Hunt and Mr. Merrill, will you kindly escort the Governor to the rostrum?

Ladies and Gentlemen, I am honored to present Governor C. A. Robbins. (Applause).

HONORABLE C. A. ROBBINS: Ladies and Gentlemen: It is a rather unique experience for me to be standing before a group made up of attorneys. The members of the Bar, of course, as I realize, are members of a professional group similar to the one to which I myself belong. And I would like to state for your information that I am still in good standing, having recently paid my dues, so at least from that view point I feel I am qualified to speak to you just as a member of a fellow profession.

I have listened to the remarks of your President, to his able and candid discussion of what has been denominated in the program "The 'Musts' of the Bar." I am impressed by the further fact that they are not only, as indicated by him, "musts" of the Bar, they are "musts" for the citizens of Idaho.

Too few of the laity recognize the fact that sometimes the machinery of government, like any other kind of machinery, becomes outmoded or worn out—one or the other or both—and that something has to be done about it if it is to be effective. I am very happy that your President has seen fit to discuss these matters with you as candidly as he has.

I am struck with the fact that the keynote of the entire talk was pointed toward unification and simplification. And it seems to me that that is the point of any discussion which would be pertinent and relative to matters of government at this time.

To the lay mind, of course, I think it is safe to say that it has been a cause of wonderment, and perhaps to us, that these matters have not been long ago somewhat simplified and unified. At the same time, with all the appearance of complexity which these things have to the lay mind, we wonder how they ever could be reduced to their lowest terms so that they would be comprehensible. However, I conceive it entirely within the possibilities of your knowledge and your ability to make a solution which will be valuable to the people of the state.

I want to congratulate you this morning on behalf of the State on what appears to me to be the opening of a successfnl meeting of your profession. I think it is a really remarkable thing that in a state as small as Idaho we have as effective and earnest groups of professional people as we have. And what I am going to say this morning I will say to you because as a member of one of the learned professions, I think sometimes you, my own profession and others, do not exercise in our several communities and in our various spheres the influence as leaders which we ought to be exercising inasmuch as we are of a so called learned profession. If we were to go back to the roots of the word "education," as I think you all know, we would find that it means to lead. And sometimes we have been overlooking an obligation which belongs to us to be leaders in bringing about these things. They should not be left to Tom, Dick and Harry or to some unorganized group that might lead us into a worse condition than that which has resulted from our not keeping our business current with the progress of the times.

I note that I too have been given a subject on the program. I am to discuss the judicial and executive departments. I am not going to do it. I assume, however, that if I do wander from the assigned topic I may listen to objections. I may even expect to hear some exceptions interjected. But I am going to take the chance. I am going to say just a few words relative to that subject and then pass to one which I want to present to you. It isn't a startling thing. There isn't anything new in it, but I think that it is about time that we took some cognizance of the fact that we need to do something about our Courts.

It is my firm conviction that nowhere under the sun has there yet been offered any substitute worthy at all for that balance of power that we find exemplified in our fundamental governmental structures whereby we have our judicial, executive and legislative functions, where we have at once the distribution which is equitable and restrictive between those various departments, and that if we have respect for and desire to see the continuity of this form of government which has meant so much to us, it is incumbent upon us at this time and henceforth to preserve at all costs this balance between the several departments. In the executive branch of your State, I want to assure you, we have no desire to legislate. We have no fondness for attempting to interpret the law or issue directive orders. We recognize that we cannot interpret the law except as it is interpreted for us by those chosen for that task in the office of the Attorney General or by our Courts. We realize that our sole function is to administer to the best of our ability such laws as the legislature has placed upon the statute books within the limits of our constitutional authority.

So much for the assigned topic. Anything more that I might say would be mere prolixity.

It is my desire to pose to you a problem, such as I conceive it to be, which some day we must face, particularly in this age in which we have reached a point where paying the interest on what we owe is going to be a terrific drain upon our ability. This problem is the problem of too much government or too much complexity of government. Some of you may have heard me make some remarks on this subject before, in which case I want to beg your indulgence. It may be a dangerous thing to discuss. It may be a dangerous subject by virtue of its very nature because of local pride and local enthusiasm. People do not like to have the subject tonched upon at times. And on the other hand, it may be a dangerous thing for me to discuss, because I have a haunting feeling that I may somewhere along the line, as a member of the legislature or even as your chief executive, have contributed somewhat to that complexity. But I am going to stick my neck out and discuss it anyway.

First as to local governmental units: We are reliably informed that in the United States there are about 155,000 units of local government. Incidentally, the only decline in any particular group of those local units noted in the recent past has been in school districts. Now, these local governmental units range all the way from cities and villages on down through the school district, highway districts, drainage districts, irrigation districts, herd districts, park districts and finally the cemetery districts. And as you all know and know too well, that does not exhaust the list, not even in Idaho. And as you all know, most of those bodies are able to levy assessments or taxes.

We are further reliably informed that the majority of those units are small in area. And we are further reliably informed that a majority of these units are very small in population. We know further, from our own personal knowledge, and it is set forth in reports on the subject, that most of them overlap. We know that the majority of them have insufficient resources.

On the subject of overlapping, I saw recently somewhere a statement to this effect, that the average district or the average unit of a local government character overlapped five others. And it is not uncommon, particularly in the metropolitan areas, to find eight, nine and ten overlapping governmental units all exercising their function entirely apart from the others.

Our information also shows us that there is one such unit for every 850 people in the United States of America and one every 19 square miles. It ranges all the way from almost 16,000 for the State of Illinois down to 54, I believe, for Rhode Island, something like 200 in the State of Maryland, and in Idaho we have practically 1,700. We have one, in fact, for every 315 people in the state.

Let's recall again that each one of these units has the power to levy taxes by some means or another. What, then, is the net result of this thing I have been talking about?

I think that the first one is tax inequities, and we are beginning to find, through the agency of our Tax Commission and some of the studies which they are prosecuting, that it is possible to lay at the door of this very cause which I have cited some of the tax inequities concerning which we have had bitter complaints.

In the second place, this results in—I don't know whether this is a good expression or not—uneconomic buying. You have a little piddeling unit here attempting to buy without knowing how, perhaps, and without the advantage of mass buying.

And furthermore, they represent the most wonderful opportunity that ever existed for buck passing. And in addition to that is a definite disproportion between the quality and the amount of service in proportion to the cost. I think we are all aware of that.

Further than that, there is a hampering community-wide development because of the fact that we have here a group bent only on accomplishing the purpose of that particular unit and too frequently doing it without giving thought to what is going to happen to another unit which should be a part of an integral whole for which they all ought to be working.

And then I think perhaps more serious than some of these other things is the fact that in addition to the hampering of the community wide development and community wide interest, there develops in the mind of the citizen a lot of confusion. He can neither understand nor can he effectively control the operation of the various governmental units. Where there is such divided responsibility and such overlapping, he ultimately either becomes rebellious and uncooperative or he just becomes disinterested in what happens. He doesn't vote and doesn't take any interest, because he thinks he is tied to the third rail anyway and there is no escape.

And finally you have a multiplication of offices that adds to the costs, and because the units are small and have insufficient revenue or resources, we do not attract to them the best type of public servants. And it all adds up in the end to waste.

Now, if change is desirable in the face of these facts, and I think it is, it will be a slow and somewhat painful process, and it can be made successful only after a great deal of careful study with certain aims definitely in view. And I want very briefly to point out what I think those aims should be.

The first is to establish for an area one local government without all this distribution of functions and setting up of units. Second is to make the area large enough so that it can be efficient. In other words, it should be self-sufficient in so far as its needs are concerned. And finally make it a bit more difficult, legislatively,

to establish local units which are thus inadequate. The result of failure to do so, I think, is too apparent to spend much time commenting on. There will be fiscal chaos, and we have plenty of that, and the loss of popular control. It has never seemed to me that in multiplying agencies to do a job for a particular locality we enhanced the value of local control or the power of local control.

The greatest difficulty, of course, arises in the added cost of attempting to maintain what is too small a unit to be efficient. And that doesn't just apply to the small units. We have a classic example of that. I have repeated this before, and I think a lot of you are familiar with it. The City of Chicago, we are told, sells water to various suburbs and communities. Five of these resell the water. The community of Harvey buys water from the City of Chicago at 6.8c per thousand gallons, and Harvey sells it to Markham at 19c per thousand gallons, and Markham sells it to Cook County Infirmary for 25c per thousand gallons, and Cook County is not very much except Chicago. So Chicago buys back its own water for 25c a thousand gallons after having already sold it for 6.8c.

Now, if it were not so painful, I might point out to you a few things that I think we do in Idaho that are just about as silly. Some day I may have the figures so that I can do that.

There are things which are suggestive of the fact that some of our states and some of our communities are attempting to solve these problems. I think that we find in the action of the recent Missouri Constitutional Convention some evidence of effort at least to meet the situation by sort of permissive action for joint contracting performed for these agencies in a given area. It is a field which I think we might well explore and see what possibilities it has for us. In some instances there have been successful consolidation of cities and counties. That has not always worked, but where it has not, I am convinced there have been local reasons which account for that fact.

Now, there are certain deterrents as there always are to any program which we might want to put into effect. The first of these is going to be the effect of local loyalties. We don't like to see an office taken away from our community. We don't like to think of losing a particular unit of government. But some day, if we are going to succeed in the problem of making government simple and effective, we are going to have to forget that point. Tradition has set for us, has developed for us, a lot of set patterns, and we worship before them as we would a shrine, and they are not that sacred.

Then we will meet also the influence of local office holders and their families, the interests of local business and individuals who are not able to look beyond the end of their noses. And we will run into the old urban-rural antagonism which so frequently stymies us but which, fortunately, I believe, are growing less and less. And finally we will run into the thing which very frequently acts as a deterrent—inertia. We are satisfied to let things go along in status quo.

Who is brave enough to start the job? (Applause).

PRES. KNUDSON: We thank you, Governor, for your interesting and informative address.

Before we adjourn for lunch, Mr. Smith has an announcement.

E. B. SMITH: This announcement is made with apologies to Carey Nixon for the method we had to adopt in the publication of what we call the Nixon-Schooler Digest, which is a reprint, beginning with the Territory of Idaho, of the various basic laws which we use every day in the examination of abstracts of title, and especially

those relating to community property. It has been annotated through 64 Idaho and 162 Pacific 2nd. It was hoped that when the Bar commission authorized publication of this compilation for distribution that we would be able to find the money with which to do it. But publication costs and materials have increased, doubled and trebled. We have finally gotten this out in loose leaf form, multigraphed, at a cost of something over $600.00—which incidentally is not yet paid—which exceeds $1.00 per member of the Idaho State Bar in costs alone. The task of getting this work together has been rather arduous. We have a number of these available today, and they are yours. We are going to distribute them to every member of the Bar. We are going to suggest a donation of $1.00 to go towards the cost of this. It is not mandatory upon you. It is yours whether you make the donation or not. Mr. Frank Martin is the Chairman of that division. We have gotten them up in a form with just a clip and punched knowing in advance that you will want to bind it in your own way—maybe in a loose leaf folder, a board-book binder or any way you want. As an illustration, Mr. Nixon has bound his with a 28-lb. cover, and he has also put these tabs on the division sheets, giving the various divisions in the set-up. It is hoped that you will obtain your copies through Mr. Martin.

FRIDAY, JUNE 27, 1947, 2 P. M.

PRES. KNUDSON: We are going to deviate from our published program to hear from Mr. Glenn R. Winters of Ann Arbor, Michigan, Secretary-Treasurer of the American Judicature Society and Editor of that Society's Journal, and Chairman of the American Bar Association Special Committee on Judicial Selection and Tenure. He will speak to us on "The Bar and Selection of Judges." (Applause).

GLENN R. WINTERS: Thank you, Mr. Knudson. It is a real pleasure to be here in Idaho. This is my first visit to this state, and I will confess that I am very enchanted by your lofty mountain ranges, the delightfully clear air, the sparkling water that I have been drinking and the delightful welcome I have had from your people.

Out here some two thousand odd miles from the city of Detroit I am not sure how familiar you are with Detroit newspapers. Perhaps you have heard of the Detroit Free Press—the institution the Scotchman with the pants over his arm was supposed to have been seeking. The others today are the News and the Times. These are dignified, conventional papers. A few years ago there used to be another, and I did not realize it was gone until last week when I looked for it in Ayer's directory—the Detroit Saturday Night. This was a tabloid in the best traditions of the term. It was small in size—just right to read in a crowded street car with one hand clinging to a swaying strap, mostly pictures, for the benefit of those unwilling or unable to read; and its editor was not hampered by the inhibitions of the New York Times in his choice of news items.

You would hardly expect such a publication to forsake its regular fare of bathing beauties and sex crimes to explore the problems of the judiciary, and yet one issue of the Detroit Saturday Night a few years ago published a delightful editorial on "How to Be Elected Circuit Judge in Detroit." It will only take a moment to read it to you:

"Applicants for this position should possess the digestion of an ostrich, a firm right hand with a capacity of at least 3,000 shakes a day, a keen memory for faces and names, dignity tempered by geniality and affability, a fluent tongue coupled with the ability to talk to all sorts and conditions of men—and women—and say nothing offensive and leave the listeners with an impression that the speaker is a person of vast wisdom, good humor and tolerance.

"Applicants also should be able to attend a series of luncheons, club and lodge meetings, smokers, dances, a banquet or two, and several sports events in the course of a day and yet find time to attend to the exacting duties of the bench. This, of course, presupposes the physical strength to get along with little or no sleep.

"Applicants should also possess a commanding presence, particularly because of the necessity of winning the confidence and esteem of the women. And, naturally, the applicants must possess the specialized education and training necessary for a circuit judge.

"If you believe we have overdrawn the case, stir about town a little and observe the actions of the members of the circuit bench, all of whom are candidates for re-election this spring. None has yet blossomed out as a song and dance artist, but short of that they seem to be omitting nothing calculated to win the voters' favor. We might imagine from the newspapers these days that they are everywhere but on the bench."

Another one I like is Judge John Perry Wood's description of a judicial election campaign in California before adoption of the constitutional amendment now in force:

"At election time the judges of Los Angeles and the candidates for the bench spread their names over the county by every method known to advertising. They were bill-boarded like a popular soap, sidewalks and public halls were littered with cards extolling the merits of candidates asking to be permitted to sit in judgment over the lives and property of the people. Contributions were solicited from firms frequently in court. One candidate collected $50,000 for a position that paid $10,000 a year.

"Some of the candidates degenerated to the depths of the promoters of cigarette sales campaigns. One candidate agreed to dispense 'Justice with Mercy' if re-elected; however, the voters preferred the candidate offering 'even-handed justice.' Another candidate offered to conduct ' a fair and friendly court' if elected, but the voters turned him down for the judge offering to 'save a life.' It was facetiously said that after this judge saved his own life by being re-elected, the campaign to 'save a life' then and there terminated."

My purpose in reading you these passages is simply to provide what a photographer would call a contrasting background for what a clergyman would call my text. The text is a paragraph that should be familiar to all of us, and yet how long has it been since some of us have read the American Bar Association Canons of Professional Ethics? Here is Canon Number Two:

"It is the duty of the bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves."

Our particular concern today is with the first half of that canon:

"It is the duty of the bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the bench, and it should strive to have elevated thereto" only persons of specified high qualifications.

My first observation is to point out that the canons of professional ethics constitute an affirmative obligation upon the lawyers to whom they apply. Canons identical with these or based on them are the official standards of conduct for all lawyers in twenty-three states, including your own, having an integrated bar, and their observance is a requirement for membership in the voluntary state bar associations of a number of other states, as well as the American Bar Association. Many a lawyer who has not bothered to look at the Canons since he was admitted to the bar has been astonished to find disciplinary proceedings brought against him for violation of a rule which he "didn't know was in the Canons," but that plea never has been considered an adequate defense. The organized bar of a state is as obligated to live up to Canon 2 as an individual lawyer is to refrain from misappropriating trust funds or stirring up litigation.

The second point of interest is that Canon 2 itself is phrased affirmatively and actively. The three sentences you heard the second time contain three injunctions to affirmative action. The bar is to *endeavor to prevent* politics from controlling the judiciary; it is to *protest earnestly and actively* against improper candidates or appointees; and it is to *strive* to have the right kind of men elevated to the bench.

The sound and logical basis for this concept of the responsibility of the bar in the important field of judicial selection lies in the relationship of the courts to the bar. We are accustomed to hearing that attorneys are "officers of the court," meaning that they are a part of the machinery of the court. However, if the bar is a part of the court, it is no less true that the court is a part of the bar. Sir William Jones had something similar in mind when he wrote:

> What constitutes a State?
> Not high-raised battlement or labored mound,
> Thick wall or moated gate—
> Not cities proud with spires and turrets crowned—
> . . . . . .
> No; men, high-minded men,
> With powers as far above dull brutes endued
> In forest, brake or den,
> As beasts excel cold rocks and brambles rude.

If it be true that men rather than battlements and towers constitute a state, then it is also true that men, and more specifically members of the bar, rather than desks, flags and railings, constitute a court. The judge is so identified with the court that we are all thoroughly accustomed to referring to the judge as the court. Even jurors alone cannot constitute a court—a judge can and does. Judges must be trained in the law, and there is no other place from which to recruit persons with that training than the ranks of the bar. It is not an unfair way of putting it to say that from the bar of a state, all of the members of which are participating in the administration of justice, certain ones are sorted out for the specific job of presiding at trials and rendering judgments. If the conduct of individual attorneys in court reflects credit or discredit upon the court, so by the same token does the performance of the court reflect credit or discredit upon the bar, of which it is in a very real sense a part.

It is in recognition of this responsibility that committees on judicial selection and tenure exist in half or more of the state bar associations and the American Bar Association, and that this subject is on the program of your meeting today. The court's organization and procedure as well as its personnel are part of this picture for the same reasons, and I am gratified to note that you are also giving attention to problems of court organization at this same meeting.

When it comes to implementing the bar's responsibility with effective action,

the question of what course to pursue arises, and there are two possibilities to be considered. Lawyers in some states have confined their efforts to the one and in other states to the other. Local circumstances differ, and there may be appropriate occasions for either one by itself or for both. At least, neither one ever should be lost sight of. The first, as thorongh, long-range planning for the ultimate adoption of the best method of selecting judges yet conceived. The second is the taking of such steps as opportunity affords for improving the present procedures as much as possible. Naturally, the two are bound to be closely associated and may at times merge into each other.

The first step involves the preliminary question of what the best method may be. Opinions naturally differ, and the trend of thought has varied one way and another with the passage of the years. At the same time, changes in the living habits and activities of the people have given rise to need for changes in methods of selecting judges, so that what was once satisfactory may now be highly unsatisfactory.

In no less than forty of the forty-eight states today all or part of the judges are elected by popular vote. This has been the rnle everywhere except in a few of the Atlantic states for just about a hundred years—dating from the time that so-called "Jacksonian Democracy' swept the country and idealized popular election for short terms as the solution of all governmental problems.

The quotations I read to you a few minutes ago from the Detroit Saturday Night and from Judge Wood of Los Angeles are sufficient to indicate that at least in some localities judicial elections are hardly satisfactory and that some better method ought to be obtainable. It is true that conditions are not that bad in other areas, notably rural communities where the candidates as a rule are fairly well known to the voters, but even in those places serious criticisms of the elective method remain unanswered.

The ballot, you know, is an instrument of extremely limited powers. It is in fact difficult for any group of people to make its will known. A mob can resort to parades or hangings in effigy; an audience can clap or boo; but with any of those methods and even with the ballot, the means of expression available to the group are not much greater than those of a baby not yet able to talk. The ballot can be used only to answer a question yes or no, or to make a choice among simple alternatives.

It was facts like these that led the Short Ballot Organization some thirty years ago to declare that it was actually undemocratic to impose on the democratic process burdens it was unable to bear. The vote, they said, cannot be used intelligently to choose the whole catalogue of public officials from a mass of candidates who are strangers to the voter, but should give the people an opportunity to choose among well-known candidates committed to well-known views and policies for the important governmental posts, and let them appoint their own assistants and subordinates to carry out those policies. The soundness of these principles has been generally recognized, even though the long ballot still persists to a great extent.

There is no legitimate place in this picture for the election of judges. Their work does not bring them into the public eye, and the only policy properly involved in choice of judges is that of impartial administration of justice, to which all candidates are of course pledged. The choice among judicial candidates lies properly in evaluation of their personal integrity, intelligence, legal training and judicial temperament. Casual acquaintance, which is the most that the mass of voters can claim even in the smallest community, is not adequate to weigh these complex and difficult factors. A trained and competent authority is needed. There is probably no community in the world where high school teachers are elected by popular vote, and yet the determination of the professional qualifications of a judge requires as

much care and professional skill in the chooser as does the selection of a teacher of mathematics, civics or French.

Actually, in most instances the situation is even worse, for the voters have nothing like a free choice. They vote for the persons whose names are on the ballot, and if the nominees were chosen by a political party that party had almost a *de facto* power of appointment.

In states where they have sought to avoid that by having a nonpartisan primary, the effect has been to deprive the judicial candidates of the benefit of party responsibility, and to make the primary election a free-for-all not only for legitimate judicial candidates but for any lawyer who may think it would benefit his practice to have his picture posted throughout the county as a candidate for circuit judge. It is hard to induce good lawyers to compete in such a scramble.

The situation in either event lends itself admirably to the operations of local political machines, whose corruption of the judiciary has been responsible for reform movements at one time or another in most of the leading American cities. Indeed, a survey of the Committee on Judicial Selection and Tenure of the American Bar Association a few years ago showed that dissatisfaction with judicial election existed in all but a half-dozen of the states making use of that method, and at this very moment there are definite reform movements, or agitatiaons for it, in nearly half of the forty-eight states.

When we begin to consider the lines along which this reform might be directed, we become aware of something in the nature of a dilemma. The appointive process, on the one hand, has a long and impressive record of satisfactory service, due largely to the fact that it makes possible a careful, intelligent and professional examination of the candidates' qualifications and a choice on the basis of those qualifications. Yet under certain circumstances it is subject to abuse and has been badly abused. The elective process, on the other hand, in spite of the array of drawbacks we have just enumerated, is still in use in a majority of the states and tenaciously clung to by many people. Their demand for elected judges, like their demand for jury trial, is a manifestation of a deep-rooted determination among free people to keep in their own hands control over the processes whereby their lives, liberties and properties are disposed. Recalling the unholy Court of Star Chamber and the Bloody Assizes of an earlier day, we cannot say that they are wrong in that determination. If this dilemma can be solved, it will be by a plan that preserves the informed and intelligent choice that is the strong point of the appointive system, and yet leaves unimpaired such part of the elective process as the voters can use to reserve for themselves some form of ultimate control over the judges appointed to serve them.

In the plan originated about thirty-five years ago by Professor Albert M. Kales, endorsed by the American Bar Associateion ten years ago and adopted in Missouri in 1940, this balance is accomplished by provisions for the filling of judicial vacancies by appointment of an elected officer from a list of names suggested by a nominating body, the appointees to go before the voters at stated intervals thereafter on the sole question of their retention in office. Here is the text of the plan as endorsed by the American Bar Association:

"(a) The filling of vacancies by appointment by the executive or other elective official or officials, but from a list named by another agency, composed in part of high judicial officers and in part of other citizens, selected for the purpose, who hold no other public office.

"(b) If further check upon appointment be desired, such check may be

supplied by the requirement of confirmation by the state senate or other legislative body, of appointments made through the dual agency suggested.

"(c) The appointee after a period of service should be eligible for reappointment periodically, or periodically go before the people on his record, with no opposing candidate, the people voting upon the question, 'Shall Judge.....be retained in office?' "

From the standpoint of selection, the crucial part of this set-up is the nominating agency. In Missouri it is a commission, consisting, for the appellate courts, of the chief justice *ex officio*, three lawyers elected by the bar of the three appellate districts, and three laymen appointed by the governor from the three appellate districts. For nomination of circuit judges the commission is similar but on a smaller scale, with the presiding judge of the appropriate appellate court as its chairman, and two lawyers and two laymen.

Up until the last two years all discussion of the merits of this and other kinds of nominating agencies was entirely *a priori*, since none had ever been in existence. That is no longer true, for the Missouri plan now has a respectable record of nearly seven years of excellent service. Appointments during that time have been acknowledged good by everybody, including the plan's opponents, and it is only natural that similar provisions appear in most of the judicial selection plans now being advocated in a number of states. It becomes increasingly clear that regardless of the merits or demerits of other plans, the Missouri plan is seaworthy and suitable for adoption in substantially its present form.

Nevertheless, it must be acknowledged that until some others are tried it cannot be proven that this one is definitely the best. Among other proposals frequently advanced is that of nomination by the bar, either through the machinery of a state bar organization or through a direct vote of all lawyers individually.

The most elaborately conceived plan along this line was devised six or seven years ago by an Indianapolis lawyer, Mr. Charles H. Richards. His plan would operate in four steps, designated as bar petition, bar primary, regular primary and regular election. Incumbent judges under age 70 would be automatic candidates unless they renounced candidacy. Other candidates would be initiated by petition signed by a prescribed number of members of the bar. In a preferential bar primary the members of the bar would vote their first, second and third choices, and the three highest would be the nominees on a separate non-partisan ballot in the regular primary election. The two highest then become nominees at the regular election.

This plan never has made any headway in Indiana, and simplification would probably improve it, but it is of considerable interest in connection with our discussion today of the responsibilities and opportunities of the bar in the selection of judges. A commission of the Bar Association of Arkansas at work the past year on revision of a plan for reorganization of that state's judicial system recently published a tentative redraft of the plan, one of the leading changes of which was substitution of nomination by members of the bar for nomination by the judicial council.

One question that remains undecided is what part the organized bar may constitutionally play in this process. Suppose, for example, that instead of a special nominating commission, the Missouri Plan provided for nominations by the Daughters of the American Revolution, or the hod carriers' union. That would appear to be unconstitutional as delegating a governmental function to a private agency. This one may soon be decided, for a South Carolina statute providing for appointment of the judge of a county domestic relations court upon the recommendation of a county

bar association is under attack right now because of its alleged delegation to a private agency of the governmental function of appointment to office. That statute is broadly drawn and susceptible to the interpretation that the governor is required to appoint the nominee of the bar association. The outcome of that particular controversy will be awaited by many of us who are interested in exploring the possibilities of this type of bar activity. It would seem that in view of the lawyer's status as an officer of the court and his special qualifications for making an intelligent choice, a good argument could be offered in defense of the statute. However, the case would be a lot stronger if the bar organization in question were an integrated bar. Comprising as is does the entire bar of the state, and tied in closely with the supreme court in various ways, the integrated bar is in such a position that the dangers of delegating appointive powers to private agencies do not exist in its case. Disciplinary activities of the integrated bar come about as close to governmental activity as recommending judicial appointments, and these are everywhere accepted as proper. I would like to see a state with an integrated bar sometime experiment with bar nominations in a plan similar in other respects to that endorsed by the American Bar Association, and would not be disappointed if Idaho should be the state.

The mechanics of such a nominating system so far as I know remain to be worked out. The 1947 revision of the Arkansas plan simply says that nominations shall be by the bar of the district involved. Presumably it would have to be by vote of all members of the bar in that district, and that itself requires some form of parliamentary procedure and usually nominations. The initiating petition in the Richards Plan might be used to advantage here for nominations to and within the bar itself.

The dividing line between what I have called long-range reform and doing what can be done to improve the present procedure is substantially a constitutional one. In virtually every state, methods of selecting judges are prescribed in the constitutional amendment. Whatever can be done short of constitutional amendment is within range of smaller guns and ought not to he ignored hy any har organization interested in doing its best with this problem.

I suppose many of you are familiar with the efforts that have been put forth recently along this line in your neighboring state of Utah. Foiled year after year in their efforts to get the kind of judicial selection plan they wanted written into their constitution, they finally got through an amendment empowering the legislature to change the procedure as it saw fit by statute. The bill for which the Utah bar campaigned during the recent legislative session would have set up a series of elaborately organized Judicial Selection Commissions, the sole function of which would be to submit nominations not to the governor or an appointing authority, but to the voters for their consideration at the next general election. This proposal impresses me very favorably. One comment on the Missouri plan that I have heard is that it leaves practically nothing for the governor to do, as the nominations are so good that he cannot make a mistake no matter which one he picks. Then why is it essential that the governor do it at all instead of the voters? If we are assured of good nominations, need we feel too disappointed if we settle for a plan involving final choice at the polls, especially if such a procedure can be established by statute and without constitutional amendment?

An interesting variation of the Utah plan would be to have the nominations to the voters submitted by the bar rather than by special nominating commissions. I do not know how easy this would be to arrange in a state now making use of regular partisan nomination and election, but in most of the states now providing for non-partisan judicial ballots there is a vacuum wherein nobody sponsors any candidates at all, and this operates to the advantage of those candidates most adept at sponsoring themselves. Michigan has attempted a makeshift solution to this

problem by providing for party nominations and then non-partisan elections, but the results have not been very good. Nomination by the bar would fill that vacuum without doing violence to the non-partisan requirement, and if the legislature of such a state could be sold on the desirability of informed and intelligent nominations such as the bar is able to give nothing more should be needed to give it a try.

It might be well to repeat again that discussion of untried plans and procedures such as these just mentioned is all *a priori* and subject to discount accordingly. Indeed, among the published speculations on this subject have been some by high authority that were frankly dubious as to the propriety and practicability of bar participation in selection of judges. It has long been questioned whether an organization could afford to single out one of its own members who aspired to a judicial post against another aspirant also a member, and support the one while opposing the other. My answer to that would simply be that lawyers are supposed to be grownups and not children and are supposed to be aware of the fact that even among top-notch lawyers judicial aptitude is almost surely not present in equal degree.

Herbert Harley, former secretary of the American Judicature Society, once questioned the proposition that the bar would automatically have the highest possible motive for desiring the best judicial talent. He pointed out that in cases where the facts and law are with the opposition but sentimental factors are on their side, lawyers want a sentimental judge, while if the other lawyer is winning by playing on the heartstrings of the judge they may well yearn for a strict legal technician. Furthermore, under the adversary system as now in operation, lawyers have a freedom in the court room of which they are jealously fond, and prefer judges who let them conduct their trials as they please. Thus, he suggested, "mere stupid patience and timidity on the judge's part come to be virtues which the lawyer confuses with impartiality and judicial temperament."

The best way to resolve doubts of this type is to give the bar a chance. Unofficial bar primaries throughout the country over quite a long period of years have given the lie to some of them. In a very scholarly study of "The Role of the Bar in Electing the Bench in Chicago" published about ten years ago, Mr. Edward M. Martin of that city concluded that the recommendations of the Chicago Bar Association made through its bar primaries had been both reliable and impartial. The Cleveland Bar Association has a long record of patient and unselfish effort in choosing and sponsoring bar-endorsed candidates, and within the past year or two has developed a rating system for candidates that might be used to advantage by a bar organization that had the chance to try its hand at real official nominations.

The elected judge has had his way in this country for a century, but bis sun is slowly setting, as a glance at the map will reveal. Twenty-one states° choose their judges just as they do their other public officers, by nomination of political parties, either by primary election or in convention, and a subsequent election. Fourteen states°° have attempted to "take the judges out of politics" by removing them from the political parties and having them elected on a non-partisan ballot. In Michigan is an anomalous hybrid system, with political party nomination and then non-partisan election. The remaining thirteen states°°° make use of some form of appointment for all or part of their judges.

°Party nomination and election of judges—Utah, Colorado, New Mexico, Texas, Oklahoma, Kansas, Iowa, Illinois, Indiana, New York, Pennsylvania, Maryland, West Virginia, Kentucky, Tennessee, North Carolina, Georgia, Alabama, Mississippi, Arkansas and Louisiana.

°°Non-partisan election of judges—Washington, Oregon, Nevada, Arizona, Idaho, Montana, Wyoming, North Dakota, South Dakota, Nebraska, Minnesota, Wisconsin, Michigan and Ohio.

°°°Vermont, Virginia, South Carolina—chosen by legislature. Rhode Island—supreme court

Plans patterned after or closely analogous to the Missouri plan are under active consideration in a dozen or more states at this time, and in nearly as many more interest in the improvement of methods of selecting judges has manifested itself in one way or another. In a half-dozen states it appears as part of a broad plan for modernization of the entire state judiciary. The Arkansas plan, first drafted a year ago and recently redrafted by a state bar commission that has devoted a year of work to it, differs from the Missouri plan chiefly in that nominations are by the entire bar of the district affected rather than by a nominating commission. In the Texas plan the leading difference is that the supreme court nominating commission consists of the chairman of the various district commissions. A revision of the Arizona judiciary article including a Missouri-type judicial selection plan was drafted by the Arizona Judges' Association last year and submitted to the legislature by the state bar legislative committee, but no legislative sponsor was found and the project appears to be temporarily halted. Also presently in eclipse are the campaign for a Missouri-type system in Oklahoma, which was rejected at the last meeting of the Oklahoma Bar Association, and the Minnesota court plan drafted by the judicial council four or five years ago and now very nearly extinct. The Oklahoma plan, however, would have applied to the entire state, and in declining to endorse it the Association directed further study of the possibility of working out a plan applicable only to the appellate judges and the trial bench of the state's largest cities as was done in California and Missouri.

Judge William Logan Martin, president of the Alabama State Bar Association, has been stumping his state in behalf of an adaptation of the Missouri plan which he hopes may be approved by the Association at its next meeting for submission to the voters in 1949. A coalition of three committees of the Pennsylvania Bar Association is sponsoring a similar plan in that organization, and Association approval is hoped for at the annual meeting in Atlantic City next week. The committee on selection of judges of the Washington State Bar Association was ready to introduce in this year's legislature a proposed constitutional amendment providing for a Missouri-type plan, but decided to defer it to the next session and conduct an educational campaign in the meantime. The Judiciary Committee of the Colorado Bar Association, at work on a complete revision of the judicial structure of that state, has been studying methods of selecting judges intensively, and although no decision has yet been reached, it is probable that the plan submitted to the Association at its annual meeting next fall will contain something comparable to the Missouri plan, to which the committee has given much favorable attention and study.

The Utah State Bar has just suffered a defeat in its long campaign for adoption of the ingenious plan just mentioned that deserves a trial somewhere.

New York, which led the parade away from appointment to election of judges a century ago, has had more than one occasion to regret it during those hundred years. Four years ago the revelation that a man with proven underworld connections and open political support of that element had the nomination for supreme court justice and in spite of a hue and cry over that fact went on to win the election, stimulated a judicial selection reform movement that had its inception in the Association of the Bar and culminated in the organization of the present Citizens' Committee on the Courts. The Missouri plan has been studied with great interest,

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by legislature and superior court by governor and senate. Connecticut—minor court judges by legislature, probate elected, other by governor with confirmation by legislature. New Jersey—vice-chancellors by chancellor; others by governor and senate. New Hampshire, Massachusetts, Maine (except probate)—by governor and council. Delaware—by governor and senate. Florida—circuit judges by governor and senate (but upon Democratic primary nomination); supreme court elected. California—appellant judges by governor subject to confirmation by a special commission and subsequent periodic non-competitive election. Others elected. Missouri—plan described in text, but applies only to appellant judges and circuit judges of St. Louis and Kansas City. Others elected.

along with many other proposals, but the plan that has drawn the most support is a unique one combining the tenure subject to the periodic non-competitive election with original appointment by the governor without a nominating commission and with confirmation by the senate. Right now the Committee is concentrating on improvement of removal procedures.

Judicial selection campaigns of small scope are in progress here and there. The Illinois constitution is almost impossible to amend, but the large Municipal Court of Chicago is a statutory court, and Chicago bar leaders are working on a campaign for an appointive plan to be adopted by the legislature for that court. In Rhode Island where not so many years ago the legislature turned out the entire supreme court in one *coup*, the state bar association is sponsoring a constitutional amendment to make those judges, like the rest of the state judiciary, appointed by the governor and senate. Legislative appointment of municipal judges in Connecticut is also under attack, some parties favoring election, but the judicial council advocating executive appointment. In Ohio, where a campaign for an appointive judiciary was defeated about ten years ago, the Cleveland Bar Association has been making history with its improved methods of testing bar opinion on the qualifications of judges and judicial candidates and making that opinion felt in the judicial campaigns of that city.

Unorganized interest in the subject, so far without tangible results but likely to lead to them, may be noted in a half dozen other states. The Kansas legislature recently passed a resolution directing the legislative council of that state to make a study of this subject and report back with recommendations at the next session. At the last meeting of the Montana Bar Association a justice of the Montana supreme court spoke critically of the non-partisan ballot and urged that the Association undertake a reform campaign. The Democratic Party of Indiana pledged itself to judicial selection reform at its last convention, and even in Massachusetts, stronghold of the appointive judiciary, there is considerable interest in certain features of the Missouri plan, especially the nominating commission and the subsequent confirmation at the polls.

It is a pleasure to be able to include Idaho in this catalogue of states, in view of the emphasis placed on judicial selection problems in your last two annual meetings and the enthusiasm of men like Mr. Baker, who brought the subject up a year ago. I will venture the hope that in the not too distant future Idaho may share with Missouri and I hope with Arkansas, Colorado, Pennsylvania and some of these other states the distinction of having made outstanding provision for the administration of what Daniel Webster spoke of as the greatest concern of mankind on earth—justice.

PRES. KNUTSON: Thank you, Mr. Winters, for your very enlightening and interesting discussion.

Next on our program is a paper by Marshall B. Chapman of Twin Falls on the subject "Reorganization and Unification of the Judiciary of the State of Idaho."

MARSHALL B. CHAPMAN: Mr. President, members of the Bar of Idaho and our Guests: Everybody here will appreciate the value of Mr. Winters' remarks in helping us to solve the problem of tenure and selection of judges in Idaho. And I desire, at this time, to express appreciation to Governor Robbins of Idaho in the splendid appointment he has made of Paul W. Hyatt as successor of Justice Ailshie to the Supreme Court of this State. (Applause).

My assignment on this program is to present to you a concrete plan for the unification and reorganization of the judiciary of this State. The Judicial Council (1929-1932) made exhaustive studies of this subject. The plans which I shall present will be, generally, in line with the thoughts of the able members of that Council.

Any plan for the reorganization of our courts and the redistricting of our State naturally will meet opposition of some for geographical reasons, for personal convenience, and because any plan presented may conflict with personal ambitions. On the other hand, out of our discussions may come constructive meritorious criticism which may lead to the adoption of a practical and efficient plan of unification and reorganization, having the approval, generally, of the bar, the judiciary and the public, whether or not it be the one proposed.

I have not had the privilege of being a member of the judiciary. However, for fourteen years I was an Official Court Reporter, and in that position had both an opportunity to observe the problems of the judges, and to become well and personally acquainted with the members of the judiciary in Southern Idaho and, to some extent, in the northern portion of our State. Since then, as an active practitioner, I have had further opportunities to observe these problems, and particularly the personal sacrifices made by Judges in accepting their high offices. I believe that during my experience, any lawyer elevated to the bench sustained substantial financial loss; all have been subjected to possible defeat after having left a substantial practice. Able attorneys who enjoy luerative practices hesitate to become candidates for judicial positions, or to accept appointment because of the prospect, always present under our present election and tenure statutes, that a defeat at the polls despite enviable records will force them to start anew.

I approach this subject with the idea that our judges should be improved, and with the hope that their compensation and security can be made commensurate with the high offices which they occupy. In presenting to you a plan for the unification and reorganization of our Idaho Courts, I do so with the highest respect and regard for those men of our profession who occupy judicial offices.

I shall divide the subject into four parts:

1. Selection;
2. Reorganization of courts;
3. Compensation and retirement; and
4. Unification.

SELECTION OF JUDGES:

Through the efforts of the American Bar Association and its many State affiliates, State after State is adopting a plan for the selection of judges, to make the tenure of office more permanent and more attractive to the members of our profession.

Many plans are now in use or proposed throughout the United States. I shall not burden you with the detailed operation of those plans. I believe most of us are somewhat familiar with the Missouri system of selection of Judges. Under that system a commission is created composed of both lay and bar members, charged with the duty of presenting three names to the Chief Executive upon the occurrence of a vacancy, from whom the Chief Executive must select the judge. The principal objection to the Missouri system, insofar as our State is concerned, is expediency. That plan would require a Constitutional Amendment, and could not be put into immediate operation.

There is another plan known as the "Bar Primary Plan," which provides for the placing in nomination of judicial candidates by petitions and a Bar Primary is then held, and the three highest become the nominees and are voted upon at the ensuing general election.

A further plan has been suggested which would appear to require no Constitutional Amendment and, it may be, is more practical in Idaho than any other

thus far suggested. Under that plan candidates for office of Justice of the Supreme Court would be nominated at a convention of the State Bar and candidates for office of District Judge would be nominated at a convention of the Bar of the Judicial District. Vacancies on the bench would be filled by selection from one of two names suggested to the Chief Executive by the Bar of the State of the appropriate District. Such a manner of selection of Judges would be practical and acceptable, not only to the Bar, but also to the people of this State, and a vast improvement over present methods. Naturally, we in the profession are in better position to know the ability, disposition and suitability of our members who may aspire to judicial office. I believe, also, that the people have confidence in us, and would be willing to leave to us the responsibility of selecting from among our number the men who should be elevated to high judicial office. The Bar of the State, if given the right to nominate but one candidate for each office, would be enabled to insure the continuance in office of a capable judge. If necessary to meet objections on constitutional grounds, blanks could be left on the ballot, as in other cases, by which the voter might express his preference for another.

REORGANIZATION OF COURTS:

Going next to the subject of reorganization of Courts, we have five Supreme Court Justices, sixteen District Judges, forty-four Probate Judges, and eleven Judicial Districts. How many Justices of the Peace there may be in the State I do not know.

Digressing, I find that since the survey made by the Judicial Council of 1929-1932, there is no data available disclosing the present volume of business of the various Courts of this State. This is unfortunate, because we are somewhat handicapped in arriving at conclusions in the absence of current data.

The Judicial Council made a survey to determine the number of cases filed in the various Judicial Districts, in the Supreme Court, and the population and assessed valuation of each District for the period from 1920 to 1929 inclusive. I do not question the value of this information in working out a plan of reorganization, but it is my opinion from past experience that the number of cases filed, the population and assessed valuation, do not furnish a complete measure of judicial requirements. A better method would be to determine the time each Judge has been actually engaged in court work. To obtain this information would require that someone be sent to each County in the State to inspect the minutes of the Courts. I would suggest that arrangements be made to secure such information in that manner before any final plan of reorganization of our Courts is presented to the Legislature.

In the survey by the Judicial Council it was found that, during the period from 1920 to 1930, inclusive, 1921 was the peak year for judicial business in this State, so far as cases filed was concerned, and that, as compared with the year 1930, there was a 47% reduction in civil business, and a 41% reduction in criminal business. In other words, in 1921 there were 6,604 civil cases filed and 961 criminal cases filed in the State of Idaho, and, in 1930, there were 3,521 civil cases and 519 criminal cases filed. The figures further show that there was a gradual decrease in volume of business during the entire period from 1921 to 1930. Having been a Court Reporter in 1921, I would attribute the peak of cases filed during that year to:

(1) The large number of divorce cases following World War I.

(2) The financial recession occurring at that time; and,

(3) The large number of bootlegging criminal cases, which reached their peak at that time, just prior to the absorption of the major part of this business by the Federal Courts.

In order to illustrate the data available for the period from 1920 to 1930, inclusive, I call your attention to three tables which I have taken from page 222 of Idaho Law Journal, covering the proceedings of the Idaho State Bar meeting, held at Moscow, Idaho, in 1931:

TABLE I

Trend of Judicial Business as Shown by Number of Cases Filed in District Courts Annually from 1920 to 1930, Inclusive

	Civil	Criminal
1920	5784	628
1921	6604	961
1922	6304	871
1923	6322	920
1924	5195	854
1925	5119	716
1926	4630	522
1927	4193	522
1928	3964	578
1929	4011	587
1930	3521	519

Decrease from 1921 peak—Civil 47%, Criminal 41%.

Table II

Number of Civil and Criminal Cases Filed in Each Judicial District During 1930

Number of District	Civil	Criminal
1st	189	39
2nd	138	46
3rd	602	48
4th	133	21
5th	310	35
6th	229	30
7th	360	73
8th	355	43
9th	412	80
10th	254	32
11th	549	72
Totals	3521	519

TABLE III

Judicial Business as Shown by Average Number of Civil and Criminal Cases filed in Each District from 1920 to 1929, inclnsive:

First District	221
Second District	184
Third District	651
Fourth District	344
Fifth District	943
Sixth District	400

Seventh District	688
Eighth District	517
Ninth District	700
Tenth District	352
Eleventh District	1037

Taking first the reorganization of our Judicial Districts: There are in the First, Second, Eighth and Tenth Districts five District Judges. In those respective Districts, there was an average of 1,274 cases filed per annum during the period from 1920 to 1929. The population of those Districts in 1940, as disclosed by the Census of that year, was 135,776, as against a population of 141,000 in 1930. I do not have data as to the present assessed valuation of property in, or population of, those Districts. The last information I have as to the assessed valuation is the remarks of Mr. A. L. Merrill at the 1932 State Bar Convention, when he submitted the proposal of the Judicial Council for a reorganization of the judiciary in this State. At that time the counties embraced in the First, Second, Eighth, and Tenth Judicial Districts had an assessed valuation of $142,219,330.

The First, Second, Eighth and Tenth Districts comprise what is commonly known as North Idaho, and include the counties of Boundary, Bonner, Kootenai, Benewah, Shoshone, Latah, Clearwater, Nez Perce, Lewis, and Idaho. I suggest that those Judicial Districts be consolidated into the First Judicial District, with two judges in lieu of the five now serving in that area.

In the Third and Seventh Judicial Districts, embracing what is commonly known as Southwestern Idaho, consisting of Adams, Washington, Valley, Payette, Gem, Boise, Ada, Canyon, Elmore and Owyhee Counties, we now have four District Judges, which territory had, in 1940, a population of 140,241, as compared to a population in 1930 of 129,200. There were filed from 1920 to 1929, in those Districts, an average of 1,339 cases per annum. Using again the figures given to us by Mr. Merrill at the 1932 Convention, those Districts had an assessed valuation of $112,000,000. I propose that the Third and Seventh Districts be consolidated into the Second Judicial District, with two Judges in lieu of the present four.

The Fourth and Eleventh Judicial Districts, embracing the counties of Blaine, Camas, Gooding, Lincoln, Minidoka, Jerome, Cassia and Twin Falls, had a population of 90,745 in 1940, as compared to a population of 95,700 in 1930. Again using Mr. Merrill's figures, these Districts had an assessed valuation of $77,000,000. From 1920 to 1929 there were filed in these Districts an average of 1,431 cases per annum. I propose a consolidation of the Fourth and Eleventh Districts into the Third Judicial District, with two Judges in lieu of three.

The Fifth, Sixth and Ninth Judicial Districts had a population of 158,111 in 1940, as against 178,400 in 1930. The assessed valuation of those Districts, as given by Mr. Merrill at the 1932 Convention, was $147,000,000. These Districts comprise what is commonly known as Southeastern Idaho, consisting of Lemhi, Custer, Butte, Bingham, Bonneville, Jefferson, Madison, Fremont, Latah, Clark, Bannock, Power, Oneida, Bear Lake, Caribou, and Franklin Counties. Between 1920 and 1929 there were filed an average of 2,043 cases per annum in those Districts. I propose a consolidation of the Fifth, Sixth and Ninth Judicial Districts into the Fourth Judicial District, with three Judges in lieu of four.

You will note I do not recommend simply a proportionate reduction in number of District Judges. Our present Judicial Districts were not established by any rhyme or reason, but entirely upon political premises. Using the figures available for the period between 1920 and 1929, and the 1930 population figures, we find, on the

one hand, that in the First Judicial District, embracing only Shoshone County, with one Judge, and a population of 18,200 an average of 221 cases per annum were filed. The Second District, embracing Latah and Clearwater Counties, with one Judge, having a population of 29,200, an average of 184 cases per annum were filed; in the Fourth District, embracing Blaine, Camas, Lincoln and Gooding Counties, with one Judge, having a population of 21,700, there were filed an average of 344 cases per annum. On the other hand, we find the Ninth District, embracing Clark, Fremont, Teton, Madison, Jefferson and Bonneville Counties, with a population of 66,100, and an average of 700 cases filed per annum, with but one Judge. The eleventh Judicial District, embracing Cassia, Minidoka, Jerome and Twin Falls Counties, with a population of 74,000—an average of 1,037 cases filed per annum, and two Judges. The Fifth Judicial District, embracing Power, Bannock, Bear Lake, Franklin and Oneida Counties, with a population of 74,500—an average of 943 cases filed per annum, and two Judges.

One of the difficulties in expediting the bnsiness of a District, comprising a number of counties, is getting cases at issue. If stated motion days were held each month in each county, when motions and demurrers would be heard without notice, when the stated term arrived all cases would be at issue and for trial.

I believe justice would be far more efficiently administered if we had fewer, but busy, Judges, than a greater number, without sufficient work to keep them busy, amounting to a glorified retirement. My observations are that the Judges themselves would much prefer the former situation.

Believing it is more desirable for the Judges to be busily occupied, and to be paid on a basis commensurate with their work and responsibilities, I propose a Supreme Court of three members, in lieu of the present five. Under our present system, our Supreme Court may call in District Judges, if necessary. Any Retirement Act should provide that those Judges who have taken advantage of this Act should be subject to call from time to time. This would make available not only the active Judges, but the retired Judges of the State, for service on the Supreme Court. I do not have precise information as to the amount of work done by the Supreme Court during the past year, but am reliably informed by those familiar with the work of the Supreme Court that three active Justices would have no difficulty in handling the work of that Court. Before a plan of reorganization is presented to the Legislature, definite data should be obtained.

In Idaho we have 44 Counties and 44 Probate Courts exercising constitutional and statutory jurisdiction. A number of states have abolished their Probate Courts, and have conferred upon the Clerks of the District Courts the ministerial duties of the Probate Courts, and have vested in the Courts of general jurisdiction the judicial functions of the Probate Courts. This change has proved highly satisfactory. If the District Courts would designate stated probate days, the probate work would add but little to the work of the District Judges. I propose transferring juvenile cases to the Justice's Courts, but do not propose any change in the civil or criminal jurisdiction of such courts.

The vesting of additional jurisdiction in Justice's Courts, and a consideration of the prevalent evils of that system, well known to all of us, require that thought be given to selection of Justices of the Peace. The United States Commissioner has proved to be an efficient aid to Federal Courts, and his tenure and manner of selection highly satisfactory. Adopting that precedent, I suggest that District Judges be vested with the power to appoint at least one Justice of the Peace in each County in his District, more if deemed necessary, to serve at the pleasure of the appointing Judge. This would give to each County a committing magistrate, a court to hear misdemeanor cases, a Juvenile Court, and a court of limited civil jurisdiction.

In determining in what manner this State should be redistricted we should have, and it indeed is unfortunate that we do not have, exact data as to the volume of work over each ten year period in each County. The use of data from 1920 to 1929 is, of course, inadequate and may be subject to criticism. I have assumed that the work in the several Districts in the State will be proportionately the same. I am confident, when the judicial work of this State has been properly unified and coordinated, that three Supreme Court Justices and nine District Judges in four Judicial Districts would be able to handle efficiently the judicial work of this State, including Probate work. The work of the Judges then would be far more uniform, the overworked Judge would be relieved, and the idle Judge be given something to do.

COMPENSATION AND RETIREMENT:

In order to maintain the efficiency of any reorganization plan, it is essential that active and leading members of the Bar be attracted to the judiciary. In order to accomplish this goal we must have not only a safe system of selection, but also compensation commensurate with the greater duties and responsibilities imposed. This can be accomplished only by increasing the present salaries of Supreme Court Justices and District Judges, and providing an adequate retirement system so that the occupants of the Bench will be assured of continuance in office during the period of satisfactory service, and not be faced with the prospect of collecting a scattered clientele, following defeat at the polls despite excellent records.

Salaries of $12,000 per annum for Supreme Court Jnstices, and $10,000 per aunum for District Judges, would be sufficient to attract the type of lawyer which not only the Bar but the people of the State would wish to determine their important property rights, and protect their personal rights.

By eliminating the offices of two Supreme Court Justices, and their two law clerks, the present salary bill of the State would be reduced approximately $18,000.00 per annum, in addition to travel expenses. By reducing the number of District Judges from 16 to 9, the present salaries of these Judges and their seven Court Reporters, amounting to approximately $58,100 would be saved,—again, in addition to travel expenses. The elimination of the offices of 44 Probate Judges, with annual salaries estimated to average $1,500 per year would effect a further saving of at least the sum of $66,000.00 per annum. I understand that there are a few counties which do not have Clerks of the Probate Court, so, assuming the elimination of 40 Clerks of Probate Courts, with estimated average salaries of $1,200 a year, we would effect a further estimated saving of $48,000 per annum. This would amount, at present salaries, to an estimated reduction in salaries of $190,100 per annum. The proposed increase in salaries of Supreme Court Justices would amount to $16,500 per annum, and in salaries of District Judges increased to $45,000 per annum, or a total of $61,500 per annum, effecting a saving to the taxpayers of this State of $128,600 in salaries alone. In other words, we could increase the efficiency and ability of our Courts, pay salaries commensurate with the high responsibilities of the office, expedite the handling of judicial business, and, at the same time, save annually to the taxpayers of this State the substantial sum mentioned. This reduction in annual salary bill would greatly exceed any retirement pay received under a full retirement plan, without requiring contribution from the Judges.

If such salaries could be paid and assurance be given of future financial security for the Judge and his family, and thusly the Judiciary made attractive, the

caliber of our Judges could be substantially unproved. I say this without derogation to the present members of our judiciary, and with the thought that there would be a greater number of capable men available from whom selections could be made. I recommend that the present retirement law be amended to provide retirement for Judges at full pay after ten years tenure in office, and upon retirement, whether voluntary or involuntary. If the retirement is voluntary, it should be compulsory at the age of 70 years. If a Judge involuntarily retires, either through defeat or disability, within a period of less than ten years after his elevation to the Bench, his retirement pay should be proportionate to his period of service. The Judge then would have both adequate compensation and financial security. Learned members of the Bar would then, upon recommendation of their fellow lawyers, be willing to leave their practice and enter upon the performance of important and honorable function of Supreme Court Justices or District Judges. Under our present system a man must be either independent financially, have difficulty in earning a livelihood in his profession, or make undue financial sacrifices on the part of himself and family to accept judicial office.

UNIFICATION OF COURTS:

A complete coordination of the work of the judiciary of this State requires that there be a head, with authority from time to time to assign Judges who do not have sufficient work to keep them occupied, to other Districts where the work is heavier. I recommend that the Chief Justice of the Supreme Court be placed at the head of our judicial system and that reports be made to him at regular intervals of the work in the several Districts of the State. If the Judges in one District are having difficulty in keeping their calendars clear, a Judge in a less busy District should be directed by the Chief Justice to assist in clearing up such calendars. The Chief Justice would then know what District Judges could be called upon to assist in the work of the Supreme Court, and in other Districts, without interruption in the work of their Districts. If proper coordination could be had, the number of District Judges in a District would not be of controlling importance.

We have at present eleven Judicial Districts in the State, with a separate set of rules of procedure in each District. We likewise have an entirely different set of rules in the Federal Court. The need for uniform rules of procedure in all District Courts is apparent to every practicing attorney and is urgent. It should be made the imperative duty of the Supreme Court to promulgate and adopt uniform rules of procedure for all inferior courts. Thus may the question which has for years plagued the Bar Commission, the lawyers and the Courts, be settled.

The proposals which I have submitted are of major importance to every member of the Bar, as well as to the public generally. They are offered to you for the purpose of inviting criticism and discussion. Any plan for rehabilitation of our judicial system must come from the Bar. With the retirement of over fifty percent of our Judges in prospect, this is the psychological time to agree upon a plan. If we expect to carry through to ultimate adoption any plan, it is necessary that we have not only the united support of the Bar, but also the active work of each member. I suggest that the Bar Commission cause to be made such surveys as may be necessary to determine the amount of actual work being done in each District, for periods from 1916 to 1926, from 1926 to 1936, and from 1936 to 1946, and that the information be assembled in such way as truly to reflect the actual conditions, and be presented to the 1948 State Bar Convention and the 1949 Legislature.

I further believe that if we are going to meet with success in the adoption of any reorganization plan, we should do two things: First, agree upon a plan; and, second, appoint a Legislative Committee with instructions to present to the 1948 Bar Convention the necessary proposals of constitutional amendments and legislative acts necessary to execute such plan. Only in this way can the members of the Bar be in position intelligently to discuss our program, or the Governor be made conversant with it prior to the convening of the 1949 legislature.

PRES. KNUDSON: Mr. Chapman, we thank you very much for your very able discussion of our problems.

Next on the program is a discussion on "Legislative Requirements" by Judge Hugh A. Baker of Rupert.

JUDGE BAKER: Mr. President, Members of the Bar and Guests: Before proceeding to a discussion of legislative requirements, I want to say, as a member of the Resolutions Committee, that the committee will hold its first meeting tonight following the ice carnival at the office of the association, Room 366 in the Lodge. And I also ask that any member of the Bar or other persons who has any resolutions to propose have a copy delivered to some member of the committee before that hour. And Mr. Chapman, the committee especially requests that you prepare and let us have a draft of the resolution you would like to have the committee propose in order to carry into execution your very excellent paper.

At this time I also want to thank Mr. Winters for his very able and enlightening discussion of the question of judicial selection.

If there were entire agreement as to method to be employed to improve the judiciary of this state, a proper discussion of "Legislative Requirements" would, of course, be limited to that plan. No agreement has been reached. Only the extreme optimist would believe it could come and perhaps only the foolish would want it to come at this convention when even those present will have insufficient time to consider everything that may be involved. Any major change in our judicial system is of such importance to the bar and the public as to require caution and careful consideration. So, it would seem, in a discussion of "Legislative Requirements" at this time we should notice each of the several types of plans proposed for selection of judges and other matter to which our attention has been directed.

A few general statements may not be out of place.

Wherever concerted or studied efforts have been made to improve the judiciary, there has come agreement of purpose to accomplish the following ends, all deemed essential:

1. Divorce completely the judge and his office from politics; deny to political parties the right to use the office as a reward or a threat; place the judge beyond political pressure, influence and temptation in appearance and in fact.

2. Give to the competent, capable and satisfactory judge adequate assurance that, within limits fixed by retirement acts, he may retain his office as long as he desires it and remains competent, capable and satisfactory, thus making the office of judge a less hazardous occupation;

3. Preserve the right to displace, with machinery necessary therefor, those who prove to be incompetent, incapable or unsatisfactory; and some lawyers who become judges, like some men who become ministers, prove to be unworthy; and

4. Make the judiciary attractive to those from among whom its members should be recruited by insuring a tenure conditioned only upon ability, both mental and physical, and satisfactory service and by providing adequate compensation during

service and a certain livelihood during subsequent disability either actual or presumed.

These matters have been ably discussed today and there is no occasion to amplify.

The first effort has always been to make the judiciary non-partisan or non-political. In 1934 the people of this state, acting under the irresistible spell of the idealism of a non-partisan judiciary, made it so, in name at least, in Idaho by constitutional amendment in these words:

Art. 6 Sec. 7 "The selection of justices of the supreme court and district judges shall be non-partisan. The legislature shall provde for their nomination and election, but candidates for the offices of justice of the supreme court and district judges shall not be nominated nor endorsed by any political party and their names shall not appear on any political party ticket, nor be accompanied on the ballot by any political party designation."

While the amendment denied to political parties the right to profit from the presence on their tickets of the names of popular judges and the right to use the office as a reward for services rendered, it did not solve the problem. Other evils have appeared here as in all states where the same remedy was employed.

Chief among the evils is: The destruction of all security of tenure by removing the aid which political organizations can and do give to capable judges, and political parties are concerned in having the names of strong candidates on their tickets, placing the entire load on the shoulders of the incumhent judge, and affording to a good organizer and campaigner an excellent opportunity to defeat a satisfactory judge who has quietly devoted his time and his ability to his work. The hest judges are notoriously poor organizers and campaigners. It may be that political leaders now regard the loss of judicial candidates on their tickets as irretrievable and will not resist efforts to bring about such legislative and constitutional changes as may be necessary further to improve the judiciary in Idaho.

During the last decade or two bar associations in particular have recognized the urgency of the movement for improvement of the judiciary and have exerted themselves to solve the question in satisfactory manner.

None has advocated seriously the restoration of the offices to political parties. The effort, on the contrary, has been to continue the separation and if not complete to make it so. While it appears from a survey conducted a few years ago by the American Bar Association that the attorneys in states where judges are appointed for life as in the Federal courts are satisfied, no committee has recommended complete adoption of the rule of appointment for life.

As Mr. Chapman has said several plans are in operation or suggested.

The plan most frequently mentioned and most widely discussed, perhaps because of its innovations and the dramatics attending its adoption, is that known as the Missouri plan. It is in fact the Albert M. Kales plan in operation and it has proven to be highly satisfactory. Under that plan judges first acquire judicial office by appointment, never by election. The appointment in case of vacancy which may result from failure to obtain approval of the majority of the voters as well as by death, retirement or resignation, is controlled. The appointment is made by the chief executive but is limited to a selection from a list approved by a commission named for that purpose and including among its number members of the bar. Upon the expiration of his term, a judge, if he desires to succeed himself, files his declaration and "runs on his record" without opposing candidate. The voters answer the simple

question "Shall Judge ..... of the ..... Court be retained in office?" If a majority votes "yes" the judge is elected for a full term and if a majority votes "no" a vacancy results to be filled by appointment from the approved list.

The history of the Missouri plan is indeed dramatic and demonstrates what can be done by a state bar if enthused, active and determined. The Missouri bar was defeated in its efforts to obtain adoption by the legislature of that state of a resolution for the amendment of the constitution necessary to the adoption of the Kales plan. Political leaders were not inclined voluntarily to surrender judicial offices as party offices. The bar then by initiative endeavored to obtain approval of the amendment. The public relations committee was very active and it worked with remarkable efficiency. It created voluntary associations of workers in each county. Labor and other leaders became members. Support was solicited and obtained from veteran's organizations, chambers of commerce, service clubs, women's clubs and other associations pledged to community service; newspapers favored by repeated editorials; moving picture shows co-operated by displaying slides at opportune moments; radio stations fell in line and during news broadcasts inserted an appeal for support of the amendments. Of all amendments proposed at that election the bar amendment alone carried.

Political leaders, loath to surrender important offices on their tickets, prevailed upon the next session of the legislature to propose an amendment repealing the bar's initiative amendment. The people of Missouri liked the idea they had adopted at the preceding election and by overwhelming vote rejected the repealing amendment.

All reports indicate that the plan is working out most satisfactorily in Missouri. The appointments have been of capable men of the highest type; good judges have uniformly been retained; some incompetents have been removed and their places filled by recommended lawyers. Since the Idaho constitution provides for the "election" of judges and "election" inplies the "choice or selection by electors" the Missouri plan cannot, it seems clear, be adopted in Idaho without constitutional amendment.

The Utah plan proposed but defeated at the last session of the legislature of that state, has some of the elements of the Missouri plan but preserves the election feature. That plan could, it seems, be adopted in Idaho without constitutional change. In Utah judicial candidates have been party candidates and perhaps the reductance of party leaders to surrender the advantage strong and popular judges give to their tickets had something to do with the defeat of the measure. While the bar of that state is disappointed, it is continuing its efforts.

The Utah plan provides for a Judicial Selection Commission of seven persons. The Chief Justice is in all instances a member. Two voters are selected by the Senate; two by the House of Representatives and two by the bar of different political parties. In case of district courts it is required that all members except the Chief Justice be residents of the judicial district. Vacancies are filled, not recommended merely, by the affirmative vote of four members of the Commission.

The bill provides for the nomination by the Commission of two candidates for each office to be filled, one of whom must be the incumbent, if he declares his candidacy. The names of the persons nominated are placed upon a separate "Judicial Election Ballot" without party or partisan designation.

Another ground of proposals, following somewhat the Richards plan, has come. This plan gives to the bar of the state a more controlling voice in filling vacancies

and in nominating candidates. In fact, it gives to the bar the exclusive right to nominate and to provide a list of names from which vacancies must be filled.

The Richards Plan provides for the nomination of judicial candidates by a bar primary. The incumbent is always a candidate, unless over-age or he declines to run, and unless fourth or lower in the bar primary, he and the one receiving the highest votes are the candidates. If the incumbent is fourth or lower, the two highest in the primary are the candidates.

This plan, like the Utah Plan provides for and preserves an election and could undoubtedly legally be adopted in Idaho without change in our constitution.

It has been suggested that the state bar be given the exclusive right to nominate candidates for justice of the supreme court by nominating not more than two candidates for each such office to be filled; and that the bar of each judicial district be given the right to nominate candidates for the district bench by nominating not more than two for each such office to be filled. Others, including Mr. Chapman, have suggested that the bar of the state and the district should have the right to control appointments to fill vacancies submitting a list from which the appointee must be selected. The case of Fisher v. Masters, 59 Ida. 366, is direct authority that this may be done wthout constitutional change. To those who say the right to nominate should not be given exclusively to the bar, that the right to nominate should be open to all and that blanks should appear on the ballot to permit "write-in" elections, I quote from the opinion of the late Mr. Justice Ailshie in part as follows:

"The contention that the voter or elector is denied the right to vote for anyone he desires to support for the office of district judge, whether he has been placed on the ballot in the method prescribed by the statute or not, is fully answered by the fact that any qualified elector has the right to place a candidate in nomination, or at least to participate in placing him in nomination; and if he can secure the requisite number of signatures and the consent of his nominee to run for the office, he can have his name printed on the ballot. That is as much as one could do at a nominating convention under the old and time-honored system. He could place the name of his candidate before the convention and if he could secure a majority of the votes of the convention his name would be printed on the ballot; otherwise he failed. Whether he secured enough votes or not, he could at least place his name before the convention and have it voted on. That is as much as the elector is entitled to. That is what he may do under this law if he desires to do so. . . .

Now it seems clear to us that, under the provisions of this new section of the constitution (Sec. 7, Art. 6) and the authority of Sec. 4, Art. 6, supra, it was competent for the legislature to provide a method, open to all alike for placing candidates in nomination and having their names printed on the ballot; and that it was equally competent for them to say to the electors that this would be the exclusive method of securing the printing of names of candidates on the ballot and that no other method should be employed, and to that end prohibit the leaving of blank spaces for the writing in of names of persons not regularly placed in nomination."

The proposal that the number of justices of the supreme court be reduced to three cannot be accomplished without previous amendment of Art. 5 Section 6 providing that "the supreme court shall consist of five justices." The reduction in number in justices of the supreme court appears impossible of immediate attainment. This may be another example of the evil of extending constitutional provisions beyond basic principles and generalities.

Art. 5, Sec. 11 of the constitution expressly authorizes the legislature to reduce

or increase the number of judicial districts and district judges. The 1949 session of the legislature may without restriction make changes effective at the end of terms of district judges now in office.

Probate courts cannot be abolished or district courts given original jurisdiction of matters of which the probate courts now have such jurisdiction without constitutional change. Sec. 21, Art. 5 provides, "The probate courts shall be courts of record and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons and appointments of guardians," in addition to their concurrent civil and criminal jurisdiction.

Justices of the peace are constitutional elective officers. Art. 5 Sec. 22 provides: "In each county of this state there shall be elected justices of the peace as prescribed by law." Their jurisdiction over any matter is neither original nor exclusive.

The question of salaries of judges is now one solely for the legislature. We have judicial precedent that the constitution offers no obstacle to change of salaries at the legislature's will. Perhaps I should have said the anthority is that the legislature may increase judicial salaries at will.

In conclusion, I suggest to this convention that its resolution committee propose and the convention adopt a resolution that the Commissioners appoint at least two committees of such number and constituted in such manner as may be deemed most suitable for these purposes: One committee with definite mandate to study the proposed plans for selection of judges and filling vacancies in the district and supreme courts and to report to the 1948 convention of the bar of this state after having caused to be furnished to each member of the bar a copy of its report and recommendations; and one committee operating cooperatively with the other to prepare and present to the same convention a draft of necessary or desirable legislative and constitutional changes to accomplish the proposals recommended by the first.

PRES. KNUDSON: That was a splendid discussion Judge Baker, and we thank you.

Next on our program are discussions, and they will choose their own subjects. First is Barney Glavin, Speaker of the Idaho House of Representatives.

BARNEY GLAVIN: Members of the Bar and Guests: I think I "got took in" a little bit on this deal. But there is one thing I would like to say to the members here. In the last session, the poor salaries that were paid to your District and Supreme Court Judges was brought to the knowledge of the members of the legislature. I think all the members realized that something had to be done. Just how it is to be done is a question and a job that you fellows are able to do and should do. Start at once. Don't wait and come around when the legislature convenes or is perhaps over with and say, "Here is a bill. Get it through." That just doesn't work, especially if you are going to raise salaries and try to put that through in a fast way. Somebody is going to balk on it, and somebody is going to say no.

I do believe that if you get a feasible plan that will work and then go to your men that are members of the legislature—maybe you don't know who they will be, but who you think they will be—and have them support it, you can get it through. Let people know about it, every one of them. They will talk among themselves, and pretty soon they will start selling the idea for you.

We all know that the legislation passed in the last session is going to retire a considerable number of your present judges. They are going to have to be replaced in the next two years. Now is the time to get this job done. You are going to have less opposition, because many of the older men are going to have to go. New men

are going to take their places. Two years later, after these new men go in and you come around with a deal like this, you are going to meet more opposition.

When prices are good your legislature, I suppose, will be made up principally of poor farmers and stock men, but I think they will be feeling a little bit better. They loosened up this last session and began to see that maybe the fellow working in political jobs was entitled to a fair living. As compared to a farmer, it looks pretty good. Most of those men, I believe, will be back unless there is a radical change in state politics. There are good men there, fellows that are interested in the state, and they are willing to help. But somebody has got to bring that work to them and explain it to them.

As a layman about all I know about it is what I pick up here. And that is where I think so many of these deals fall down. When it comes up to the legislature, they don't put the work before us. They don't get the job started. Have it all ready to do when your legislature convenes. You will have lots of fellows to help you, and I think that is the way you will put this job over. Thank you. (applause).

PRES. KNUDSON: Thank you, Mr. Glavin. Next on our list for a short discussion is Harry Elcock, President of the Idaho State Chamber of Commerce.

HARRY ELCOCK: Gentleman of the Bar and Guests and Officers: It was with great pleasure that I listened to this discussion of Mr. Chapman and Judge Baker and Mr. Winters, and then from the Speaker of the House from this state. It was interesting from the layman's point of view, because you are doing some streamlining. In doing that in industry and bnsiness we always start out with research and experimental work. Now, the research and experimental work has been going on in other states as far as your problem is concerned. You have a good background to go on, and by good and careful research of your own as to the resources and the economics of our state, you can put over such a deal as this by taking it to the people. In other words, you want to streamline your judicial work in this state, and it can be done by taking it back to the people.

Now, as a representative of the State Chamber of Commerce, I will say that we are very, very interested in anything of that type, and our office will be open to help you put something of this nature into effect. We realize that a group such as this is not used to meeting in big groups such as a research organization of a company. Consequently, it appears to me, from the discussions that we have had, that it is harder for you gentlemen to put over something collectively than it is for other types of businesses. For example, I read over and studied the Judicial Council of Idaho Report made from '22 to '29, and as you look over the names of those men that were on that committee you find that all of them are the most outstanding men that Idaho has had in the work you fellows pursue. Yet nothing was done about that report. And the only reason that I can see for that was lack of enthusiasm on the part of the members of the Idaho State Bar. Maybe you didn't agree at that time. Maybe research and streamlining was not quite as much in vogue then as now. But I feel that if you will work and get the bill into shape so that the legislature can work on it, the people of Idaho will get behind you.

I know from various discussions I have had with lawyers and laymen that they are all vitally interested in this job that has been proposed here this afternoon. I thank you. (applause).

PRES. KNUDSON: Thank you for your remarks, Mr. Elcock. Next on our program is a discussion of the War Crimes' Trials in the Pacific by Col. Frank E. Meek of Caldwell.

COL. FRANK E. MEEK: Mr. President, Members of the Bar and Guests: When Mr. Smith asked me to appear on this program, I consented to do so with some reluctance, because since my return from Tokyo I have talked so much about my experiences that surely everyone has heard what I have had to say.

However, I want to talk especially now to you as lawyers, because I think you would be interested to know some of the procedures that we evolved over there and what it was all about.

To begin with, shortly after the Potsdam Declaration in which it was declared to the world that those committing war crimes and violations of the Geneva Peace Treaty would be held accountable, out in the Pacific an organization known as the War Crimes Branch of General Headquarters was set up. Primarily its main function was that of investigation, and it started out investigating all war crimes and all of those terrible atrocities that were committed out there. After the fall of Japan, released allied prisoners of war were flown back to Manila,. and we worked night and day with those men getting their statements. So shortly after VJ Day we were ready to go. We had a great mass of evidence.

I want now to have it definitely understood that we then stood as a victorious nation and a victorious army. The Japanese were a defeated foe. In the stress of warfare, passion and prejudice rule, but I want the lawyers of my state to know that when we set up our rules, regulations and procedures, we kept in mind that the law follows the flag and that we were going to give fair, honest trials to those war criminals. I think that is exactly what we did.

First we set up commissions before whom they would be tried. Those of you who are unfamiliar with the army, when you hear the words "court martial,' get the idea, partially justified, that a man going before a court martial has to prove his innocence; that the civil rule is reversed. But for these trials we set up military commissions, and the members of them were appointed by the Supreme Commander; for instance, in the Yamashita case and in the Homma case, there were two Major Generals and three Brigadier Generals on each commission.

Then for those charged as war criminals we went through the roster of what army personnel we had over there, and we got a panel of defense lawyers. And they were good lawyers. In fact they were so good in the Yamashita and the Homma cases, the two major cases, that tbey went to the Supreme Court of the United States, and by a 6 to 2 decision the convictions were confirmed. The lawyers appointed to the defense panels over there lived up to the highest tradition of lawyers. They worked loyally for the defendants. In fact sometimes so hard and loyal that I became a little bit annoyed with them.

By the fortunes of war I happened to be on the other side, having been appointed as chief of prosecution of war crimes in the Pacific, and at one time I had in the neighborhood of 135 army and navy lawyers working in that branch. We were set up so that we could run ten commissions. We sent over to the States and got competent reporters and clerical forces, and at one time we ran nine courts daily.

The procedure was that the accused was brought in on a charge, and I will read you the charge against Homma, because it is very brief. It is the United States vs. Massaharu Homma. It charges that "between the 8th of December, 1941, and the 15th of August, 1942, the Lieutenant General of the Japanese Imperial Army and Commander in Chief of the Philippines Armed Forces of Japan at war with the United States of America and the Allies did unlawfully disregard and failed to discharge his duties as such Commander to control the operations of the members

of his command permitting them to commit brutal atrocites and other high crimes against the people of the United States of America, its Allies and dependencies, particularly the Philippines, and he, Masahura Homma, thereby violated the laws of war."

And in addition to that charge there was served on General Homma 47 specfications which were broken down, particularly in the death march specifications, into 24 other specifications. I will take one here at random to show you what they were like. "From about April 12, 1942, until about the 9th of May, 1942, at General Hospital No. 2, Bataan, Philippines, Japanese artillery units wilfully and deliberately refused to permit the evacuation of American patients and personnel, and after said units had been placed around the hospital, fired upon American installations on Corregidor drawing a return fire from the American artillery, thereby exposing them to said shell fire as a result of which numerous American patients and medical personnel were wounded or killed."

I will read one from the death march. This is specification No. 13. It is rather odd that we would happen to hit that number, but we did. "From about April 9, 1942, to April 2, 1942, there was conducted the infamous death march of Bataan, which was a series of death marches in which approximately 10,500 American and approximately 74,000 Philippine prisoners of war were forced to march distances ranging from 60 to 120 kilometers, from Bataan to San Fernando, although transportation was available and was to have been used under the terms of the surrender agreement, during which time the following atrocities were committed:' And then it goes on, as I said, giving 24 specifications. It names the dates and persons, in so far as we could do so, of some of the atrocities that were committed upon those poor unfortunates who were forced to make the death march.

Briefly that was the procedure that was conducted in all of the trials in the Philippines. We set up the rules of evidence. Those rules were rather harshly criticized by Justice Murphy in his dissenting opinion. Sometime, at your leisure, look at the Supreme Court's decisions that came out just recently. You can read all that they had to say about it. I am not going to defend ourselves on that, but I am going to say this: Over in the Philippines, as you know, Justice Murphy was once High Commissioner, and the people of the Philippines thought a lot of him. So much so, in fact, that they named one of the camps over there Camp Murphy. Immediately after his dissenting opinion, they changed the name of Camp Murphy.

I want to again stress the fact that we were a victorious nation. We were not witch hunting. We were not venting our victory or spite upon a defenseless people. Rather, we presented, under the rules of land warfare, the evidence of their war guilt and the commssion of war crimes. It was not a pleasant duty. Some of you have had the responsibility of prosecuting a man for his life. I didn't enjoy that duty. I felt that it was a job that had to be done, of course, and went ahead with that job.

Perhaps, you would like to know a little about some of those crimes for which Homma was found guilty. I am going to confine myself to Yamashita and Homma.

Homma, in his own testimony, testified that for 15 months he had trained the troops on Formosa for the invasion of the Philippines. He testified that he was called back to Tokyo about the 20th of November, prior to Pearl Harbor, and given the assignment and given the mission and the date he was to shove off to capture the Philippines. He had the 14th Army, one of the two best trained and equipped armies of the Japanese armies. It was the best of their mechanized armies.

The thinking of the Japanese high command was a peculiar thing. One of the

things that we charged Homma with was failure to give hospitalization or care to the prisoners on Bataan. In cross examination during the trial he could tell me at great length and very elaborately of all the equipment he had—of his guns, ammunition, transportation, his men and their training. But when he came to hospitals and medicine, he didn't know anything about them and very candidly didn't give a damn. That is the attitude of the Jap. That is apparent as you go around over Tokyo or Japan.

Digressing for a moment. As I went around over Japan during the time I was there, it was brought forcibly to me that I didn't see the maimed or crippled. That is because the Japs' theory and practice is that if a man can't do his job as a soldier, let him die. They applied the same doctrine to ours. On the Bataan Peninsula, when General Sharp surrendered, he saved out transportation and gasoline to move those surrendered men back to wherever the Japs wanted to take them. But that was not the Japanese way. So they were forced to march those long, weary, dusty jungle trails from down on the tip of Bataan clear up to San Fernando, which was about 120 kilometers. They were not given food. They were not given water or shelter. There was repeated testimony, day after day of testimony, of American soldiers who had come back to the Philippines, and of Philippine soldiers, that there was running water along the route of that march; that the Japs would offer to let them go over to drink it, and then would bayonet or shoot them as they attempted to drink. For three or four days on that march those men had nothing to eat except a little ball of about third rate rice. We will never know, and we could not prove with any exactitude, the number that died on that death march to San Fernando. We do know that about 10,500 Americans started on that march, and we know there was in the neighborhood of 60,000 Philippinoes who were in our army.

When they got to San Fernando, they were put in bull pens there for two or three days, and then they put them into little steel box cars of the Manila Railway. Those box cars are about 20 feet long and about as wide as our box cars. They only have four wheels under them, so you know they are not big. They would put 75 or 100 men in them under that blazing hot sun and close the doors and haul them on up to Tarlac. It took about 10 hours to get there . Then they got out and marched to Camp O'Donnell, which was another 20 kilometers.

Remember, too, that from the first of the year our troops over there had been on half and third rations. They had run out of medicine. When they surrendered, they were weak, they were emaciated, and they were sick. Everything was wrong with them. They got to Camp O'Donnell the latter part of April, and we have the record of deaths there. In fact, we introduced in evidence the diary that was kept by Major Kahn listing by name and serial numbers and the date of death and the cause of death of every American prisoner that died in Camp O'Donnell from the last of April to the 15th of June. There were 1452 of them. Then they were moved over to another prison camp. Up to the time Homma left the island and went back to Tokyo on August 5th, of that little bunch that was left, over 1800 more died.

That is the kind of treatment that our men received from the Japs after they were told in dropped messages signed by Homma—and those messages were introduced at the trial—that they would be accorded the honors of prisoners of war.

But that is only a part of the story. Remember I told you there were 60,000 Philippinoes captured on Bataan and taken to Camp O'Donnell. Between the last of April and the 5th of August the recorded deaths—they were recorded in ten volumes of original records by the Philippinoes themselves and were recorded under the direction of the Japanese prisoner of war camp Commander—and according to the ten volumes introduced in the record, 27,440 died between the 29th of April

and the 5th of August. Those were Philippinoes, the little Asiatic brothers that they were going to welcome into the Greater East Asia Co-prosperity Sphere.

On cross examination concerning the death march, Homma rather reluctantly admitted that he had traveled the route of the death march several times. Yet he saw no wrong. Everything was fine. And his staff officers, one after the other, took the stand and testified for him, and they all saw nothing wrong about it. One admitted he saw five dead Philippinoes along the route of that march. And yet that route of march was literally paved with the dead and dying.

Perhaps worse than all of that was when they gathered together the Americans and other nationalities up at Bago and down at Manila and told them they could take their bedding and some food and that they were going to put them in camps. But when they came to gather them up, they left the food and clothing at their homes and took them out to Santo Tomas, the big Catholic school with a high stone wall around it. The yard there is about 20 or 30 acres. They put them in there and shut the gate and locked the gate—men, women and children. And the prisoners asked, "Well, where is the food? Where is the clothing? Where is the bedding?"

And the Japs said, "We are not concerned with that. That is your concern."

I want to pay my tribute now to the loyal Philippinoes and the Philippine Red Cross. If it hadn't been for them those four or five thousand internees in Santo Tomas would have died. I can think of no worse torture than to take a man and his wife and children and keep them under those conditions. All the hospital care and facilities they ever had in Santo Tomas were provided by the internees themselves. Those conditions beg description.

Briefly, those were the things that Homma was tried for.

Perhaps you would like to know a little about Homma the man. Homma had spent 9 years of his life in the Japanese Legation in London. He spoke beautiful English. He had been in the Japanese delegation that had gone to two of the Geneva Conventions. He was as fully advised of and aware of the laws of land warfare and the rules that had been set down at the Geneva Conventions as anyone in this room, and yet he violated every one of them. He set up in San Diego, under Col. Offa, one of the vilest, most cruel, most inhuman torture chambers ever perpetrated since the days of mythology. I could go on by the hour and tell of Philippinos and of Americans who were tortured there and killed. I could tell of the whole Chinese Consular Staff kept there for 30 days, tortured and then taken out into the Chinese cemetery on the edge of Manila, stood on the edge of a grave and shot into it. We dug up their bodies and identified them. And that was one of the the offenses for which Homma was tried.

Going now to Yamashita, I could tell of that terrible rape in the Bay View Hotel in Manila in the closing days of the Jap occupation when over 600 women—old women, young women, almost babes in arms—were herded by the Jap soldiers into that big Bay View Hotel and raped and ravished. Those that tried to escape were machine gunned as they tried to get away from the Bay View Hotel. That is something that didn't come out publicly because for three days we took such testimony behind closed doors with the newspapers and everyone barred. It got so horrible that the old tough General, the President of the Commission, said, "We have heard enough of that." And I think he had.

In the closing days of Camp Payne in Manila, they herded 1500 Philippino prisoners into the old walled city, into one of the cathedrals—men, women and children. A little child, one of the few survivors from that horrible massacre, was

on the stand. You probably saw her picture in Time Magazine. She told how, as they went in, they could see that the great chandeliers of that building were covered with something. They herded them in and locked the doors. There was a great explosion. The chandeliers were full of hand grenades.

Those are some of the atrocities those men were tried for. And for the first time in the history of the world, Commanding Generals were tried on the theory of command responsibility—being responsible for knowingly permitting, day after day and week after week and month after month and year after year, those kinds of horrible atrocities.

In addition to those we tried they are still trying the small criminals, the Colonels and Captains and those we could identify.

I want to say this, too, that in the trail of Homma, we permitted his defense counsel to go to Tokyo and bring back about 12 so called character witnesses. Among them was his wife. She was a very demure and a very brilliant little woman. And in all my experience in court, I have yet to see a witness that made a better appearance in court than Mrs. Homma. She was superb. I was never so glad in all my experiences in court to have a witness get off the stand. I assure you I did not cross examine her. Of all the witnesses I have ever known in court, she stood out above them all.

Yamashita, who was the first one tried and about whom you heard so much, was a stocky, tough general. He stood about five feet five, and where his shoulders left off and his head started you couldn't tell. I wondered how they could ever break his neck by hanging him, but they did. I do want to say this about Yamashita. I think he knew, from the very moment he went into the court room, that he was going to be convicted and was going to be executed. But the nerve of the man was outstanding. After the Supreme Court had decided the case and he appealed to the President and the President refused to act, General MacArthur ordered the execution to take effect. I have talked with the man who went to get Yamashita and woke him up at about 2:00 o'clock in the morning. Yamashita didn't speak any English at all, but he spoke beantiful German. He had been trained in Germany. The man indicated to him it was time to go, and Yamashita said, "Is this it?" He said, "Yes."

Before he went out, he indicated that he would like a bottle of beer, and they gave him a bottle of beer. Unfortunately it was the only one they had, and he wanted another, and he got a little angry about that. They brought him to the scaffold. There was a Japanese interpreter there. He asked which way Tokyo was—and whether they faced him that way or not, I do not know—but he faced towards what he thought was Tokyo, and before the hood was placed over him, he let out a couple of "banzais," bowed towards what he presumed was Tokyo, and then was perfectly willing to go on and meet his Creator.

Homma, on the other hand, stood up beautifully during the trial and when he was sentenced. He made every effort in the world, but as he was taken out that morning to be executed—he was shot—he talked with the officer who went along with him about committing suicide. And he was very, very critical of the whole procedure. Maybe he had a right to be. Maybe I would be too if I were in his place.

But I do want to say this about those Japanese. I saw many of them sentenced to death, and they took it standing up and in very fine spirit.

If I were to talk from my heart today, I would rather not talk about the war crime trials. There is something closer to my heart than that. I came back from

over there, and I saw the terrible aftermath of war. For a moment, I would like to talk to you about that.

I have seen the terrible devastation of Manila, pearl of the Orient, once a city of 800,000 people, with beautiful homes, fine cathedrals, wonderful buildings, its churches and hospitals, now all a mass of ruin with its people living in hovels. Over Luzon, the main island of the Philippines, the fields are ravished. Its sugar cane will not be in production for years. Its mines and all its industry are gone. I went on up to Okinawa and saw the terrible devastation there. And then for a time I was stationed in Tokyo. And I wish you could stand, as I have, in Yokohama, which once had vast factories which were the finest in the world, and as far as the eye could see in any direction, all that remained was smoke blackened factory chimneys. The rest was all leveled to the ground. Or go up to Toyko, a city that once held six million people, with beautiful homes, beautiful buildings, and you will find that four-fifths of Tokyo is burned to the ground. Here and there is a little island that miraculously escaped fire to give you an idea of what was once the beauty of Tokyo. And so it is for 4 cities of Japan. All but one of their major cities, Kyota, which was the home of their shrines and their old capitol, was destroyed.

And then, as I mentioned a moment ago, remember that there are more than a million men that are not in Japan and never will be, and then think of the 300,000 that we lost in this war. Many of you have never seen that or been through it, and I hope and pray to God that you never will, but I think it is well, when we are thinking of revising the judiciary, that we think a little bit about the safeguarding of our future. I think it is just as important, and more so now than I thought 20 years ago or 10 years ago or 3 years ago or any time, that we see to it that we keep prepared, that we have snfficient preparedness so that we can say to anyone what we mean and mean what we say and have the things to back it up.

I wish you could have stood with me in my office in Tokyo on May Day a year ago. It was the first May Day they had been permitted to have in 14 years. It was Communistic inspired. I want to tell you about it. For hours they marched into that vast concourse in front of the Imperial Palace. There are about 40 acres there between the outer and the inner moats. When that throng got in there were 500,000 Japs there, and when I looked down from my office, they were canopied with Red banners, the Red banner of Communism. That is something to think about. Under General MacArthur the Communists are not getting much of a hold over there, but they will as they will every place else.

Those are some of the things that we should think about. It is not easy to see those things, and it leaves with those of us who have bad to see them the thought, "My God, will my country ever learn? Will it ever learn that it can happen and it has happened?"

I have been in two wars, and in my memory I have seen three wars. You older men here can remember more than that. It will happen again, and I want to say to you and urge on you to think about this. It is so important that we do something about national defense.

We now have universal military training but it is not military in the sense that it is military controlled. It gives every youth an opportunity to train himself and to be trained. This next war will be one of spaces with the atomic bomb, with directed missiles, with guided aircraft without a soul in them that can fly thousands of miles and drop its loads and come back to its landing base. That is being done. Bear in mind that the next Hitler will have learned the lesson to attack us first and not some other nation, and we will not be given the opportunity to prepare to defend ourselves. It is so very important.

PRES. KUNDSON: Col. Meek, we thank you.

Before we recess, will the Cbairman of the Canvassing Committee report?

FRANK MARTIN Jr.: Your Canvassing Committee report that the lawyers of the Northern Division, by their ballot, have elected Everett E. Hunt as Commissioner from that Division. I move the adoption of that report.

(Whereupon the motion was duly seconded and carried unanimously).

SATURDAY, JUNE 28, 1947

PRES. KNUDSON: Our program calls for a discussion by John A. Carver, Jr., of Boise, in connection with estate planning. Mr. Carver.

JOHN A. CARVER, Jr.: Mr. President, Commissioners members of the bar and guests:

Planning is the determination of action to be taken to assure the attainment of a desired objective. The exercise of informed and experienced judgmnt is control. A sound plan, and efficient control of its execution, will yield an acceptable result.

"Estate Planning," in the light of these generalities, has meaning to lawyers only when (1) it is shown to involve a problem, the scope and nature of which demand attention; (2) it is established as being a legitimate and proper professional activity; and (3) it is related to the duty of lawyers to be informed on the revenue and property laws of the state and federal governments, at least in some degree commensurate with their complexity, before advising clients concerning them.

The privilege [1] accorded us in our legal system of making decisions during lifetime as to the disposition of property on death is an expensive one, at least more expensive than it once was. Costs of distribution, including management during the period of distribution, and federal and state death taxes, are items of this expense. Other expeuse, or "shrinkage" items, include debts, expenses of last illness and burial, accrued taxes, and sometimes costs of litigation.

Estate planning is the arranging of property affairs during life so that upon death, a maximum of the economic benefits of productive efforts during life will pass to the decedent's chosen beneficiaries, in accordance with his intentions, and at a minimum cost of transmission. [2] In other words, intelligent planning and effective control of the execution of the plan, can assure that the expense items will be at a minimum, and that benefit to the survivors will be at a maximum.

In the mythical ideal state there would not be two sovereignties exercising a taxing power over the same property at the same time, tax laws and property laws would not speak different languages, there would be only one taxing system, and revenue gathering and estate administration would be standardized. In other words, there would be no necessity for estate planning. But standardization is no panacea, and we would not willingly exchange our present system, complicated as it may be, for another.

Instead, we will take our system and our laws as we find them, study and understand them, and advise our clients intelligently concerning them. The federal revenue laws—estate tax, gift tax, and income tax laws—are not well coordinated among themselves. The state inheritance tax is based on a taxing principle different from the federal state tax. [3] The incidents of the community property system are still

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1. *Succession of Gheens*, 88 So. 253 (La. 1921), *In re Becker's Estate*, 57 N. Y. S. 942 (1899).
2. Research Institute of America, *Federal Tax Coordinator*, vol. 8, page 39,-002 (1946 ed).
3. See Note 19 and 20, *Infra*.

recognized in the administration of the federal income tax law: [4] they are legislatively violated for purposes of administration of the federal estate and gift tax laws. [5] Congress, in its eagerness to eliminate the tax advantage which community property state residents had, has substituted for it a positive tax disadvantage. 6/ Gifts made during lifetime, but in contemplation of death, are included in the decedent's gross estate. Since contemplation of death is subjective, and the subject is dead when the question comes up, the litigation on this point has been extensive. [7]

Another facet of the lack of standardization is the Internal Revenue Bureau's quite legitimate interest in securing a maximum amount of revenue for the United States. Thus, its agents will sometimes agree quite amiably to a low valuation figure proposed by the administrator of an estate, knowing that loss of estate tax revenue suffered will be more than made up in increased income tax revenue later. [8]

The starting point for estate planning is the realization of the impact of revenue laws, administration costs, and losses through possible forced liquidation, coupled with the further realization that much can be done during life to soften such impact.

Planning is not limited to the single act of drafting a last will. It includes, or may include, investing or reinvesting of savings with due regard to liquidity; selling, retaining, or acquiring certain property; making gifts to members of the family; contributing to charitable or similar organizations; setting up a trust; revocably or irrevocably; taking out life insurance; purchasing an annuity; changing the legal form of a business; making arrangements for the transfer of a business on death. It may also include the deliberate abstention from some of these transactions.

Estate planning is not an academic matter drawing its vigor only from the intricacies of our revenue and property laws. Its intensely human aspect will catch the attention of the conscientious lawyer much more quickly. Taxes have to be paid in money; so do most of the costs of administration of decedents' estates. Death results often in a situation very much like insolvency in the equity sense, where there are not enough liquid assets to meet current obligations. [9] The widow, minor children, and others who depended and had a right to depend on income from the decedent's property, suffer, and suffer cruelly sometimes, because the effect of death taxes was not adequately understood during life. They suffer because devices such as insurance payable to the estate to meet the need for funds were not appreciated and utilized. They may suffer because the opportunity to transfer property to chosen beneficiaries during lifetime, under the gift tax exemption or exclusions, was not availed of; or because goodhearted but untrained persons, inexperienced widow or irresponsible children, were named as executors, when highly competent and experienced corporate fiduciaries might have been selected.

Your own experiences will verify the accuracy of the hardship aspects of lack of planning, whether in life or for after death disposition of property.

Estate planning is a matter of concern even to those whose estates will probably be not affected by the federal estate tax. The other shrinkage items apply in any event. Before deciding that there will be no federal estate tax due, it must be remem-

4. *Poe v. Seaborn*, 282 U. S. 101. (1930).
5. Revenue Act of 1942, 56 stat. 798. Note I. R. C. 811(d)(5), 811(3), 811(g)(4), 1000(d). *Feranandez v. Weiner*, 326 U. S. 340, (1945). 20 *Proceedings of the Idaho State Bar* 63-84.
6. Pedersen, *Application of Federal Income, Estate and Gift Tax Laws to Community Property*, 45 Michigan Law Review, 409, 432-436 (Feb. 1947).
7. Regulations 105, Sec. 81.16. Commerce Clearing House, *Inheritance, Estate and Gift Service, Federal* para. 3423 (1946).
8. Regulations 111, sec. 29.113(a)(5)-1.
9. *Phipps v. Harding*, 70 F. 468,470 (CCA7, 1895).

bered that certain property interests of the decedent will be included in his gross estate, even though not ordinarily thought of as owned by him on his death. In this connection, attention must be paid particularly to insurance policies payable on the death of the decedent, where the decedent paid the premiums, or had any of the incidents of ownership during his lifetime. [10] The provision that all the community property shall be included in the estate of the spouse first to die, except that part shown to have been secured by the separate earnings of the surviving spouse, is of utmost importance. [11] The provision in the state inheritance tax law which exempts all community property transferred to the surviving spouse from the state inheritance tax must not be allowed to be misleading. [12] Even if the federal estate tax will not apply, it is well to remember that the man with $20,000 to dispose of is as anxious that it go intact to his selected beneficiaries as is the man with $200,000, perhaps even more so.

When the federal estate tax does apply, it is likely to be the most expensive shrinkage item. The rates go up rapidly, and a net estate of $150,000 will have to pay about $20,000 tax.

Within our definition of planning as the determination of action to be taken to assure the attainment of a desired objective, we can emphasize that by "desired objective" we mean the effectuation of the client's wishes. The plan must be the client's plan, not the lawyer's. It must be the client's plan, not the trust company's or the insurance company's.

This does not mean that the lawyer's task is simple, because it is seldom that a client will have his ideas formulated. Usually under the compulsion of an impending trip, or other real or fancied emergency, the services of the lawyer are sought for the drawing up of a will. The lawyer may draw the will, collect his nominal fee for such service, and close the case with the pious hope that some day the estate may fall to him for his handling. On the other hand, he may sense an additional responsibility, and will undertake what has been called benign cross examination. He will ascertain *who* is to benefit; *why* the client wants to confer this benefit in each case; *when* this benefit is to take effect—before death, at death, or at some date after death; *what* assets are now available for distriution, and *what* will probably remain for distribution after shrinkage is taken into account. With these facts, the lawyer and the client will go over the various possibilities which comprise the *hows* will, trust, gift, insurance, power of appointment, etc. Only if all the preliminaries of fact finding are carefully taken care of will the prime objective of compliance with the client's wishes be obtained. Only that way will the client be saved from being the pawn of a scheme aimed mainly at avoiding taxes, or of a scheme to sell a substantial amount of insurance, or of a scheme to bring business to a trust company. As we shall see, tax savings may be effected, and they are important considerations; liquidity of the estate may be best assured by utilizing life insurance, assuming insurability; the trust device may save almost all administration costs, and assure that a second death tax will not be levied later. But these are conclusions, to be reached from the facts, and not assumptions to be started with.

It may be convenient in the planning stage to go through a sort of hypothetical probate, to determine what the cash requirements of the estate will be. In this process, the shrinkage factors previously mentioned can be totalled, proposed cash bequests can he examined in the light of the need for liquid assets, provisions for payment of bequests to members of the immediate family out of residue can be

10. I. R. C. §811 (g).
11. I. R. C. §811 (e) (2).
12. 1947 S. L. c. 37, §1, amending I. C. A. §14-407, approved February 10, 1947.

evaluated, and a general survey can be made of the status of the estate in the event of death.

It has been stated that "all estate problems and their corrective procedures are significant or insignificant in direct ratio to their impact on the purchasing power of the post-probate estate." [13]

Keeping this criterion in mind, consideration will not be limited to cash requirements of the estate. Assuming that some of the assets will have to be converted, which ones should be selected? State laws may contain provisions regulating the investment of estate funds. [14] Market conditions may dictate certain action. High cost of maintenance, or insufficiency or undependability of income yield may be determining factors. Management is the key to continued production of income, and the estate will be dissipated unless plans are made to assure that qualified persons are selected as executors.

I have purposely deferred discussion of the question of the propriety of lawyers' activity in this field, believing that the question answers itself. Certainly as I have defined the term, estate planning can be the primary concern of no other group, because the pattern of the law, its administration and interpretation, cannot be separated from it.

The ethical overtones are summarized by the Committee on Professional Ethics of the American Bar Association: [15]

> "Many events transpire between the date of making a will and the death of the testator. The legal significance of such occurrences is often of serious consequences, of which the testator may not be aware, and so the importance of calling the attention of the testator thereto is manifest. It is our opinion that, where the lawyer has no reason to believe that he has been supplanted by another lawyer, it is not only his right, but it might even be his duty to advise his client of any change of fact or law which might defeat the client's testamentary purpose as expressed in the will."

If you are satisfied that estate planning necessarily involves the practice of law, then you are already on record. This association has previously considered the propriety of other than lawyers practicing law.

However, we delude ourselves if we rest on the principle alone. Insurance men and trust companies are far ahead of lawyers in the "field" of estate planning. Legal periodicals hardly mention the subject, while insurance publications journals of trust companies, tax journals, and accounting and business services are full of it.

I was in my office last week working on this paper when an insurance man called on me. His approach was "estate planning," and he used the term specifically. I told him of my study of the subject, and we discussed and compared viewpoints. He was thoroughly informed. His information on the revenue laws, both state and federal, was extensive.

His portfolio contained work sheets, to be filled in by the "prospect" enabling him to get a visual impression of many of the shrinkage factors we have mentioned here. His sales aid contained in large type the statement that THERE IS NO SUBSTITUTE FOR INSURANCE IN PROVIDING FUNDS WHICH THE STATE

13. Powers, *Objectives of Estate Planning*, 82 *Trusts and Estates* 475 (May 1946).
14. E.g. 1947 S. L. c. 206, p. 482.
15. Opinion No. 210.

WILL REQUIRE. The fact that insurance proceeds are themselves includible in the estate, and therefore are taxable at the top rate bracket applicable, was not so forcefully emphasized.

I asked what course he followed when, after thoroughly selling his prospect on the merits of insurance for this purpose, the prospect was found to be uninsurable. He answered patly—all I can advise him then, he said, is to give his property away before he dies. This, as we will see, is not bad advice, IF it is thoroughly understood. However, such advice seems to be a little outside the normal province of the non-legal adviser.

I haven't talked with trust officers, but the same specialized interest often appears there. The superiority of the trust, revocable or irrevocable, as the device for assuring economical disposition of property is contended for in that field. [16a] As in the case of insurance, there is much to be said for the contention. The important thing, however, is to remember what we've already said—that selection of any device is a conclusion to be reached from all the facts, not an assumption to be started with.

Lawyers must remember, too, that they can't be complacent in their knowledge that this is the practice of law and therefore their business. Lawyers have advised clients into some pretty sorry messes, as far as their property disposition problems are concerned. An entirely unplanned estate may result in greater hardship for the survivors than a planned estate, however slanted the plan may be to some special interest. The so-called "clever" lawyer, usually one who fancies himself an authority on the revenue laws, may he so intent on devising a scheme acute enough to avoid the tax collector that he creates a monster which devours the assets of the estate in litigation and other costs, incident to straightening out the property law mess which has been created.

I don't consider estate planning to be a specialty, not even a part of the specialized practice of tax law. Depending on the size and character of the estate, personalities involved, current stability or lack of stability of the revenue laws, business conditions, and other such factors, there may be occasion to call for the services of the specialist in real estate, the tax lawyer, the trust officer, the life underwriter, even the trial lawyer. But every lawyer must know enough about the subject matter to advise the run-of-the-mill propertied client, and to know when to call for the expert. Particularly when it comes to calling in the non-lawyer, he must be aware of his own deficiencies, because the client's welfare may depend on his honesty in this regard.

Two handbooks, written from the lawyer's viewpoint, are recommended. "Theory and Practice of Estate Planning," by Rene A. Wormser, [17] and a monograph, "Estate Planning," by Joseph Trachtman, issued by the Practicing Law Institute of the American Bar Association, Taxation Section. [18]

The title of this topic is "Estate Planning in Relation to Inheritance Tax Requirements." I hope by now I've established that tax law is not the main consideration in estate planning. If I have, we can examine applicable revenue laws without danger of overemphasizing them.

16. I. C. A. 31-907, as amended by 1943 S. L. c. 23, p. 51.
16a. Shattuck, The Creation of Estate Plans, I Journal of the American Society of Chartered Life Underwriters 242 (March 1947).
17. Callaghan, 1946.
18. Series I, No. 11, October 6, 1945.
19. *Magoun v. Illinois Trust and Savings Bank*, 170 U. S. 283.

The estate tax imposed by the federal government and the inheritance tax imposed by the state are entirely different. An inheritance tax is imposed on the right to *receive* property, and is computed on the share taken by the individual devisee or legatee. The federal estate tax is imposed on the right to *transmit* propertp; it is an excise and constitutionally may not be a tax on the property, but is measured by the value of the property; it is computed on the aggregate value of the statutory net estate, not on the share of the individual distributees. [20]

The structure of the federal estate and gift taxes puts a premium on tax avoidance through the transfer of property by gift during life, rather than by bequest. From a revenue point of view, the separate treatment of transfers during life and at death has been called a weakness of the structure of the two taxes. From the taxpayer's point of view, this weakness is of only academic interest as a weakness. It is of solid, practical, financial interest as a means of effecting savings for the benefit of the estate. When it is stated that the astute avoid and escape tax, while the unwary and ingenuous don't, [21] the moral is to be astute, not to deplore the tax structure.

The federal estate tax law does not take effect on estate of the value of $60,000 or less. However, in computing the gross estate, there will be included the total value of all property, real or personal, tangible or intangible, except real property outside the United States, transferred in any of the following ways: [22]

a. By will or intestacy.

b. Survivorship provisions of joint tenancy or tenancy of the entireties.

c. By virtue of powers of appointment.

d. Property previously transferred by gift, intended to take effect in possession or enjoyment at or after death, or where the decedent reserved income, or right to appoint the income, or where he could alter, amend, terminate or revoke the gift or enjoyment thereof.

e. By gift in contemplation of death.

f. All life insurance payable to the estate, and life insurance owned by the decedent or on which he paid premiums, payable on his death to others.

g. The entire value of community property, except such part as is shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse.

Rates range from 3% on the first $5,000 of net estate to 77% on net estates exceeding $10,000,000. That rate is 25% on the $50,- to $60,000 bracket, and 30% on the $100- to $200,000 bracket.

The gift tax [23] reaches all gratuitous transfers of property which constitute statutory gifts. Gifts in property are taxable on the fair market value of the property at the date of the gift. Transfer of property for less than adequate and full consideration are taxable on the amount of the difference

The tax is based upon the amount of "net gifts" or the total amount of gifts less allowable deductions. In arriving at the total amount of the gifts, there is an annual exclusion of $3,000 for each donee; in addition, each donor is entitled to a

20. *Farmers Loan N Trust Co. v. Winthrop*, 238 N. Y. 488, 144 N. E. 769 (1924).
21. Paul, *Taxation for Prosperity* p. 309 (Bobbs-Merrill, 1947).
22. I. R. C. §811.
23. I. R. C. §§1000-1031.

lifetime specific exemption of $30,000, not affecting or affected by the annual exclusion. Contributions, of the same kind as those deductible by an individual for income tax purposes, are not taxable as gifts.

Net gifts made after June, 1932, are cumulative. In other words, the rate applicable is determined by reference to the total amount of prior net gifts.

The rate structure of the gift tax is uniformly three-fourths that of the estate tax, ranging from 2¼% to 57¾% on the same bracket breakdown.

Tax savings from transferring property during life are much greater than the 75% ratio of gift to estate tax rates indicates. Remember that a person who transfers his property during life enjoys both exemptions mentioned: $30,000 under the gift tax, which can be exhausted over the years as he sees fit; $60,000 under the estate tax; and an annual exclusion of $3,000 for each of any number of persons to whom he makes gifts. Under this latter provision, a considerable sum can be transferred during life without tax liability of any kind.

Two other tax savings factors are present: Property transferred during life comes off the top of the estate tax rate structure, and falls into the lowest gift tax brackets. Second, the amount paid out as estate tax is part of the base upon which the tax is computed, but the base of the gift tax does not include the fund which is finally paid out as gift tax.

Death taxes generally can be minimized by gifts, but this is not always true. The gift tax exemption is only $30,000, while the estate tax does not become operative unless the estate exceeds $60,000. Consequently, if an individual's entire property is worth $50,000, it could be transferred at death free from any federal estate tax, whereas a transfer by gift to a single donee would cost a gift tax of approximately $900, plus the loss of future interest on this amount. The point at which "investment" in gift tax becomes clearly advantageous, even assuming only one or two persons are to benefit, is about $150,000. [24] As pointed out before, however, the greatest advantage is in combination of gift during life and transmission at death. Gifts are never indicated if there is any doubt as the donor's ability to "afford" them.

When gifts are to be made, it is important that the donor completely divest himself of ownership. Gifts with strings attached are likely to result in double taxation of a painful variety. The creation of a trust, the ncome of which is to be applied to premiums on life insurance policies on the grantor's life for the benefit of his wife, might look like a gift, and probably is one to the extent that a gift tax would be imposed. [25] But the Internal Revenue Bureau in such a situation feels no embarrassment about taxing the income to the donor, [26] and later including the property in his estate for estate tax purposes. [27]

Conversely, a transfer may be entirely adequate to relieve the transferor of the obligation of paying income tax on the income of the property, and yet be includible in the transferor's estate for estate tax purposes, for example gifts later determined to have been in contemplation of death.

Idaho's Transfer and Inheritance Tax Act [28] was passed by the 1929 legislature, [29] apparently under the compulsion of the provision in the 1926 federal estate tax law which provided for a credit against the federal estate tax of the

24. Research Institute of America, *Federal Tax Coordinator*, vol. 3, "Estate Planning."
25. Regulations 108, sec. 86.2(a)(8).
26. I. R. C. §167 (a) (3); Regulations 111, Sec. 29.167-1 (b).
27. I. R. C. §811 (g) (2).
28. I. C. A. Title 14, ch. 4, as amended.
29. S. L. 1929, ch. 243.

amount of any estate, inheritance, legacy, or succession tax actually paid to a state with respect to property included in the gross estate, up to 80% of the amount of the federal tax imposed by that law. [30] Almost all the states thereafter enacted tax laws to take advantage of this. The provision still applies, but its effect is not great now, because the subsequently enacted "additional estate tax" contained no provision for such a credit.

The rate structure of the Idaho inheritance tax was set at current levels by the First Extraordinary Session of the 1935 legislature. [31] There is a different rate structure applicable to each of four statutory classes of recipients. The first class are husband, wife, lineal ancestors and issue, and adoptive vhildren. For these takers, the tax rates range from 2% on the first $25,000 ahove exemptions, 4% on the next $25,000, 6% on the next $50,000, 8% on the next $100,000, to a maximum of 15% on all over $500,000. In the second class are brothers, sisters, or desceudants of such, wife or widow of a son, or husband, of a daughter of decedent. For this class, the rates start at 4% and go to 20%. The third class includes uncles or aunts or their descendants, and the rates range from 6% to 25%. Class four includes those more distantly related or not related, and for takers in this class 8% is the minimum and 30% is the maximum.

Exemption follow the same pattern, monetary exemptions ranging from $10,000 to the widow or minor children and $4,000 to all others in the first class, to $1,000 to those in the second class, $500 to those in the third class, and nothing to those in the fourth class. [32] All community property transferred to the surviving spouse is exempt, under a 1947 amendment. [33] There is no tax on property transferred to charitable, educational, religious, or like beneficiaries. [34]

The tax is computed as to the share taken by each beneficiary, so the incidence of the applicability of higher rates is comparatively rare. This tax, however, yielded the state over $300,000 in the biennium ending December 31, 1936. [35] The federal estate and gift tax collected in Idaho in one year, the fiscal year ending 30 June 1946, was slightly under a half million dollars. [36]

Note should be taken of the penalties attaching to the nonpayment of the tax within a year of death, and the 5% discount provision for prompt payment. [37] The state inheritance tax law is comprehensive, and payment of state inheritance taxes may be an important part of estate administration to be planned for.

The 1947 amendment exempting community property from the operation of the Idaho Inheritance tax raises several points. First, it amounts to a tax reduction, and marks a trend opposite to that of the federal law with reference to community interests. Mr. Schimke's able exposition at the 1946 bar meeting of the amendments to the federal revenue laws on the subject of taxability of community interests showed clearly the tendencies of the federal estate and gift taxes in this regard. [38] As a tax reduction measure, the 1947 amendment may almost emasculate the Idaho inheritance tax law as a revenue producer, the amount at stake having been estimated to be almost $100,000 a year. [39]

30. I. R. C. §813 (b).

31. S. L. 1935 (1st E. S.) ch. 56, amending I. C. A. §§14-405 and 14-406.

32. I. C. A. §14-407, as amended.

33. See note 12, *supra*.

34. See note 32, *supra*.

35. The State's share (90%) of the tax amounted to $330,524.46 for the biennium. Figures furnished through the courtesy of Mr. E. G. Rosenheim, Director, Inheritance Tax Division, Idaho Department of Finance.

36. Annual Report of the Commissioner of Internal Revenue, 1946.

37. I. C. A. §14-409.

38. 20 *Proceedings of the Idaho State Bar* 68-84 (1946).

Second, the social or economic justification for the legislation is obscure. The facility with which community interests can be converted to separate property interests, [40] and the inducement for such action arising from changes in the federal estate and gift tax laws, [41] will very likely yield a large harvest of property situations of unsettled and unclear status. This will be fruitful of litigation, will hold up the settlement of estates, and will make the Idaho nheritance tax burden apply or not apply to the share of a surviving spouse on the basis of technicalities. Indeed, it may be found that the federal government will tax property as a part of the estate of the spouse first to die as a community interest, and the state will tax it as separate property.

One reason given for the change in the law is that it is considered enough that the state get its inheritance tax "bite" out of the community property only once, when the survivor dies. This would have to be premised on a theory that the vested interest of each partner of the community in the community property enjoys a special status for inheritance tax purposes, superior to that of the separate property of such persons. The legislature can make such a determination, of course, and obviously has done so. But the logic in the reason given is not impressive. In the first place, from a revenue point of view inheritance tax under the Idaho system has heretofore come largely from the tax on community property, because the bulk of property held by individuals in this state is community property, and because transfers of a size to be taxable to any extent are found mostly in the transfers to survivors of the community. When the survivor later dies, the property is broken up into smaller parcels, ordinarily, and the incidence of tax is correspondingly much less. In the second place, the same logic could be applied as well to separate property, and to the unmarried taxpayer. Inheritance tax incidence could be deferred for generations, if the legislature so chose.

Third, the law says notlung about the applicabilty of its provisions to estates of persons who died prior to the effective date of the amendment, February 10, 1947. There is little doubt but that the law in effect on the date of death will govern the estates of persons who died prior to that date. However, I have been advised that several members of the bar of this state have raised the question.

In the problem of plaming for the applicability of these laws, the inducement is facilitation of administration, more than money savings in taxes to the estate. Such an inducement is often even more important.

Estate planning is a vital problem in these times. Entire segments of the subject have been omitted here, particularly development of the use of trusts. No part of the subject has been given the thorough treatment it deserves. As stated before, estate planning is tied up with the law, and our laws, particularly our property laws, have grown exceedingly complex, and they are by no means static or stable. Nor can the lawyer rely on the statute books alone to furnsh him the whole story. Title 26, on Internal Revenue, takes up comparatively few pages in the United States Code. To get the law, reference must be made to the Treasury Regulations, Treasury Decisions, Cumulative Bulletin, court and Tax Court decisions and various office orders, rulings, and memoranda. Sheer bulk of this material is almost beyond the capacity of the general practitioner. Estate planning may involve inquiry into the

39. By the Director of the Inheritance Tax Division, Idaho Department of Finance.

40. S. L. 1943, ch. 23, amending I. C. A. §31-907.

41. Pedersen, *Application of Federal Income, Estate and Gift Tax Laws to Community Property*, 45 *Michigan L. R.* 409 (Feb 1947).

laws of a half dozen or more states besides the state of death, where the decedent or the planner holds property, and occasionally even the law of a foreign nation must be examined. Double taxation of intangible assets, based on determinations of domicile is a reality very often.

Yet the estate planner's lawyer need not be a tax expert, or any other particular kind of expert. The tax law he needs to know for that purpose, he ought to know anyway. That is, the general structure of the federal revenue laws, and where to find the answer to specific problems. Few of the ordinary business transactions of this day escape the examination of the federal internal revenue bureau. Consider, for example, the matter of creation of a partnership among members of a family. Every lawyer here who has any amount of probate practice can furnish a book full of example of complications which are avoidable if there is proper planning.

As stated in the beginning, what is needed is awareness of the problem, appreciation of the professions's responsibilities for doing something about it, and faithful attention to the lawyer's duty to keep abreast of the law, and the economic and sociological problems of his time.

PRES.: Mr. Carver, we thank you for your interesting discussion.

Next on our program is a discussion by Martin V. Huff of Moscow.

MARTIN V. HUFF: Ladies and Gentlement—Mr. Carver has brought out the various things you have to think about, and I have picked out just one aspect of the whole problem and tried to reach a solution on this little aspect—life insurance.

Let me repeat, as Mr. Carver brought out, that in ordinary practice such as most of us have in our offices, we don't find the decisions or the material we need. We have to go to the tax decisions.

The first question I have—

Are proceeds of life insurance payable to beneficiaries other than the estate of the insured subject to Federal estate tax?

The special $40,000 exemption for insurance payable to named beneficiaries was eliminated by the Revenue Act of 1942 as to insured persons dying after Oct. 21, 1942. Under the present law proceeds payable to named beneficiaries may or may not be taxable, depending on whether the insured person directly paid the premiums and on whether the insured person held any of the incidents of ownership of insurance at his death.

What are the controlling factors in determining the taxability of life insurance payable to named beneficiaries?

Life insurance proceeds may be classified as (1) those receivable by the executor or administrator, or payable to, or in fact receivable by, or for the benefit of, the estate; and (2) those payable to all other beneficiaries. Reg. 105, 18.25. Under present law applicable to decedents dying after October 21, 1942, such proceeds are taxable as follows:

Class (1): Insurance payable to the decedent's estate, is includible in the insured's estate to the full extent of all amounts paid under policies upon the life of decedent. Reg. 105, 18.26.

Class (2): Insurance payable to other beneficiaries is includible without exemption if either:

(a) The decedent possessed at death any incident of ownership, exercisable alone or in conjunction with another, or

(b) Premiums were paid directly or indirectly by the decedent. Proceeds are taxable in the proportion that the amount paid by the decedent bears to the total premiums paid. Reg. 105, 81.27.

What is a "legal incident of ownership"?

The term has never been defined exactly by the courts; The nearest approach to a definition is contained in Regulations 105, 81.27, which does not confine the term to ownership in the technical legal sense. For example, a power to change the beneficiary reserved to a corporation of which the decedent is sole stockholder is an incident of ownership; so also "the right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy." An incident of ownership does not include a reversionary interest. However, an assignment of an insurance policy by a decedent possessing other incidents of ownership may result in the proceeds of the policy being includible in gross estate under † 811 (c). Reg. 105, 81.27 (a).

What effect has the payment of premiums by someone other than the insured person on the taxation of life insurance payable to named beneficiaries?

If someone other than the insured pays the premiums from his own funds, the proceeds will not be taxed in the insured's estate unless the insured possesses one of the legal incidents of ownership. See † 95.

Note that the law includes insurance proceeds in the insured's estate if he "indirectly" pays the premiums. Example: Decedent transfers funds to his wife so that she may purchase insurance on his life. She purchases such insurance. The payments are considered to have been made by the decedent even though they are not directly traceable to the precise funds transferred by the decedent. Reg. 104, † 81.27 (a).

However, in a recent decision, the insured had at various times made gifts of income-producing property to his wife. The income was used by the wife to pay six-sevenths of premiums on insurance of which she and her children were beneficiaries. Insured had only the right to have proceeds paid to his estate if all beneficiaries predeceased him. The Board of Tax Appeals ruled that wife's use of the income for such premium payments was not sufficient to make the premiums attributable to the husband, and decided that for tax purposes only one-seventh of insurance proceeds were to be included in the insured's estate. Est. of Cain, 43 BTA 1133.

If premiums are paid from community property, what part of the proceeds are taxable?

Where community funds are used for premium payment the proceeds will be taxed in the same way as if such premium payments were made entirely by the insured spouse, except to the extent that it can be shown that the payments were made from funds received for personal services of the surviving spouse, or from the surviving spouse's separate property.

How is insurance for the payment of death duties treated?

Insurance which is taken out to provide funds to meet death duties is included in the amount of insuranec payable to the estate. Reg. 105, † 81.26.

What is the estate tax effect of making insurance payable to a trustee, with

power in the trustee to use the proceeds for payment of taxes, or for purchase of assets to raise cash for taxes?

Where insurance is payable to a trustee in such a manner as to *require* the trustee to use the proceeds to discharge any expenses or indebtedness of the decedent's estate, it is considered to be receivable by the executor within the meaning of the statute, and the entire amount is includible in the gross estate. Est. of John S. Logan, 23 BTA 236; Pacific National Bank, Morgan Est., 40 BTA 127; Reg. 105, † 81.26.

Where the authority of the trustee to make payment of taxes and debts is merely *discretionary,* and the trust is for the benefit of named individuals, proceeds of insurance payable to the trustee are not considered to be receivable by the executor, except to the extent to which the proceeds are used for the benefit of the estate. Old Colony Trust Co., Est. of Flye, 39 BTA 871.

In some cases an estate owner takes out on his life insurance equal to the estimated liabilities of his estate, and then immediately assigns the policies irrevocably to an irrevocable trust for certain named beneficiaries. The trust beneficiaries thereafter pay the premiums. The trustee is authorized to purchase any assets of the insured's estate at their fair market value as of the date of purchase, and to hold these assets as trust investments. Such an arrangement provides cash for the payment of taxes without sacrifice of assets at forced sale, since the executor is assured of a ready market for any securities which must be sold. Yet, it would appear that the insurance proceeds as well as any other assets in the trust—assuming it was not created in contemplation of death—are fully exempt from estate tax. While there are no rulings or decisions holding such a trust exempt, in view of the fact that there must be many trusts in existence it may be assumed that the Government admits, in practice, that the insurance is not taxable. Moreover, since the assets of the estate are not increased (but merely conserved) by the insurance, and the benefits are entirely indirect, there would seem to be no basis in the law or regulations for subjecting the proceeds to tax.

PRES. KNUDSON: Thank you, Mr. Huff.

We will pass on to another subject and hear a discussion on the federal encroachment upon local control of water rights by A. C. Inman.

A. C. INMAN: Mr. President and fellow members of the Bar: Several years ago T. L. Martin discussed a subject very similar to the one I will present this morning but approached from somewhat of a different viewpoint, namely, the analysis of certain proposed legislation which was then pending in Congress.

The subject can be controversial. And I am going to try to present it in a way that is not controversial by merely outlining the steps through four or five decisions of the Supreme Court of the United States by which the federal government has largely taken control of the major water resources of the country.

The struggle of farmers and irrigators against increasing federal control over streams and water rights is gradually emerging as one of the economic and political issues in the West. The insistence of certain groups for federal "Authorities" or other agencies to provide for "integrated water control and resource development" throughout entire river basin areas and watersheds, and the determined opposition by reclamationists and water users, have recently served to spotlight the controversy, and public interest is therefore becoming focused upon what is undoubtedly the most important question concerning irrigation water rights and reclamation development that has arisen since the passage of the Reclamation Act of 1902.

The proposed Anthority type of legislation, however, is but one phase of the problem. *Full legal basis for exclusive federal control over water rights and water courses is an established fact,* under existing decisions of the Supreme Court of the United States. The break-through has already been made; Advocates of regional development programs under federal controls are but seeking to consolidate and exploit the position heretofore gained from judicial decisions by the highest court in the land.

Western irrigators will probably be surprised to learn that the security of their water rights has been gravely affected by recent litigation involving a river in the State of Virginia, a government flood control reservoir in Oklahoma, and a hydro-electric project in Iowa. But that is just what has happened,—in spite of the united effort of 41 states which appeared in one case to oppose the onrushing tide of federal river control. They lost.

The gradual but inexorable assumption of federal jurisdiction over inland streams and waters is reminiscent of the Arab who permitted the camel to put his nose under the tent. Step by step the beast gained full entry, finally forcing the owner to get out. There wasn't room for both,—just as there cannot be a practical dual control over western streams and tributaries. The matter must be resolved into either federal control on the one hand, or a continuation of state and local supervision and control on the other.

Past decisions of the Supreme Court of the United States and existing federal legislation (e. g., the Tennessee Valley Authority Act and the Federal Power Act) have already emasculated the powers of the states over local streams and waters. "Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control" (statement by the Supreme Court in Northwest Airlines vs. Minnesota, 322 US 292, 303). And recent decisions of the Supreme Court have extended that control to non-navigable creeks and streams throughout entire watersheds.

Federal jurisdiction having been established under the Constitution through judicial decree, it remains only for Congress to act, in order to assert that jurisdiction and make it absolute, at which point and time state control ends. This has been the effect regionally under the Tennessee Valley Authority Act, and generally throughout the United States insofar as federal control has been asserted in the Federal Power Act. Other forms of agency control, once adopted, can assert and extend complete federal jurisdiction to other areas.

It is to many a surprising statement that the ownership and validity of irrigation rights is dependent upon the "commerce clause" of the federal Constitution, and the power of the federal government thereunder. "The states possess control of the waters within their borders 'subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers' . . . The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government." United States vs. Appalachian Electric Power Co., 311 US 377, 405, 426.

Just what is the "commerce clause" in the Constitution? It is set forth in Article I, Section 8, that Congress shall have power "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." How the founding fathers would turn, could they know the ever-broadening interpretations by which the Court has extended their simple and plain language!

Commerce obviously involves the protection, supervision and control of naviga-

tion. But—"We have recently recognized that 'Flood protection, watershed development, recovery of the cost of improvements through the utilization of power are . . . parts of commerce control' . . . *And we now add that the power of flood control extends to the tributaries of navigable streams.* For just as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key flood control on a navigable stream be found in whole or in part in flood control on its tributaries.' Oklahoma vs. Atkinson, 313 US 508, 525-6.

In passing, we can belatedly take note that the power and authority "to regulate commerce," under the Constitution of the United States, *was granted to the federal government by the states themselves,* in the making, ratification and acceptance of the Constitution. In fact, individual, local and state rights over waters and water control are held merely by sufferance, and at the pleasure of Congress, so long as it does not choose to enter the field of regulation. When it does (as under the Tennessee Valley Authority Act and Federal Power Act), all conflicting rights of the states are terminated, and the power and authority of the federal government becomes exclusive and supreme.

The extent to which federal control over waters and water rights has been extended by the United States Supreme Court, and state control correspondingly lost, can best be illustrated by a brief review of four decisions of the Court, three of them occurring within the past seven years. These four cases are:

(1) *United States v. Rio Grande Dam & Irrigation C.*, 174 US 690, holding that the federal government may enjoin the appropriation and storage of waters of a stream which would interfere with or diminish the navigability of the lower reaches of the river.

(2) *United States v. Appalachian Electric Power Co.*, 311 US 377, in which the Court held that navigability of a stream, for the purpose of federal jurisdiction, depends not only upon the natural condition of the stream, but upon possible availability for navigation after the making of reasonable improvements, and despite falls, rapids and other obstructions; that the federal government has power to exclude entirely, and without compensation, a riparian owner from the benefits of the flow of a navigable stream; and that both states and individuals hold the waters of navigable streams, *and the lands under them,* subject to federal control for purposes of commerce.

(3) *Oklahoma v. Atkinson.* 313 US 508, wherein the court held that federal control of navigable streams extends to their entire tributaries and watersheds, and includes the power to control the entire basin of the stream; and that such federal control is superior to any program of the state for water development and conservation, which "must bow before the 'superior power' of Congress.'

(4) *First Iowa Hydro-Electric Cooperative v. Federal Power Commission,* 328 US 152, holding that an applicant to the Federal Power Commission for license under the Federal Power Act need not show compliance with state laws relating to water rights and the beds and banks of streams. If such state law conflicts with the authority of the federal government under the commerce power or other sources of federal jurisdiction, the state law may be ignored. "The detailed provisions of the (Federal Power) Act providing for the federal plan of regulation leave no room or need for conflicting state controls."

(1) UNITED STATES V. RIO GRANDE DAM & IRRIGATION CO. (1899).

As far back as 1899, the Supreme Court of the United States put out its "travel at your own risk" sign to irrigators. An irrigation company, having complied with all the laws of the Territory of New Mexico in reference to the construction of reservoirs and dams and the diversion of water of public streams, began construction of a dam to divert certain of the waters of the Rio Grande River for irrigation purposes. The United States brought suit to enjoin both the construction of the dam and the diversion and use of the water, on the ground that it would obstruct the navigable capacity of the stream. It was admitted that the Rio Graude was not navigable at the point in question, nor even at any place within the entire Territory of New Mexico. The government argued, however, that the diversion and use of water for irrigation purposes would diminish the flow, and therefore affect navigability along the Texas border area several hundred miles downstream. The Supreme Court of the Territory of New Mexico upheld the rights of the irrigators, 51 Pac. 674. The Supreme Court of the United States reversed the dercee, and instructed the local court "to make inquiry as to whether the construction of the dam and appropriating of the said waters would diminish the navigability of the Rio Grande, and, if so, to enter a decree restraining such act." All very logical and simple. But the warning was sounded—the camel's nose was under the tent.

The Rio Grande case also makes clear the ineffectiveness of so-called protective clauses, such as some of the more recent authority bills have contained, purporting to recognize and protect state interests and existing water rights. The New Mexico irrigators had cited three acts of Congress, passed in 1866, 1871 and 1877, which provided, among other things, that whenever rights to the use of water for agricultural, mining and other purposes had vested and accrued, "the possessors and owners of such vested rights shall be maintained and protected in the same." 43 USCA 661. In reviewing these acts, the Supreme Court of the United States said:

> "To infer therefrom that Congress intended to release its control over the navigable streams of the country and to grant in aid of mining industries and the reclamation of arid lands the right to appropriate the waters on the sources of navigable streams to such an extent as to destroy their navigability, is to carry those statutes beyond what their fair import permits. * * * To hold that Congress, by these acts, meant to confer upon any state the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated."

Aside from the question of the power of Congress to enact away or otherwise alienate, in any manner, the constitutional powers of the federal government under the commerce clause, the above quotation shows how easily and effectively such protective enactments can be held for naught, when they run counter to any subsequent law or other assumption by the federal government of its constitutional jurisdiction and control.

(2) UNITED STATES V. APPALACHIAN ELECTRIC CO. (1940).

This case involved the question of jurisdiction and authority of the federal government, through the Federal Power Commission, to assert control over, and require a federal license for, a dam in the New River in the State of Virginia. The company building the dam was "a riparian owner with a valid state license to use the natural resources of the state for its enterprise."

The Chief of Engineers, U. S. Army, had filed a report with the Federal Power

Commission concluding that the New River was not navigable, and further, that the proposed development would not affect navigation on the Kanawha River (of which the New River is a tributary). The trial court and the Circuit Court of Appeals had both held that the river was not navigable, and that the United States could not enjoin the construction of the dam, for which full authorization from the state government had been obtained.

The case was appealed by the federal government to the United States Supreme Court, and in the appellate proceeding, not only the State of Virginia, but *the representatives of 41 states* (including the Attorney Generals of Arizona, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah and Wyoming) *appeared or filed briefs against the further encroachment by the federal government in the field of water rights and river control.*

While conceding that Congress may prohibit the erection of dams and structures in *navigable* waters, the the states asserted that such authority did not include the power to exact conditions *unrelated to navigation*, for permission to erect such structures. This, they pointed out, would enable the federal government to take over natural resources, such as water power, mines, oil or farmlands, as consideration for the privilege of doing interstate business, and that states thus lose control of their resources, and property is withdrawn from taxation.

All this was of no avail. The Supreme Court reversed both the local trial court and the Circuit Court of Appeals, found and held that the New River is "a navigable water of the United States," and directed the lower court to enter an order enjoining the construction of the dam, except under a license from the Federal Power Commission.

The following quotations are from the decision of the Supreme Court of the United States:

> "The respondent is a riparian owner with a valid state license to use the natural resources of the state for its enterprise. Consequently it has as complete a right to the use of the riparian lands, the water, and the river bed as can be obtained under state law. *The state and respondent, alike, however, hold the waters and the lands under them subject to the power of Congress to control the waters for the purpose of commerce . . .* The Federal Government has domination over the water power inherent in the flowing stream. *It is liable to no one for its use or non-use.* The flow of a navigable stream is in no sense private property; 'That the running water in a great navigable stream is capable of private ownership is inconceivable.' *Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion.*"

The Court further held that federal power over navigable waters is not limited to control for purposes of navigation only, but extends to any matter (e. g., flood control, watershed development, water power, etc.) which may be considered a regulation of commerce; and that the federal government could attach to a license such conditions as it saw fit, even though this might mean the ultimate acquisition by the United States of the project in question. The court said that an invasion of state sovereignty by the federal government in this connection is not possible (i. e., no redress may be had by the state or its citizens in the courts), as the United States is acting by virtue of its power to regulate commerce under the Constitution. "So long as the things done within the states by the United States are valid under that power, there can be no interference with the sovereignty of the state."

> *Navigability, for the purpose of federal control, depends not only upon the natural condition of the stream, but upon availability for navigation after possible improvements.*

But the most important point in the New River decision was the Supreme Court's extension of federal control over streams and rivers, by holding that a stream would come under federal jurisdiction even though it was not navigable in its natural state, and in spite of falls, rapids and other obstructions, provided that it could or might be made subject to navigation (if only for the floating of logs or small boats) by means of locks, artificial channels or other "reasonable improvements." As to this, the court said:

> "To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered . . . *A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken . . .* The power of Congress over commerce is not to be hampered because of the necessity for traffic . . . *There has never been doubt that the navigability referred to in the cases was navigability despite the obstruction of falls, rapids, sand bars, carries or shifting currents.*"

Although the decision was by a divided court, *the above language is the law of the land.* In the dissenting opinion, two justices plainly pointed out the full implications and effect of this rule:

> "If this test be adopted, then every creek in every state of the Union which has enough water, when conserved by dams and locks or channelled by wing dams and sluices, to float a boat drawing two feet of water, may be pronounced navigable becanse, by the expenditure of some enormous sum, such a project would be possible of execution. In other words, Congress can create navigability by determining to improve a non-navigable stream."

(3) ATKINSON V. OKLAHOMA (1941)

If there be any question of exaggeration in the minority prediction just quoted above, and as to the power of Congress to assert and obtain control over *any* river, stream, creek, brook or rill, such doubt will be dispelled by a review of the case of Oklahoma vs. Atkinson, wherein the Court again extended the power of the federal government over local waters—and this time to include non-navigable streams, tributaries, watersheds and entire river basins.

In this case, the State of Oklahoma sought to prevent the construction by the federal government of a flood control dam and reservoir which would flood 100,000 acres of land in the state, inhabited by 8,000 citizens, and in a high state of cultivation. Included were 50,000 acres underlaid with oil and gas, and 15,000 acres of highly productive oil lands, with large producing wells. The state itself owned 3,800 acres occupied by schools, a prison farm, highways, rights of way and bridges. The net loss in taxation to local taxing districts was estimated at $40,000 annually, and the annual wealth production lost to the citizens of Oklahoma from the lands in the reservoir basin at about $1,500,000.

The State of Oklahoma further pointed out that the waters (of the Red River) to be impounded in the reservoir belonged to the State, but would be taken from it without compensation, and diverted from the State and into Texas for the purpose of power production. The State claimed, and the Supreme Court admitted, that no part of the Red River in Oklahoma is navigable.

It is basic law that the United States (i. e., the sovereign) cannot be sued, except

if and to the extent that it is willing to consent thereto. Consequently, the State of Oklahoma, in an endeavor to protect itself and its citizens, went to the Supreme Court and asked for permission to file a complaint seeking an injunction against the government from proceeding with the project. Permission was denied, 309 US 623. As a last resort, the State then brought suit against the contractor, and also against government attorneys who had begun numerons condemnation suits for the purposes of the proposed reservoir.

The power of Congress, acting within the scope of its commerce power is absolute; the courts will not interfere.

In its complaint, the State pointed out that the proposed project would not in any way protect or improve the navigable portions of the lower reaches of the Red River or of the Mississipppi, "except in the intangible, indirect, inconsequential and unsubstantial way" set forth in the government's project report. The State further claimed that as a result of a change in plans, "the statutory scheme had been changed from one preponderantly for flood control to one preponderantly for water power." The Supreme Court, however, decided against the State on both contentions. The Court said:

> "We would, however, be less than frank if we failed to recognize this project as a part of a comprehensive flood control program for the Mississippi itself . . . It is, of course, true that *the extent to which this project will alleviate flood conditions in the lower Mississippi is somewhat conjectural* . . . Such matters raise not constitutional issues but questions of policy . . . They are therefore questions for the Congress, not the courts . . ."

Also:

> "Nor may we inquire into the motives of members of Congress who voted for this project . . .
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> ° ° ° °
>
> ". . . as we have said, the fact that ends other than flood control will also he served, or that flood control may be relatively of lesser importance does not invalidate the exercise of the authority conferred on Congress."

Obviously, it is immaterial whether the tail wags the dog, or vice versa. If there is any substantial pretense of hanging the cloak of federal authority on the hook of "commerce power," any act of the federal government may be justified and upheld, regardless of actual motive, purpose or effect.

Federal control now exists over non-navigable streams, tributaries, watersheds and entire river basins.

But, again, as in the New River case, the real import of this decision is its extension of federal control (under the theory that flood control is a part of the power to "regulate commerce") over non-navigable streams and waters, throughout entire river basins.

> ". . . it is clear that Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions . . . *And we now add that the power of flood control extends to the tributaries of navigable streams . . . There is no constitutional reason why Congress cannot under the commerce power treat the watersheds as a key to flood control on navigable streams and their tributaries. Nor is there a constitutional necessity for viewing each reservoir project in isolation from a comprehensive plan covering the entire basin of a particular river . . .*"

The interests and sovereignty of a State are immaterial.

> ". . . Since the construction of this dam and reservoir is a valid exercise by Congress of its commerce power, there is no interference with the sovereignty of the state. . . . The fact that land is owned by a state is no barrier to its condemnation by the United States. . . . The possible adverse effect on the tax revenues of Oklahoma as a result of the exercise by the federal government of its power of eminent domain is no barrier to the exercise of that power. *'Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield.' . . . And the suggestion that this project interferes with the state's own program for water deevlopment and conservation is likewise of no avail. That program must bow before the 'superior power' of Congress. . . .*"

(4) FIRST IOWA HYDRO-ELECTRIC COOPERATIVE v. FEDERAL POWER COMMISSION (1946)

In this controversy the State of Iowa, as intervener, was the real party in interest, in opposition to both the federal commission and the cooperative. Its endeavor to sustain the effectiveness of its own state water control act was unsuccessful, as there is no way of opposing federal water control, once federal jurisdiction has been asserted by Congressional act.

The case is of special import to all water users, as it sets forth the legal basis upon which *the federal government, or any agency or Authority thereof* (here, the Federal Power Commission), *can ignore and invalidate any state law relating to obtainment, priorities, administration or control of water rights.*

The State of Iowa had adopted a water control act (Code of Iowa, Chapter 363) similar to that of many western states, providing that no dam shall be constructed in, nor any water taken from, specified streams for stated purposes, without a permit from the state executive council. Various other provisions were set forth in the act for the administration and control by the state of its water resources.

The First Iowa Hydro-Electric Cooperative had twice applied to the state executive council for, and had twice been denied, a permit to construct a dam in the Cedar River (a tributary of the Iowa River, which is in turn a tributary of the Mississippi). No further application was filed with the state authorities, and no permit or authorization had been obtained from the state for the project in question.

The cooperative's proposed project, which had the approval of the Federal Power Commission, involved the diversion of practically the entire flow of the Cedar River about 28 miles above the point where it joins the Iowa River. The water was not to be returned to either the Cedar or Iowa Rivers at all, but, instead, transported across the state and emptied directly into the Mississippi. The State of Iowa was opposed to the granting of a federal license for the project, on the ground that the diversion of water from one stream to another under such circumstances was in violation of its own policy of water control, as expressed by state law.

In the cooperative's application for a federal license, both the cooperative and the commission were confronted with the requirement in Section 9(b) of the Federal Power Act, that "each applicant for a license hereunder shall submit to the commission . . . satisfactory evidence *that the applicant has complied with the requirements of the laws of the State* or States within which the proposed project is to be located with respect to bed and hanks and to the appropriation, diversion, and use of water for power purposes,"—ostensibly inserted in the Act as a "safe-

guard" to states' rights and state control of local water resources. As stated above, the cooperative had not state permit, and could not get one.

State water laws and regulations may be ignored.

Construing the above-quoted language, the United States Supreme Court held that, "It does not itself require compliance with any state laws," but, in effect, only such showing as is 'satisfactory' to the Commission;" that if the state law was not effective, in view of the federal government's assertion of jurisdiction,— and it was held not to be effective in this case,—then, obviously, no state permit or consent of the state would be required! The Supreme Court said:

> "To require the petitioner to secure the actual grant to it of a State permit under Sec. 7767 (i.e., the state statute) as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State*the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government.*
>
> *". . . Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. . . .*
>
> "The securing of an Iowa state permit is not in any sense a condition precedent or an administrative procedure that must be exhausted before securing a federal license. It is a procedure required by the State of Iowa in dealing with its local streams and also with the water of the United States within that State *in the absence of an assumption of jurisdiction by the United States over the navigability of its water. Now that the Federal government has taken jurisdiction of such waters under the Federal Power Act, it has not by statute or regulation added the state requirements to its federal requirements.*
>
> ". . . . The State of Iowa not only is opposed to the granting of a State permit but is opposed also to the granting of a federal license for the project. This opposition is based at least in part on the ground that the State statute, as interpreted by the State officials, expresses a policy opposed to the diversion of water from one stream to another in Iowa under such circumstances as the present.
>
> *"It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as well as on behalf of all others."*

That is very plain language, and leaves no doubt as to where the ultimate control lies. I have quoted thus at length from this decision because the language of the Court speaks so clearly for itself that any further analysis of the effect of the case upon a state's control of its waters and water rights is rendered unnecessary.

With this ruling in mind, consider the effect of a provision, such as has been included in various proposed authority bills introduced in Congress, that no dam, diverting works, or other structure affecting navigation, or the use of waters, or lands or property of the United States, shall be constructed, or maintained, in "any stream or water course in the Columbia Valley region," except with permission or in accordance with regulations prescribed by the federal government. A similar

provision relating to the Tennessee River and its tributaries is a part of the Tennessee Valley Authority Act (16 USCA 69).

If legislation of this nature is passed, and Congress asserts such jurisdiction over western streams, the federal government under the Iowa case doctrine would have exclusive jurisdiction, and state control and protection of local water and existing water rights would exist, if at all, by sufferance only.

Federal eminent domain power an important adjunct to water right control

As an incident to federal control over local water and water rights, the eminent domain powers of the federal government and its agencies cannot be overlooked. Here, again, those powers have been broadly interpreted and construed by the United States Supreme Court. The common-law rule that statutory power to condemn property should be given a strict interpretation is held inapplicable under federal statutes containing the usual provision for a liberal construction to carry out the objectives and purposes of the legislation involved.

Likewise, the showing of "necessity" for the taking, and of the "public use" for which the property is expropriated, are held satisfied merely by an expression or resolution of the condemning agency that the taking is deemed necessary for its purposes under the act in question. Such agencies and Authorities have been held "to have a power to condemn coextensive with their power to purchase." That was the ruling of the Supreme Court of the United States in TVA v Welch, 327 US 546.

In the Welch case, the Tennessee Valley Authority, in building a dam in North Carolina, had flooded the only highway leading to an area of 66,000 acres inhabited by 216 families. In order to reduce its liability arising from the destruction of the highway, and following negotiations with state and county authorities, the government decided to buy up all the land and move the people out. Some' of the families refused to sell and leave their farms, and the TVA removed them by condemnation proceedings. The land was not flooded or otherwise affected by the dam and reservoir, or required by the Authority for any purpose,—in fact, it was subsequently turned over to an adjacent national park. The Supreme Court pointed out, however, that the Authority had passed a resolution that it deemed such acquisitions necessary for its purposes, and that *this was all that was required under the broad powers given the Authority by law.* The questions of "necessity" for the taking, and of the "public use" involved, were thus disposed of.

The power of Congress to grant to a federal agency or authority the power to condemn water rights is not open to question. Consequently, the government's power of eminent domain,—under which the owner is not even entitled to a jury trial to assess his loss or damages (43 USCA 675, 678),—is an important adjunct to federal control of local waters and water rights.

Earlier in this review the statement was made that there cannot be a dual control over western streams and tributaries. The matter must be resolved into either a continuation of state and local supervision and control of waters on the one hand, or complete and exclusive federal jurisdiction on the other. "A concurrent power in the states to regulate commerce is an anomaly not found in the Constitution. . . . A concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impracticable in action." Smith v. Turner, 7 How. 396.

Among the results of the further assumption of federal jurisdiction over western waters may well be these:

(1) The transfer of administration or control of water rights from the state to an agency of the federal government, under circumstances where that agency will itself be a major appropriator and user of water, and therefore a party in interest as well as the agency administering the law.

(2) The requirement of applications to and authorization from such federal agency, instead of the state, for the appropriation, diversion and use of water,—and for the construction of dams, diversion works or other facilities in rivers and streams.

(3) The denial of state constitutional and statutory protection to existing rights and priorities on the ground that they were obtained, and are held, "subject to the power of Congress to control the waters" under the commerce clause.

(4) The requirement that all water litigation, especially if the agency is involved, be conducted in the federal courts.

(5) The lack of any necessity of the federal government abiding by state laws relating to appropriation or use of waters, or the obtainment of water rights.

(6) The abolition of the constitutional right, which exists in Idaho, to obtain a valid and recognized water right by actual appropriation and beneficial use, as distinguished from the statutory method of application and license from the Department of Reclamation.

(7) The power of the federal government to disregard the three classifications of water rights provided under our state constitution and laws, wherein rights for irrigation and domestic uses are paramount in importance over rights for manufacturing and the generation of power.

(8) The power of the federal government to condemn water rights for any use or purpose, regardless of existing uses or purposes; the lack of any requirement of a showing or proof of "necessity" or "public use" in such condemnation proceedings; and the denial of a right to a jury to determine damages or compensation for the taking, and, in this connection, the appointment of appraisers who are non-residents of and strangers to the locality involved.

Many others could be mentioned. And surprising as it may seem, some of these provisions are actually written in various existing federal laws today, and others have been included in numerous bills introduced in Congress during recent years for regional resource development and water control.

The "commerce clause," it must be remembered, is not self-executing. It requires action by the federal government, usually through Congress, to take over the jurisdiction and assert the power which the commerce clause confers; but upon such action being taken, all conflicting or inconsistent authority of the state is forthwith terminated,—state statutes, or even constitutions, to the contrary notwithstanding.

> "When Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the states to the general government." Lake Shore, etc, R. Co. v. Ohio, 173 US 297.

The continuation of state and local control of western streams and tributaries, and the security of owners of existing water rights, therefore *depend entirely upon non-action by Congress*. They depend upon preventing the Congress from including in any legislation,—whether it be in the creation of so-called Authorities, or the provision of agency or inter-agency control of resource or regional development, or in dealing with reclamation or supplemental water or flood control, or otherwise—of any provisions affecting water rights, or requiring federal permission or approval for the construction of diverting works or other facilities in inland streams, or in any other way encroaching upon the state's supervision and control of its local waters. Mere protective clauses in such legislation are not enough; they have been set aside before, and they can be set aside again,—both by legislative amendment or repeal, and by judicial interpretation or decree.

But practically and fundamentally, the security of western water rights depends upon a universal understanding, on the part of irrigators and water users, of the jeopardy in which their rights now stand,—of how far the federal government has already gone, and can farther go, in depriving both the state and the individual of supervision and control of their own waters and water rights. It is with this in mind that I have reviewed these four decisions of the United States Supreme Court, each of which is a milestone along the road of federal encroachment in the field of local water control.—and on which road the people of the West might well put up another and final marker, with the words: "Traffic beyond this point is barred."

PRES.: For your very interesting discussion, we thank you, Mr. Inman. We will recess until 1:30.

PRES.: We are going to hear a report of the 1947 Idaho Code Commission by Oscar Worthwine of Boise, it's chairman.

MR. WORTHWINE: The members of the 1947 Idaho Code Commission were appointed by the Governor on April 9, 1947, pursuant to authority conferred by House Bill No. 244, now Chapter 224, 1947 Session Laws. They are myself and Ralph R. Breshears and Carey H. Nixon, all of Boise.

Since you are familiar with this Act we will not review it here, and it is sufficient to point out that it does the following:

(a) Appropriates $100,000.00; (b) Authorizes the Commission to enter into a contract with The Bobbs-Merrill Company; (c) Fixed a price of not to exceed $75.00 for an eight volume set, and $2.00 per volume for all volumes in excess of eight not in excess of twelve volumes; (d) That the Code be delivered on or before December 15, 1948; (e) Transferred the 1943 Idaho Code Fund to the 1947 Idaho Code Fund.

The Commission was convinced that the Bench and Bar considered the following of the utmost importance:

(1) That we have a new Code;

(2) That we have it as soon as possible; We are tired of checking eight or nine volumes of Session Laws, especially since the last volume consists of over 1,200 pages.

(3) That the new Code be as accurate, usable and readable as possible;

(4) That we try to end the outmoded system of revising the entire Code every ten or fifteen years, and that we provide for replacement volumes when needed to the end that our Code will be constantly up to date like the United States Code Annotated.

Consequently, as soon as it was appointed, the Commission wired Bobbs-Merrill Company to forward the proposed contract by air mail for study by the Commission, and that it send its representative to Idaho to finally negotiate the contract.

Mr. Richard V. Sipe, Editor-in-Chief of the Legal Department of the Bobbs-Merrill Company, who had been in Boise during the legislative session, came to Boise and the general over-all contract was entered into so that the Publisher could begin its editorial work without any delay.

The contract contains the following provisions, among others:

(a) Incorporates House Bill No. 244;

(b) The 1932 Code to be the foundation and model for titles, chapters and sections;

(c) The history of each section of the statutes and laws showing amendments to the Constitution;

(d) A general chapter analysis of each chapter and an article analysis of each article at the beginning thereof;

(e) A complete cross reference to related subjects and sections;

(f) References to laws of California and other States having comparative legislation;

(g) An index to each volume and a complete and comprehensive index in the last volume of the set covering the entire compilation;

(h) Annotations of cases construing the subject matter, and citations with reference to the official Reports of Idaho, West Reporter System and Selected Case Series;

(i) Each annotation shall include an analysis of the case insofar as applicable to a particular section of the compilation;

(j) The manufacturing specifications are as follows:

(1) The over-all page dimensions of the codes shall be seven inches by ten inches and the type page four and seven-eights inches by eight and one-eighth inches or twenty-nine by forty-nine picas;

(2) The text shall be set in ten point Century type on ten point slug, single column across the page. Annotations or such other notes as may be included in eight point Century type solid double column;

(3) All shall be printed on best quality (A Grade) white or (light natural) 30 to 40 pound English finish book paper, but the weight and kind of paper may be varied with the approval in writing of the Commission as circumstances may require;

(4) Binding shall be of first quality non-flexible maroon Dupont Fabrikoid or material of similar kind and quality, the lettering to be genuine gold leaf.

(5) the binding of each volume shall be done so as to leave room in the back of each volume for the pocket part supplement, which pocket will be of the stub type.

(k) As provided in the present contract, the Code will be printed in eleven volumes, the eleventh volume containing a general index, and one thousand sets will be delivered to the State of Idaho for $78,500.00, or $78.50 per set, and additional sets will be sold to the public at $78.50 per set.

The Publisher will furnish replacement volumes as the need arises, at a price not to exceed $10.00 per volume.

Cumulative pocket part service each biennium after each regular session of the Legislature will be prepared at a price of $7.50 for each subscription for a period of two biennial sessions, and the next two biennial sessions at $8.50 for each subscription, and $10.00 for each biennial session thereafter.

A performance bond in the amount of $25,000.00 signed by the Publisher as Principal and the Aetna Casualty & Surety Company of Hartford, Connecticut, as Surety, has been filed with the Secretary of State of the State of Idaho.

You will note that reference has been made to the manufacturing contract presently in force. The reason for this is that the Commission was so anxious that the Publisher get to work preparing the subject matter of the Code, that it agreed with the Publisher as to the above named specifications, it being understood that if at all practicable efforts would be made to secure a Code more nearly approaching size and makeup of the United States Code Annotated, or some of the other Codes, and we are now in correspondence with the Published in an endeavor to work this problem out. Under the above specifications our new Code will be in the same form as that of Arizona and New Mexico, which the Commission believes easy to handle, attractive and very durable; in the event the specifications are changed the price of each set will be increased but in no event will it be in excess of the limit set by the Legislature.

As soon as it was appointed the Commission sent out letters to the Bench and Bar of Idaho asking for suggestions, and although letters were sent to every Justice, Judge and licensed member of the Idaho State Bar, the Commission has received only about ten answers, and the majority of these answers asked the Commission to be certain the new Code has a better index than the 1932 Code.

The financial condition of the 1943 and 1947 Idaho Code Fund: The 1943 Act created a Code Fund which levied a charge of $2.50 on each civil complaint filed in the district courts; The 1943 Commission sold treasury notes in the amount of $43,000.00 and expended $2,376.45, leaving $40,623.55 as the net cash proceeds of the sale of the 1943 Idaho Code Fund as of May 1st, 1947. The treasury notes issued and sold to procure the 1943 Idaho Code Fund are due at the rate of $6,000.00 a year, plus an average interest charge of $425.00.

Balance of proceeds of 1943 Idaho Code Fund on May 1st, 1947	$40,623.55
The redemption fund from taxes levied on civil actions filed	$31,443.60
TOTAL	$72,067.15

against which there are outstanding 1943 Idaho Code Fund Treasury notes of the sum of $31,000.00, leaving a net cash balance of approximately $41,067.15 in the 1947 Idaho Code Fund.

The monthly income from the levy of $2.50 on the filing of civil complaints is about $1,000.00. Consequently, the Commission does not believe that any additional treasury notes should be sold until about December, 1948; in fact, we would call and pay the outstanding notes if they were callable, and thus save the interest of $425.00 a year.

PRES.: Thank you, Mr. Worthwine. We will hear a discussion by Mr. Carl H. Swanstrom on the question of whether or not you want a Bar publication on the matter of quieting title in Idaho.

CARL H. SWANSTROM: Mr. Chairman, members of the Bench and fellow workers of the Bar:

Shall we have a publication on the subject matter of quieting title in Idaho?

May we stipulate at this time that the record show the usual expression of the great pleasure of the speaker, his keen appreciation for having a place on this program and the deep sense of humility he has in his knowledge that both by training and experience he is utterly inadequate to present remarks of worthwbile value to this learned body. If also the record might show a corny, and rather ancient, joke or two, at this point, we can then proceed with the business at hand.

Your program committee has asked that my remarks be more or less confined to the question, hence the purpose of this talk is not to give the Bar my notion of how to prepare or conduct a suit to quiet title, nor when it should, or should not, be nsed, nor in any sense to attempt any detailed discussion of the various phases of the subject matter of the action itself, and much less is it my purpose to give a highly technical treatment, based on extensive citations, of the action or any phase of it. It is my feeling that a discourse of that nature should follow this talk, and I am happy to note that has heen provided for by speakers better prepared than I; and still more do I feel that the whole range of the action should be treated in a carefully prepared publication, supported by extensive and accurate citations so that it may be available to the Bar as a permanent aid in this important phase of our practice.

No doubt if the question were submitted here and now, a practically unanimous vote of the Bar would be cast in favor of such a publication and so it might seem that further discussion is not indicated. However, if such a publication were directed and left to the judgment of any one lawyer, or to a committee of lawyers, it is doubted that the resulting work would cover all of the points which have become matters of real concern to the practicioner.

For that reason it is my purpose to invite discussion and questions as to matters concerned in the usual quiet title action, which have resulted in differences in opinion among the bar and marked differences in practice, and more particularly, to elicit from the Bar the submission of written questions, suggestions and comments as to matter that should be treated in a publication on the general subject matter of the suit to quiet title in Idaho.

The action to quiet title, of course, is used in a multitude of situations and to obtain both active and passive relief from almost limitless questions of fact and law concerning both possession of and title to property. Our quiet title action has superceded some of the common law suits and certain phases of the action are present in many suits where the quieting of title is only one of the ends sought. We are familiar with it as it has been used, or some phase of it applied to, such matters as overlapping claims on mining lands, to determne claims to the use of water, to resolve differences betweeu coterminous land owners as to boundaries, to adjudicate present and conflicting claims as to both title to and right of possession of lands and tenements. This is the type of action which I have arbitrarily and with very little legal authority, designated as the "Active Type" of Quiet Title Action. With this type of action I think we need not be too concerned here for the reason that these actions in both form and scope are always dependent upon a particular set of facts and are usually only more or less incidental to the real issues concerned.

The other type of suit to quiet title I designate as the "Passive Type." We see it much more frequently and it usually arises out of the contract of a land owner to furnish a "Sound, Marketable and Unencumbered Title" and in these remarks I am thinking largely of the action to clear, or quiet, title to real property against the cloud of real, or often fancied, objections raised by a title examiner on the sale or exchange of real property.

This Passive Type of Action to Quiet Title is often one of those nebulous, legal fictions in which the parties defendant are only possibly in existence; where the only justiciable issue may consist of some title examiner's far fetched notion that there is, or may be, a cloud on title; where we sue a party not because he has an issue of fact against our client but because of the possibility that he might conceivably have one; it is the thing that has spoiled a lot of young lawyers who might otherwise have taken the time and trouble to become good title men; it is the thing that has enabled some abstractors to endow colleges, and it is that "anamolous situation," as our old friend L. L. Burtenshaw used to say, that creates present business and income for lawyers but at the same time is taking legitimate law business away from them faster than a wbole flock of New Deal lending and other agencies.

Let me here digress to comment that in my humble opinion we have had far too many of these passive types of quiet title actions; so much so that it has brought upon the profession some partially deserved criticism from the laity which will surely as time goes on drive from our offices a great deal of legitimate law business which should by every concept of the profession, remain in the trust of lawyers.

I feel this situation stems from several factors. Among them are—

The inherent reluctance of some attorneys to pass without criticism, the cumulative work of his predecessors;

To some attorneys there is a feeling that unless he find something wrong with this lengthy abstract, his client will feel that he has not done his work well, or that he will resent a reasonable charge for his work;

Some attorneys are obsessed with a fear that their own work may later be criticised by another lawyer and thus they lean backwards to avoid that contingency to the extent that reason and good judgment are over-ridden by technicalities. I think all of us, and particularly the younger lawyer, has an ever present fear that we may pass some matter of title as sufficient and later on some other attorney may insist it is of such merit as to render title objectionable and thereby bring ourselves into disrepute as "That So and So" who told me my title was good and now that firm of *Boise* lawyers says it's no good—I should have gone over there myself when I bought the property."

These suits, too frequently, stem from the fact that an examiner for the buyer raises objection to some showing of title, which may be of very doubtful merit; in fact, you may be satisfied beyond any doubt that the title is good. Your client is under contract to furnish "sound, marketable and unencumbered title" and you have the alternative of quieting the title, or tendering your title and bringing the expensive, long drawn out (and perhaps doubtful) action for specific performance. As a matter of expediency as to time, expense and certainty of result, we bring the action to quiet title.

As illustrative of what I mean by saying there have been far too many passive suits to quiet title, a situation in Ada County was called to my attention a few years

back in which three successive suits to quiet title on the same tract of land were demanded, and prosecuted, in connection with three consecutive sales of this property and none of the suits involved any issue arising out of the title or ownership of the last three owners and parties plaintiff. Such a situation is indicative of some poor title work on the part of the first and second examiners, or the part of the attorneys preparing the first and second suits, or what the second and third demands were based on matters more fancied than real. No matter what was the reason (or better, the excuse) for the situation, we can well imagine the state of minds of the second and third owners when required to prosecute such actions as to title which their own attorneys had represented as good.

Another in Payette County was brought in a case where about the only discernable question was in the failure to attach revenue stamps to certain deeds given about 1900.

I have not yet heard of a demand having been made for a suit to quiet title to lands for the reason that the President's wife did not sign the Patent; it would not surprise me greatly to hear of it most any day.

It is painfully evident that the rapidly mounting costs of abstracts of title, as the same are augmented by frequent suits to quiet title, and shown verbatim at $1.50 a page and up, coupled with the *uncertainties* of title resulting from differences of lawyers in what is a marketable title, is rapidly driving away and into the hands of the title insurance people, work that is definitely that of the lawyer. These companies, operating on the mathamatically perfect "percentage" system and with facilities for determining from on the ground investigation whether there is probability of liability from the old, unreleased mortgage, or the unsatisfied judgment, or from the claims of heirs who were minors at the time of some disfeasance of title, can safely insure against many matters wherein the Attorney, out of fear of some of the situations before mentioned, is afraid to pass title.

I hope I am not to be misunderstood as to be charged with the belief that there is no place for the Passive Type of quiet title action. Certainly it is a very necessary remedy in overcoming objections of merit to the showing of title. My thought is that it should be resorted to in only those cases where the defect charged is one of real merit and in those situations where the persons designated as defendants, if in being, could raise a justiciable issue as to the title of the plaintiff. I feel no such issue is present if the only reason counsel can give the Court for appearing in one of these actions is

> "Well, so and so, who examined my client's abstract, thought that title should be quieted."

Trying now to get back on the main track of this discourse—aside from the marked differences of various attorneys as to the situations which demand (or justify) the action itself, there is also a vast difference in the practice as to the form of the complaint. Some attorneys use the briefest possible sort of a complaint, confining the allegations of that document to a statement, in substance, that plaintiff is now and for so many years has been record owner, under color of title, to certain premises, that he has paid all taxes thereon and held possession thereof openly, continuously, adversely and notoriously against the defendants and all the world, and that while the defendants have or claim some right, title or interest in the premises, such claims are without right whatever—and thereupon he prays judgment. One of my erstwhile legal cronies could, and often did, write a complaint wherein the caption occupied well over half or three fourth of the first page, yet he would complete his complaint, including the verification, on the second sheet. Sometimes he

migbt have to single space the last few lines and rather compress the jurat, but not often. Such practice, if it is sufficient, has much to commend it, particularly where our titles pass on abstracts.

Other attorneys implead the title by reference to record, if not more fully: they allege with great particularity the marital status, or possible marital status, of every personal defendant, and if that status is not known, about a paragraph is used to explain how "Mary Roe Jones" bears that appellation and why she is a defendant. In similar language, there is set forth the heirs and devisees of persons known to be deceased and as to the heirs and devisees of named defendants who may, in fact, be deceased, and also in the same manner as to unknown owners and unknown claimants.

Allegations of marital status, or the possibility of it, as to heirship, testacy, etc., unknown ownership, etc., are common to all these actions and it is my thought that some consideration might be given the matter of developing a rather uniform manner of stating these matters in the most concise, and if you please, precise, manner compatible with and indicated by good pleading.

Another matter vital to the results to be obtained from the Suit to Quiet Title is in the affidavit for publication of summons. Here again we find a tremendous variance in the practice of attorneys, particularly with reference to unknown heirs and devisees and unknown owners and claimants. Some attorneys, without even designating that they are the heirs, etc., of various named people, simply state that all so named defendants have departed from the state, or cannot be found therein; other lawyers implead in both their complaints and affidavits the statement that John Doe, now deceased, left surviving him certain persons as heirs at law, or devisees, or both heirs and devisees, but whether as heirs, or as devisees, or both as such heirs and devisees, being unknown to plaintiff (affiant) and that although affiant has made diligent search and inquiry in and about the county, and elsewhere, he has been unable to learn the names of any of such persons, for which reason he cannot have them personally served, and so on down the line with each and every group and class of such defendants and also as to the John Doe Husbands or Mary Roe Wives who are made parties by similar designations.

Personally, I am not satisfied with the affidavit that largely impleads conclusions, rather than precise statement of fact and so my own affidavits and complaints run into considerable yardage. I would feel that comment and study on this matter might result in a fairly uniform and concise allegations on these stock matters tending to relieve title examiners of making individual determination of whether the affidavit in a particular matter is sufficient.

It has been brought to my attention that in some of these suits no real effort was made to determine the names of the heirs of a deceased, former party in interest. There are known instances of quiet title actions filed in this state in which the complaint alleges that so and so died intestate "at a time and place to plaintiff unknown, leaving surviving him certain persons as heirs or devisees whose names are unknown and which, upon diligent inquiry, cannot be ascertained," when in the same county, at the time of the suit there was a probate record establishing these facts, at least to all the heirs known to the Probate Court and by reference to which the real parties in interest could have been determined, made defendants under their true names and if not personally served in the state, directly contacted with the mailed summons. In such instances I feel a fraud has been practiced on the real parties in interest and an imposition placed on the courts. That situation prompts me to this inquiry—

Sec. 5-508 (providing for service of summons by publication) provides the

affidavit need not set forth what efforts have been made or what diligence exerted, in the attempt to find and serve the defendants (and I belive that might be held to apply to the "naming" of defendants also) to be served by publication, but

Lohr vs. Courley, 27 Idaho 739

holds that this section does not dispense with the *use of due diligence* to ascertain the residence and post office address of defendants, and by analogy, I would feel as to the matter of ascertaining *who are* the defendants as well, and the mere assertion in the affidavit of due diligence is not a compliance with the statute on service. Now, suppose we are passing on a suit to quiet title which has just been prosecuted in connection with a pending transaction and we find the short form of affidavit, with no facts disclosed as to what was done to locate the defendants, or why they cannot be determined and we pass the action, it apparently complying with the requirements of title. But within a six months period, and after the deal has been closed, some parties appear who had a real interest in the controversy, and establish beyond any question that any use of diligence would have quickly determined their true names and their place of residence and that they could have been personally served with summons, and had they been served, or had any notice of the action, they would have appeared. How good is your suit to quiet title? Knowing as we do that about 9 out of 10 of the usual suits to quiet title are in connection with a pending transfer of realty, to be closed forthwith after the entry of decree in the suit, what should be demanded as affording reasonable protection against situations of this sort?

I am glad to note that plaec has been given in this convention for discussion of the matter of tax titles. I will endeavor to steal no thunder from the speaker who is to talk on this matter but I do want to comment that there is a very evident need for more uniformity of opinion on the marketability of tax titles. In our district, and I am sure, in the Third, tax titles are summarily dismissed by examiners as unmarketable. Banks will not loan on property where title is based on tax deed, no matter how long such title has been outstanding. One of the more prominent title examiners in our territory has repeatedly turned down these titles as unmarketable with the comment

> "Tax titles are not marketable because they can be defeated by parol evidence."

It should be evident that such conclusion has little merit to support it and is likely based on the Owyhee County tax deeds where relatives of county commissioners were the buyers from the county. But such deeds are no more, or less, subject to attack than are warranty deeds. For instance, the warranty deed, regular on its face, that was in reality given to secure a debt; Idaho is replete with cases holding such transactions to be only mortgages. Of the deed given by an incompetent or insane person, not yet adjudicated as such. Certainly those deeds can be defeated on parol evidence. Even titles based on such solemn records as wills, duly admitted to probate and after a lapse of two or more years after distribution, are believed by some prominent attorneys defeasible by parol evidence. However, that is aside the point as to tax titles. It is my notion that if the statutory steps leading up to the tax deed and to the county sale were done by the officers as required by law, and such acts are shown by their proper affidavits and records, a tax title should be just as safe and as marketable as any title based on deed. Just how much the situation has been aided by the provisions of Chapter 87, Laws of 1943 which provides that after a lapse of six years there shall be a conclusive presumption that all proceedings were regular and that no action can be maintained to contest any tax or assessment upon which the deed has been issued, remains to be seen. So far, I have

observed no difference in the attitude of attorneys and lending agencies. In any event, there is room for careful study on such matters and hope for some uniformity of conclusion as to the validity of these titles and to the need of quieting against them.

In the hope that my remarks may result in discussion from the floor and submission of written suggestions on the Suit to Quiet Title, I will comment briefly on a number of situations which seem to invite consideration by the Bar as a whole and particularly in any publication to be issued following this convention. One of these matters is the well-known mechanics lien which, by statute, was required to be foreclosed within six (6) months from filing. The speaker has passed many a title in which these ancient mechanics liens appeared in a record as unsatisfied, and he felt secure in relying upon the provisions of the statute. However, when our Supreme Court opinion in the case of Brown vs. Hawkins, 158 Pacific 2nd, 840, was announced, I suffered at least six or seven consecutive heart attacks for fear that I might be slapped in the face by reason of my having passed titles such as mentioned. The query follows that since the enactment of Chapter 125, Laws of 1947, will the Bar be in position of unqualifiedly passing titles in which unsatisfied mechanics' liens or judgments more than five years old appear in the record of title? Some rather definite conclusion should be reached by the Bar as to whether or not such titles can be regarded as marketable.

In the same connection, we have the matter of deeds regular on face exchanged between a husband and wife and containing no recitation that it was intended to make the property the separate property of the grantee. Until the amendment of Sec. 31-907 by Chapter 23, Session Laws of 1943, the question was frequqently raised on title examination as to whether or not such deeds affected the community status of the property, and the query follows as to whether or not the amendment quoted affords absolute protection against the raising of that question.

Another interesting question is in connection with the ancient and unsatisfied mortgage which we find of record in so many of the older titles. When, if ever, does an unsatisfied mortgage cease to be such a cloud as not to affect the marketability of title? By the provisions of Chapter 107, Laws of 1935, it is provided that the record of a mortgage constitutes no notice of lien for more than ten years after the expressed maturity of the mortgage or of the extension of such mortgage as shown by a recorded extension agreement. Is this statute sufficient to defeat the lien of a mortgage and debt which has been kept alive by payments made from time to time after the expressed maturity of the debt. I doubt if many members of the bar will pass a title in which there appears an unrecorded mortgage of less than 30 or more years standing, and perhaps some members will never pass such a title. If the provisions of Chapter 107, Laws of 1935, and the general provisions of our statute of limitations has any real sanctity, then there should perhaps be a meeting of the minds of the Bar as to when these ancient mortgages may be disregarded, if ever, or at least there should be uniformity in the conclusion of what must be done in connection with them to effect a marketable title. In this same connection, I am prompted to ask this question—"Can an unreleased mortgage be quieted against except upon a direct allegation in the complaint and proof upon hearing that the mortgage has been paid?" It is a very common practice in quieting titles in which such ancient mortgages appear simply to name the mortgagee and include his interest, if any, in the "shot-gun" statement that each and every of the defendants has some right, title or interest in or lien upon the premises, etc. It is the speaker's notion that such a method of quieting title against the unreleased mortgage may be such as to raise considerable question.

Another situation that is noticeably prevalent, particularly since the boom days

beginning with 1940, is found in connection with installment contracts for sale of real estate. In many instances, the contract and deed is executed and acknowledged of even date and these documents placed in escrow. The contract provides that the vendor shall furnish an abstract showing marketable title, which abstract he proceeds to procure shortly after the date of the agreement, and when it is obtained and examined, objections of title are reported requiring the suit to quiet title. The vendor immediately and in his own name files the action and does not allege the interest of the vendee under the contract. A few months later, he obtains a decree quieting title in himself. Finally, after some years, the contract is paid off and a deed dated some four months prior to the decree is delivered to the vendee. Of what effect are such suits to quiet title when the plaintiff has partd with his title and is no longer the real party in interest? Does the statute which holds that subsequently acquired title enures to the benefit of the grantee aid this situation in view of our other statutes requiring that all actions be prosecuted in the name of and by the real parties in interest?

A further situation has been found, at least in my county, in a great number of deeds given up to 1907. Literally dozens of these deeds were signed by the husband only and contained a stock form statement "that the land conveyed is not the community property and is not resided upon by the grantor or any member of his family and has not been declared upon as a homestead." Such deeds of course are sufficient if the facts stated really existed, but it is not apparent that such statements were erroneous in part, were surplusage as to another part, and which could not possibly be binding upon the wife in the event that any member of the family did reside upon the premises. The question follows that in the face of inability to obtain quitclaim deeds from the spouse or to obtain competent proof as to the non-residence on the property, is an action to quiet title against the possible interest of the wife indicated?

Finally, a situation has been developing in the jurisdiction with which I am most familiar which offers some dire possibilities as to titles based on Probate proceedings if the reasoning of the lawyer or lawyers raising the issue is well founded. At least one prominent western attorney has been demanding in all cases wherein a Probate record appears and in which there were minor heirs for whom no guardian ad liteu was appointed that quitclaim deeds be obtained from the parties who were minors or that competent proof be supplied to evidence the fact that each of such minors attained an age of at least five (5) years beyond majority and while under no disability. The theory for this demand, of course, is premised upon the contention that if the minor heirs had or might bave had an interest in the estate, and if they were not represented by guardian ad litem, they have never been in Court, and the Decree of Distribution holding that the property, for example, was community property and succeeded to by the surviving spouse is without effect as to such minor heirs. It is noted that in very few of the Probate proceedings throughout the state have guardians ad litem been appointed in such instances. It has been my practice to secure the appointment in such instances, largely because of the desire to avoid the raising of the question on any subsequent examination should the abstract come into the hands of attorneys who are making this contention. As against the contention, we have both the constitutional and statutory provisions that the Probate Court has exclusive jurisdiction of Probate matters, of the property concerned, and the persons interested, and further that the determination by the Probate Court that property was community property is conclusive, and on these provisions, the Bar as a whole has apparently placed great relience during the last 57 years of Statehood, and if such reliance has not been well taken, then we can visualize where the titles in Idaho are in a deplorable condition. In attempting to assay the worth of the contention we have been discussing, the following situation

bas occurred to me as the likely basis for the reasoning before mentioned and while so far it is entirely suppositious, it is not beyond the realm of probability.

John and Mary Workhard, husband and wife, come into one of our rural counties wbere they reside for some 4 or 5 years, during which they they are both diligently employed and apparently frugal in their habits. At the end of such period, they suddenly purchase a ranch property for say $10,000.00, which is paid in cash, and the deed is given in regular form to John Workhard. A few years later, John dies intestate, survived by his wife Mary, his son Bill, and 160 acres of valuable land. This being in a rural type of county where the Bar is limited in numbers, the widow is not met at the gates of the cemetery by a legal escort to accompany her home and to assure her of the absolute need for immediate Probate proceedings. But after a few months of lonely widowhood, Mary feels the need of communal bliss, and proceeds to fall with great gusto for the piano player at the Rainbow Night Club, and who after a short time, persuades her that the opportunity of a lifetime is presented in the establishment of a new night club at Frog Hollow. Thereupon Mary proceeds to find a buyer for the place and, of course, is required to administer her husband's estate, for which purpose she employs a lawyer and when he asks the usual stock question as to whether or not this was community property acquired by the husband and wife during their coveture, she replies "Of course it was. John and I worked hard, and we bought this property out of our savings"—and so the Petition appears in Probate Court alleging that the aforesaid land was acquired by John and Mary during the existence of their marital relationship and by their joint efforts and earnings and was their community property. In four months, the land is distributed to Mary, and she sells it and the night club at Frog Hollow is duly established when lo and behold, Covernor Robins comes into power for a four-year term and causes to be enacted into law the retail sale of liquor by the drink and the suppression of all night clubs. A few years later, we find young Bill Workhard employed at a service station at Shoshone when one day a motorist drives in inquiring the way to Sun Valley and informs Billie he is from Red Top, Iowa, and by crackie he is going out to Sun Valley to catch up on his ice skating. When he hears he is from Red Top, Iowa, Billie's ears perk up because he remembers that his Dad was supposed to have been raised in that vicinity, and he mentions the fact to the visitor. Without prolonging my story, it develops that the visitor is none other than Billie's uncle, and he expresses great wonderment that Billie is working in the service station instead of owning it, and he inquires whether Billie did not receive a substantial amount of money from his father's estate, to which Bill says "No." The Court held that Ma and Pa earned the place, and she was entitled to all the money, and she lost it in a night club in Frog Hollow. Whereupon Uncle John says "Well, by crackie, your pa and ma didn't buy that land out of their money —it came from our Great Aunt Eulima. When she died, she left me $10,000.00, and she left your dad $10,000.00 in cash, and I know he used that money to buy the ranch because he wrote and told me that that was what he had done with it, and I was the feller that sent the draft to pay for the farm." Well—Billie is now 24 years of age, and by law he was entitled to an undivided one-half interest in the land owned by his father *at the time of his death.* He knew nothing about the law of inheritance. He was not represented in Court, and he now comes to your office with great gusto inquiring what, if anything, can be done to aid the situation. I have the notion that young Billie Workhard has a claiin which might cause considerable concern to the purchaser of the old farmstead.

PRES. KNUDSON: Thank you, Mr. Swanstrom, for your very interesting discussion.

We will now hear a discussion by Wm. J. Brockelbank, Acting Dean, College of Law, University of Idaho.

DEAN BROCKELBANK: Mr. President, members of the Bar of Idaho: May I divert your attention, for a minute or two, from the subject at hand to make you a one-minute report about what is going on at the law school at the University of Idaho. I gave you the law school report last year, but this one is going to be wrapped up in a postage stamp.

First of all I want to announce that we have appointed a new Dean, Edward S. Stimson, to take that position beginning on September 1st. I am very sorry indeed that Dean Stimpson is not here to get acquainted with you at this time. I was on the committee that helped to choose him, and I am very much in favor of this choice made by the university, and I shall do everything I can to get him acquainted with you. I know that he is very keen on the proposition of selling the college of law to the Bar of Idaho, integrating our efforts as being under one common project.

We have also had a good deal of unsettlement in the law school from the time of the close of the war because of inadequate salaries, and the constant movement of personnel. I think that will be cured. We have, at the present time, five professors to begin work at the opening of the semester term, and I think conditions will be much better and we will be able to do more for the Bar. And I assure you that that is our constant desire, to work for the Bar and to work with the law of Idaho.

Now to come to the subject of a possible publication on a suit to quiet title in Idaho.

I did not have, before coming to this meeting, the advantage of reading Mr. Swanstrom's paper which you have just heard, but Mr. Swanstrom kindly told me in a general way what he expected to say.

What I now propose is to give you my own ideas, and I hope for the most part that they will either confirm Mr. Swanstrom's paper or be in addition to it.

In discussing what should be covered by any publication to be put out by the Bar in cooperation with the College of Law on the subject of the Suit to Quiet Title, I would be in favor of:

1. Keeping the subject broad enough to include all questions in real property in whatever form presented. After all, the suit to quiet title is only the procedural means of obtaining a remedy for defects in title. The procedure is important—very important, but it is also helpful if we can keep our subject matter broad enough to include discussion of *every* question in real property that may be of interest to the bar. To take only one unusual example: Somebody asked not long awo, "Is it possible to have a fee tail in Idaho?" Most lawyers when asked that question are almost completely indifferent to the answer. But the Idaho law on this matter has been discussed. Mr. Walter Anderson, citing I. C. A. 1932 §54-203 says, "No" and Mr. Gray (in the 4th Edition of Gray on Rule against Perpetuities, §19, Note 4) says "Yes." One of my students recently wrote a paper on the subject and his conclusion is "Yes." I want the subject matter of our new publication to be broad enough so that it would be appropriate to print such an article. The question may be important.

2. We should continue and complete our work on standards for title abstracters. Much work has been done on this by a committee of which Mr. Van de Steeg was chairman in 1942. (See Proceedings, Idaho State Bar, 1942, page 157 et seq.) The work was further extended by Mr. Racine's committee, and Mr. Ennis reported on that at our last meeting. (See Proceedings, 1946, page 120 et seq.) These standards have now been collected and published in the Nixon-Schooler Digest. However, it is probably true that more work on standards can yet be done, and as the bar completes its work the additional standards should be added. I believe the men who work on standards could profit from the discussions of standards that have been held in other states. I am thinking particularly of the Nebraska standards. They are published and discussed in 19 Nebraska Law Bulletin, pages 102-103, and in 20 Nebraska Law Review, pages 346-356. Incidentally, when any lawyer of this state wishes to consult such a work as the Nebraska Law Review, I wish he would write in to the College of Law and ask for it. Even if you don't have the exact citation, or any citation at all, we want to help you. We have a very fine collection of law books and I want the bar to make use of it.

We are all aware, however, of the fact that the observance of so-called standards will not protect a client in every case. Perhaps the fact which the standard assumes, and which will normally be true in 99 out of 100 cases, will turn out to be false in a particular case. This is illustrated by the story of the insane woman in the asiyum at Blackfoot for thirty-eight years and still in good health—told by Mr. Donart at our last meeting. But while standards may play a trick on a particular lawyer in a particular case, still it is a risk which all of us must take, and it does shorten the labors of the abstracter. Therefore, we should continue to create standards, to publish them for everyone to read, and to observe them faithfully. Of course, standards are not law. And what we need most is a correction in our recording system.

3. We must continue and finally bring to a head our discussions on some workable method to simplify the whole subject of titles. I refer to new legislation that will bring the law of Idaho into line with the best methods that have been tried and found successful in other states.

We have discussed these matters in the past but they have borne no fruit. They have not resulted in a legislative text which we could get behind, and have enacted into law by our legislature. We are not agreed on a system. The Torrens system has worked well in Canada and New Zealand, but apparently there are some constitutional as well as practical objections to its adoption here. (See Bardwell, The Resurrection of Registration of Title, 7 Univ. of Chi. L. R. 470, 1940; McDougal and Bradner-Smith, Land Title Transfer, 48 Yale L. J. 1125, 1939; and Powell, Registration of Title to Land in the State of New York, 1938; Reviews of Powell's book are given in 24 Corn. L. Quar. 557, 23 Minn. L. Rev. 874, and 16 N.Y.U.L.Q. Rev. 510, 1939). There are other systems of recording and various statutory devices to shorten the work of the abstractor. Mr. George Donart put out a plan for simplification in 1945 and he discussed this at our last meeting (See Proceedings for 1946, p. 43). Whether this is the best of all possible plans, I am not the one to say. But I feel that Mr. Donart's plan is a step in the right drection and we should take it up again, agree to it if we can, and if we cannot then use it as a startng point and by amendment create something better and agree to that. Or if all that is not possible, we may wish to plow new grotnd entirely. But we should do something.

If we wish to plow new ground we should examine some of the statutes that have been passed to remedy the basic difficulties we are working on here. Since 1939, statutes have been passed in Illinois, Indana, Iowa, Minnesota, and Wisconsin. (Ill. Stat. Ann. Smith-Hurd, Supp. 1944 Ill. Laws of 1941; Vol I. p. 754; Indiana Acts of 1941, Ch. 141 §I p. 428; Iowa Code (Rechman 1939) §11024; Minn. Laws 1943, Ch. 529; Wis. Laws 1941, Ch. 293.) We need to examine and compare all of these and if necessary create our own text to synchronize properly with our system of community property.

The last statute I know of on this subject is the Michigan statute of 1945. Mr.

Paul Ennis, in reporting for Mr. Racine's committee at our last session, mentioned it and it is printed in our proceedings (see Proceedings 1946 p. 121). A critical analysis of the statute by a real property specialist, Ralph W. Aigler, is printed in the August 1945 issue of the Michigan Law Review (44 Mich. L. R. 45 1945). The basic idea in the Michigan law is to make it unnecessary, in the normal case, for the title examiner, with certain exceptons, to pay any attention to matters in the chain of title that occurred prior to a fixed time in the past. Something like this has been going on in Idaho by informal agreement of the lawyers, and the period is reduced to thirty years or sometimes twenty-six years (see Proceedings 1946, p. 44). The differences is that in Michigan the remedy has been applied by *statute,* and defects in the chain of title farther back than forty years are barred from further litigation.

With the Michigan law we should study and compare the Wisconsin statute. It was passed in 1941 (Laws of Wis. 1941 Cr. 293). Here the period adopted is thirty years. This statute is ably presented and discussed pro and con by Mr. Tulane and Mr. Axley, two Wisconsin lawyers, in the 1942 Wis. L. Rev. at p. 258.

I am not prepared to say whether the Wisconsin law or the Michigan law is the better one. This must be done after longer study than I have been able to devote to the matter, and it sbould be done by a small group of title specialists. But however this body wishes to proceed, it seems to me we owe it to the public to simplify our law. There is no body other than the organized bar to do this job. So we must keep at it. Nothng less than the professional standard of the whole bar is at stake. Today one lawyer spends hours and sometimes days examining an abstract. A week or a month from today another lawyer will do the same work over again, sometimes coming to a slightly different conclusion from the first lawyer. As each lawyer must charge a fee commensurate with the time spent on the abstract, it means a heavy expense for the clients. Land costs more, interest rates are higher, and transfers are slower, all because this laborious routine has been followed by not one lawyer but by dozens. Soon the public will call the whole business a "racket" and every one of us a "racketeer." If we are to save ourselves from this unpleasant reputation, let us create our own legislative remedy. If we don't we may wake up some morning to find that an outside organization, unschooled in the law, has shoved down our throats a system that is far less suited to the needs of the state than the worst one we could have put through ourselves. So the new publication must give this subject a prominent place. In fact, as I see it, that should be the immediate objective.

PRES. KNUDSON: Thank you Dr. Brockelbank.

We will hear from Dana E. Brinck of Spokane, Washington. He will make some remarks in connection with land title systems.

JUDGE BRINCK: Mr. Chairman and Friends: A few weeks ago Mr. Smith asked me to comment on the discussions at last year's session regarding the various forms of title evidence by a representative of a title insurance company, by the president of the Idaho Abstracters Association, and by a number of lawyers. In the time remaining I could not properly prepare to discuss the subject. I did not realize until Mr. Swanstrom's talk today that I had also a subconscious reluctance to discuss it because of the rather delicate nature of the subject; that title insurance and other substitutes for our abstracting system tended to take away business from the lawyers.

I am not a practicing lawyer and have not practiced for some 23 years. I don't earn any money by fees from examining titles or bringing actions to quiet titles and perhaps shouldn't discuss a subject touching the business side of a law practice.

However, while I was practicing, I examined them with the thought that some other attorney might find some defect I had passed and my client would never

forgive me for not raising it. I felt that we were not and could not be sufficiently paid for the time spent and the risk we were taking. And it may not be wholly bad if some of that business is taken away from the Bar, if there is a better system. I do not know that there is.

While many abstract titles would be held unmarketable, I think very few titles of an honest claimant in occupation are in fact defeasible. In the 16 years I have been with the Federal Land Bank of Spokane, our legal division has examined titles for $200,000,000 worth of loans, and when I went there there had been an accumulation of 10 or 12 years of mortgages that were based on title examination. In all that business I do not think the Federal Land Bank has ever lost a dollar through an actual defect in a title. There may have been many defects preventing the titles from being marketable, but the titles could not have been taken away. The objections made to abstracts in general are to marketability of title, though there is no actual danger of loss of title so it may be that we are not justified, from the standpoint of serving the public or our own clients, in clinging to the abstracts and the cumbersome system of attorneys' opinions regarding them if something else is better.

I have made some study of the subject, and in the light of my experience I think some changes are desirable. The Torrens system is not a live subject here and is not worth discussing now, and I am not going to discuss it at length. But the legal departments of the whole Farm Credit Administration, during the 16 years I bave been up there, have discussed the subject of title evidence each year at our annual conferences. They feel they should do something to get a system that will furnish title evidence to the landowner and land purchaser in a shorter time and at less expense than under the prevailing system. Last year the attorney in charge of the legal department at Washington caused to be prepared a suggested draft of amendments to the standard Torrens law which he thought ought to be explored and considered, and I was asked to present it at the conference of our general counsels last fall. I did so, after doing some intensive work studying the Torrens system, and I can best shorten my remarks and say something that might be of interest to this Bar if I read a few paragraphs out of the paper that I prepared for that conference.

I discussed what I felt were the weaknesses of the Torrens system and stated that I believed the great majority of lawyers who have had practical experience would agree with the conclusions of Professor Powell, mentioned by Dean Brockelbank today and discussed at last year's meeting of this Bar, that the Torrens system is not practical and not workable, except in strictly urban communities. It is operating in the counties of Hennepin and Ramsey in Minnesota—Minneapolis and St. Paul—Cook County, Illinois, and a few other counties where there are unusual conditions in states where the system is operated at all. But it has never succeeded in being established successfully in sparsely settled or rural communities in this country, largely because of the expense of the initial registration if due process is to be had, and we as lawyers feel that due process is necessary. This is what I announced as my conclusions:

"It is my considered opinion that some form of title insurance is eminently preferable to any suggested system of registration. Aside from the impracticability of a mandatory Torrens system, it seems more sane, simple and just to insure against loss the person who takes a title or an interest in or upon real estate, rather than to endeavor to make his rights conclusive and insure against loss the persons whose right he shall have acquired. This avoids all questions of due process and the rights established would be free from uncertainty. No person would lose his property unjustly and any purchaser or lienor whose title should fail would be insured against loss. Private companies now fill this field in many localities, but they do not and probably will not operate everywhere, they may be insolvent or withdraw from the

field, and their premiums are ordinarily subject to no control. Insurance by the state, involving usually constitutional amendments but nevertheless probably practicable, would remedy these particular deficiencies.

"There are several arguments against state insurance and obstacles in the way which have led me to believe that no state would undertake it. That belief has been somewhat shaken by a proposal sponsored in Idaho by an able and experienced lawyer-legislator, now the candidate of his party for the United States Senate, which is having wide and serious consideration by the State Bar and many legislators. His proposal is for a state examiner and staff upon whose favorable report of examination of an abstract as its exists, or as title may be perfected, the State would issue a policy insuring the then owner and any subsequent party to the title against any defect existing at the date of the examination. Later transactions would be evidenced by abstracts from that date which would in turn be the basis of later insurance when desired; new policies with each transaction would not ordinarily be required, the existing policy and the ensuing short term abstract being ordinarily acceptable. Such a plan would tend to meet the practical need of communities where satisfactory private insurance does not exist and would dispense with the need for examination of the same long titles by successive attorneys, with their differing opinions, which is a curse of our existing system.

"But where private companies, with proper management and resources exist, it would seem that the state need take no further steps than to see to it that their financial responsibility is maintained, that their policies are for the benefit of any subsequent taker, and, that their rates are supervised so as to allow a reasonable but not an excessive return. Reissue rates are not graduated to the elapsed period since the last policy was written nor to the number of transactions covered, or other considerations which should effect the cost of reissue. I see no reason why the business could not properly be declared in the nature of a public utility and supervised as such.

"The fact that insurance premiums are graduated according to the value of the property rather than to the amount of work involved is very salutary. The heavier the cost, the better able is the property owner to bear it and vice versa; and a purchaser of unimproved property can improve it and take out additional insurance at will.

"It is my view that we can profitably explore the possibility of extending geographically the field of title insurance and of developing proposals for recommendation to interested organizations to bring about proper state supervision and regulation of title insurance or some form or measure of state insurance. I believe that our efforts in this direction would not be wasted and could have some constructive effect. I do not believe the same can be said of any attempt to sponsor the extension of a registration system, much less a mandatory one."

I then quoted 3 of Professor Powell's conclusions as set out in his "Registration of the Title to Land in the State of New York." That book, which has already been mentioned, is the latest and most exhaustive discussion of the general subject with which I am familiar, and the following of his conclusions seem pertinent here:

"1. That a registration law must be mandatory in order to cause substantial use.

"2. That any mandatory provision is unjustified, because it is not reasonably probable that it would operate better than records, and the collected evidence indicates that title registration involves difficulties, expenses and persounel problems more troublesome and more irremediable than those encountered in recordation. . .

"5. That the insurance laws should be expanded so as to bring within the supervision of the State Insurance Department the rates for original and reissue title insurance and the form and extent of the exceptions to their policies."

I think that last recommendation is a very sound one in connection with any form of title insurance. In addition, I would like to suggest that the deposit in the state be by statute made primarily for the benefit of those who are insured within the state. I think our law should permit an Idaho insurance company to go outside of the state, but I think the law should provide that the deposit required within the state be primarily responsible for losses within the state.

Now, as to the adjustment of rates, I don't know that any rates are in vogue in this area not entirely justified. The rates in Idaho are exactly the rates of Oregon and Washington, and they, in turn, are practically the rates of California, which I understand, although I am not sure, are subject to approval by some state officer.

I discussed that phase of these recommendations with some of the men interested in the present private insurance companies that are operating in this state, and I think they agree that it would be better for the insurance company, in establishing confidence of the public, if the rates were subject to approval by some state authority. I also think that they would be inclined to favor a recommendation that we have made and others have made that the reissue rate, which is, I believe, three-fourths of the original rate of the original policy, be modified and further reduced. It should be substantially reduced where a reissue is required within a few months or a year. That would meet one of the worst objections we have found. The worst burden we have found in title insurance is the necessity of duplicating a reissue rate within a very short time.

It will be of interest to you, I think, for me to read another two or three sentences from a memorandum I prepared in October, 1933, when the application for loans and title papers were coming into our legal department at the rate of some 200 or 300 a day for title examination. We were naturally quite desperate to get that work done. We had 33 lawyers in there examining titles, and I wanted to have a requirement of title insurance where it was available, which was in about two-thirds of the counties of Oregon and Washington. I reported to the Executive Committee of the Bank as follows:

"I have had the title insurance companies operating in Oregon and Washington ask their affiliates whose abstracts they insure to furnish us a list of all abstract charges made borrowers from the Land Bank and the Commissioner during the past 90 days, showing the amount paid for abstracts and the amount that title insurance would have cost.

"I find that in the counties affected, which included only those in which all abstract companies can furnish title insurance, the average cost of abstracts has been 34% in excess of what the borrowers would have paid for title insurance. To show how evenly this average persists, I averaged Washington and Oregon cases separately and found that in the Oregon cases abstracts averaged 34.5% greater than title insurance, and in the Washington cases 33% greater than title insurance. The average expense per loan was $7.00 greater than would have been the expense had title insurance been furnished.

"There are, of course, many cases in which title insurance is more expensive than the necessary abstract continuation. In 84 out of 208 cases the expense of insurance would have been greater than the abstract charges paid. The difference varies from a few cents up to, in one case, $25.50. On the other hand, the cost of abstract has exceeded the cost of title insurance in much larger amounts; in one case the difference being $150.00. The excess cost of title insurance where it exists is ordinarily not more than $5.00 and in a few cases $10.00.'

These statistics and our practice may be of some help to the Bar in considering whether it wants to give any further consideration to this subject, discussed at so many meetings. I agree fully with what the Dean said about the necessity of the Bar doing something about this. Otherwise the laymen will take it in their hands, I believe, and force upon you some unsatisfactory system, as was attempted in all good faith by a very influential farmers' organization in Washington 2 years ago. They presented a bill for an amendment to the Torrens Act which would have simply stymied all business. It was a mandatory requirement that was utterly impractical, and it was defeated. This last year this organization, having discovered that there were some legal objections to their system, got a professor at the University of Washington to draw a Torrens bill which was a very fine scientific bill and would have worked except it would have been too expensive.

I am just giving you experience and conclusions from the standpoint of a large institution dealing with a great many titles over a large area, and it may not fit the individual views of the attorneys representing individual clients whose interests cannot be spread over such a large volume.

J. L. EBERLE: May I comment? I have made a thorough investigation of title insurance with particular reference to Idaho, because for a number of years our firm has had repeated requests by non-resident clients for title insurance in Idaho. They have refused to accept either abstracts or our opinions. The other reason was from the selfish motive of the effect upon our own business.

The first thing apparent was that the public demand was such that no Bar association could stem the tide of title insurance. The more recent developments, of course, have been in regard to cost. In Seattle, in 20 years, title insurance has grown from nothing to 99.9% insurance on all titles. We found that in various states the Bar associations have worked with the title insurance companies, because they all knew that no lawyer and no abstract company could give 24 or 48 hour service. Their system was that the title companies would always make a report showing the objections and exceptions. They would recommend that the person asking for the title insurance take that report to his lawyer. The lawyers throughout the western cities, in Seattle, Portland, Los Angeles and San Francisco, told us that the individual who would have brought his abstract to the lawyer brought the title report, because he knew more about those exceptions than he would about the abstract. All are charging the same fees for the examination of those reports and without the necessity of examining the abstracts.

I do not agree with the statement made here that the title insurance has driven business from the lawyers and the Bar associations.

In Twin Falls, as you know, Chapman, Parry and Gray have the title insurance company. Their advertising is, "See your lawyer and take your title report to your lawyer."

The same $15.00 and $20.00 charges are being made by the lawyers to examine those title reports in which the conditions are set forth upon which a title may be insured.

Now as to the suggestions of Judge Brinck: We either socialize the title business and turn it over to the state, or we cooperate with private industry, the insurance companies, to the extent where we retain the legal phase of determining whther these exceptions are valid, whether they are such that we shall accept those exceptions. California lawyers have told us that a good many times they take these reports to the title company, and they talk them out of certain ones, or they remedy them and make it so the title will be insurable.

Title insurance has grown during the past 20 years. There is no stopping it in this state or any other state. It is the only satisfactory and efficient service to the people. By cooperating with these companies, we can retain the business, and there is no reason why we should lose the business. There is no reason why we can't examine those reports and get the same compensation for a lot less work.

HARRY BENOIT: The reports that have been brought to my office in Twin Falls say, for instance, the title is all right with the exception of the taxes for 1946 or a mortgage or 2 or 3 other matters. Am I to write an opinion and tell them the title is all right with the following exceptions and hand back to them the same opinion given to them by the title insurance company?

In Oklahoma, where I stopped recently, when title insurance is brought to the lawyers there, they tell them, "You have got your title insurance. They have told you what is the matter with it. If you are satisfied, all right. But if you want to know what your title is, you bring also an abstract of title." And a lot of the agencies in Oklahoma will not accept title insurance without an abstract of title too.

So far as I am concerned, when a client of mine comes up to my office with a report, I say, "I don't know a thing about it. Your title insurance specifically states what is against your property just as I would, possibly, upon examination of your abstract." I don't see where I would be justified in taking that title insurance report, write an opinion verbatim of what appears in the title insurance report and then charge him a fee for it.

J. L. EBERLE: We are not doing that in Boise. They are not doing it on the coast. When a man comes to you with a title report and asks you whether those exceptions are serious, you explain it to him. If there is a mortgage you ask him if he understands that he is assuming it when he buys the property. Is it his understanding that he assumes the taxes; and so on until you get all through with it. You are charging for your opinion $10.00 or $15.00 or $20.00. You don't have to write an opinion. He may say he wasn't going to assume those taxes, and we tell him that if he is taking this title insurance he is assuming them. He may decide to go back to his seller and have the seller clear that item.

HARRY BENOIT: You are just giving him an oral opinion?

J. L. EBERLE: That's right, and they are doing it on the coast, and we are doing it in Boise.

EDWIN SNOW: At the last annual meeting of the Idaho State Bar Association several able papers were presented on the problem arising from the fact that abstracts of title to real estate have, in some instances, become so voluminous that the expense of their preparation and examination has become a serious burden upon real estate transfers and mortgage loans. Particularly is such the case where a large tract of land is subdivided into small parcels or lots. Not infrequently in such cases the cost of the abstract of title consumes a large proportion of the value of the lot involved. Indeed, sometimes such cost of abstract may equal or exceed the value of the lot. All communities having a recording system such as ours inevitably encounter this problem as they grow older and as land passes through a lengthening succession of ownerships. Moreover, in these papers and the accompanying discussions, attention was called to hazards in real estate titles which the public records and hence abstracts of title based thereon do not disclose.

At that meeting Mr. Ernest T. Skeel, of Seattle, addressed the association, presenting the advantages of title insurance as a solution of the problems under discussion. Mr. Theo. Turner, of Pocatello, presented the viewpoint of the abstract of

title companies; and Mr. George Donart, of Weiser, urged, as he had previously suggested at earlier meetings of the Bar, that a state agency be created wherein, at the option of an owner, his title could be registered, and, as of the date of such registry, guaranteed and, in effect, insured by the State of Idaho. These several addresses or papers with the discussion thereof appear in full in the published "Proceedings of the Idaho State Bar" for 1946.

Pursuant to a resolution adopted before adjournment of the last annual meeting, your commissioners appointed a committee to give study to the papers above mentioned relating to title insurance, abstracts of title and the presented plan of land and title registration, and to submit a report at the next meeting of the Bar containing definite recommendations. R. P. Parry, of Twin Falls, Judge O. R. Baum and Ben W. Davis, of Pocatello, and the writer, as chairman, were appointed as such committee. The fact that the members were located so far apart made consultation and interchange of views a matter of difficulty. This report constitutes the general viewpoint of a majority of the committee. Any of its members who may be present at this meeting will doubtless supplement this report with respect to specific points.

In addition to the expense of voluminous abstracts of title, there is growing recognition of the fact that many infirmities of title in their nature cannot be exhibited by the public records. Human fallibility in the recorder's office occasionally causes a mistake in indexing or in copying. Fraud or forgery invalidates instruments apparently good on their face. The recording of a deed or other instrument does not necessarily establish its proper delivery—without which, of course, it is ineffective except as against an innocent purchaser; and often slight evidence of possession or dominion exercised by the true owner is construed as sufficient to put a purchaser, otherwise innocent, upon inquiry. Instruments of minors or incompetents properly executed, valid on their face, and regularly recorded may be ineffective. Marital status—that is, the fact or time of marriage, frequently affects titles. Such facts may not, and usually do not, appear of record. Roads, ditches and pole lines, or other visible and existing easements may create infirmities of title not shown of record. In addition to these hazards, impairment of title to property or to its enjoyment may arise out of zoning and building restriction ordinances not apparent from the county records. Income tax and inheritance tax liens of the United States or of the state nowhere recorded may bob up to plague a purchaser relying upon an abstract of title.

Mention is made of these things merely to indicate that the time has arrived or is fast approaching when the various contingencies affecting titles are such that the simple methods of other days are inadequate; and that some form of insurance of titles is required.

This same development has occurred with respect to other matters than titles to real property. It is a commonplace that the ordinary citizen who lives in his house and drives an automobile, nowadays protects himself by multiple coverages of insurance against fire, accident, theft, public liability, property damage, and other hazards. Business men generally, in these times, find it not only prudent but indispensable to protect themselves against all sorts of other special risks. We have recently seen in Idaho the overdue enactment of a law making the carrying of certain insurance compulsory. The necessity for title insurance, like other forms of insurance is in large part an incident of the increasing complexity of modern life.

The question then seems to be—if some form of insurance of titles is desirable, what agency can best perform that increasingly desirable function? Attempts have been made in some of the states to introduce what is known as the Torrens system

of registration of land titles, originally used in Australia. In those states where it has been enacted into law this system seems rather to have complicated than simplified or solved the problem of security in titles. None of the papers or comments on the subject of land titles before this Association has advocated the adoption of the Torrens system. In neighboring states, such as Oregon and Washington, where it has been adopted, little, if any, use has been made of it and it is generally pronounced a failure.

Mr. Donart, in his address before this Association a year ago, proposed a simplified system of title registration briefly described as follows:

A state corporation or agency would be set up which, at the request of the owner of property, would register his title and guarantee it; a title examiner for this agency would be appointed, perhaps by the Justices of the Supreme Court. The officer so appointed would, upon application of a real estate owner whose abstract was becoming unduly voluminous, make examination of the abstract and recommend that the state issue its certificate that the title was clear or that it was clear except for certain liens. The state, for a proper fee, would guarantee that such was the state of the title; and thereafter when the owner transferred his property, his abstract would start with that certificate.

Mr. Donart in no respect favored the compulsory Torrens system. In brief, he advocated title insurance, saying, "I don't care whether it would be the State of Idaho or some other organization, if it could be perpetual and you knew that it was solvent." He expressed the opinion that if any such agency was established by the state, it would first be necessary to amend the state constitution.

It seems to your committee that by the time the constitution is amended and the proposed state agency is authorized by law and set up, it would be superfluous because by that time title insurance by private enterprise will have developed to the point where it will be in general use.

In Mr. Skeel's address last year, there was presented a table showing that beginning in 1910 and up to 1941, the percentage of real estate transactions in Seattle covered by title insurance had continuously increased from 0% to 99.99%, at which latter figure it has been since maintained, there having been in recent years practically no real estate transactions covered by orders for abstracts of title, and practically no titles registered under the Torrens system which is also authorized in Washington. Substantially the same situation obtains in Los Angeles and other West Coast cities.

In Idaho the recent increase in the use of title insurance policies has been striking. A few years ago practically every real estate transfer or mortgage loan was accompanied by an abstract of title. Title insurance was almost unheard of. Today the representatives of title insurance companies claim that such insurance is available in every county in Southern Idaho except Gem County and Washington County, and that it is only by reason of special conditions relating to the abstracers of title in each of those counties that such insurance is still unavailable in those two counties. The title insurance companies claim that between 40% and 50% of the transfers in Ada and Cayon Counties are covered by title insurance, and that the percentage is somewhat higher in Twin Falls County and adjacent counties; that it is extensively used in the Idaho Falls area and to some extent in Bannock County. It is also claimed to be available and used in some of the counties of North Idaho. There is no doubt that generally in Idaho its availability and use is extending rapidly.

The Idaho Legislature, both in 1945 and in 1947, has passed special acts for the regulation of title insurance companies. Under these laws, any title insurance

company doing business in Idaho must provide a minimum guarantee fund of $25,000.00, to be deposited with the State Treasurer for the security of policyholders, with a graduated increase of this deposit for any company that does business in counties having a combined population of more than 100,000. The law further provides that each year 10% of the net premiums collected by each company shall be set aside and held by it as a "Title Insurance Surplus Fund" for the further protection of its policyholders until there has been accumulated an amount equal to 25% of its subscribed capital stock. Under the law, the form of policy which title insurance companies may issue is subject to the approval of the Commissioner of Insurance.

In brief, a substantial beginning has been made looking toward the establishment of title insurance agencies possessing the qualities of solvency and continuity. It seems to your committee that it is undesirable at this time to advocate or encourage the establishment of a state agency to duplicate a facility that private enterprise can probably better furnish.

The form of title insurance policy in use in Idaho, while insuring only the specific party insured and his heirs, provides on its face that it may be assigned. For instance, suppose Smith buys a tract of land today and accepts a title insurance policy as an assurance of the title he is getting; suppose six months from today Smith sells the property to Jones. Jones may do one of two things: First, require Smith to pay the premium on a new title insurance policy insuring the title to Jones; or secondly, he may accept an assignment to himself of Smith's policy, thus insuring Jones against any defects in Smith's ttle up to the date of Smith's policy. And, in addition to the assigument, Jones may require of Smith an extension abstract of title disclosing that there are no instruments of record adversely affecting Smith's title since the time the policy was issued to Smith.

It would be desirable if a fonn of title insurance policy could be devised or required by law which, like an abstractor's certifcate, inures to the benefit of any persons thereafter relying thereon. The title insurance policy would thereafter operate in effect as an abstract of title showng merchantable title up to the date of the policy. Thereafter, successive owners might either procure new policies of insurance or procure extension abstracts of title brought up to date showing the record history of the title from the date of the last title insurance policy.

To summarize:

(1) It is felt by your committee that some form of title insurance should be available to eliminate the expense of abstracts that have become so voluminous and hence costly as to put an undue burden upon real estate transfers and loans; also to obviate many hazards to titles that may not be disclosed by the records of the county recorder's office or abstracts of title based thereon.

(2) That such insurance can be better provided by private enterprise than by the state.

(3) That the Bar interest itself in further legislation requiring that title insurance policies inure to the benefit not only of the immediately insured but also to the benefit of subsequent purchasers or lienholders relying thereon.

(4) That to the fullest extent practicable, the present required guarantee fund of any title insurance company be increased as the aggregate volume of its outstanding insurance increases, and that the size of the guaranty fund should be related not as now to the population of the area in which the company operates, or to the amount of its subscribed capital stock, but to the amount of its outstanding policy liabilities.

(5) The possibility should be explored of requiring that in case of policies of large amount, reinsurance with another company or companies be required for a certain portion of the risk.

PRES.: A discussion by Mr. Frank H. Joseph of Weiser in connection with estates and the necessity for representation of minor heirs is our next paper.

MR. JOSEPH: If this subject were presented to me in the form of a question, to-wit: "Do you believe it necessary for minor heirs of an estate to have legal representation?" My answer would be a very positve "Yes," and that answer would be supported by Statutes and Court decisions.

Let us start with the I. C. A., Title 5, Proceedings in Civil Actions of Courts of Record, Chapter 3, Parties to Actions, Sections 5-306 and 5-307:

> "5-306. Infants and Insane Persons—Guardians ad litem.—When an *infant* ° ° ° is a party, he *must* appear either by his *general guardian* or by a *guardian ad litem* appointed by the court in which the action is pending in each case, or by a judge thereof, or a probate judge. ° ° °
>
> "5-307. Appointment of guardian ad litem.—When a guardian ad litem is appointed by the court or judge he must be appointed as follows:
>
> 1. When the *infant* is plaintiff; upon the application (etc.) ° ° °.
>
> 2. When the *infant* is defendant; upon the application (etc.) ° ° °"

Reference is also made to I. C. A., Title 10, Proceedings in Civil Actions in Justices and Probate Courts, Chapter 3, Commencement of Actions, Section 10-305:

> "10-305. Infant or incompetent person—Appearance by guardian.—When an *infant,* ° ° ° is a party he must appear either by his general guardian if he have one or by a guardian ad litem appointed by the justice. When a guardian ad item is appointed by the justice he must be appointed as follows: ° ° °"

The basis upon which these Statutes are predicated is the theory:

1. That every person has a right to his day in Court and,

2. That a minor is not capable of defending himself.

In 27 American Jurisprudence, Infants, Section 121, we find:

> Section 121. Effect of Failure to Appoint Guardian ad litem.—While the appointment of a guardian ad litem for an infant defendant is not jurisdictional in the sense that failure to make such appointment deprives the court of power to act and renders such judgment void, a judgment rendered against an infant in an action in which he was not represented by a guardian ad litem or a general guardian is erroneous, and can be overthrown by writ of error coram nobis, or by motion in the same court, or by proper appellate proceedings, at least where the want of such representative affects the substantial rights of the infant."

Refer also to Church, "New Probate Law and Practice," Volume I, Part 2, Guardians and Wards, Chapter 1, Section 3:

> "(3) Appointment, and duty of court. The law in relation to the ap-

pointment of a general guardian does not interfere with the power of the court to appoint a guardian ad litem: Hydoman v. Stowe, 9 Utah, 23; 33 Pac. Rep. 227, 229; and *where a minor heir has no guardian, it becomes the duty of the court, before proceeding to act, to appoint some disinterested person as guardian, for the sole purpose of appearing for him and to take care of his interestss* Townsend v. Tallant, 33 Cal. 45,52; 91 Am. Dec. 620; but a guardian ad litem should not be allowed to admit away the rights of his ward: Waterman v. Lawrence, 19 Cal. 210, 217. It is the duty of the court to protect the rights of an infant, although he appears by a guardian ad litem, and no pleading by the guardian, which has the effect of surrendering the infant's rights, or of prejudicing his interests, should be permitted or considered; especially where it is not only subversive of all his interest, but is not necessary to the presentation and protection of any of his rights: Seaton v. Tohill, 11 Col. App. 211, 53 Pac. Rep. 170, 172. *In determining whether a guardian ad litem was appointed for an infant, the court will not go outside of the records*"

In an opinion written by Justice Morgan, in the case of Hutton v. Davis, et al, 56 Idaho 231, 53 P. (2d) 345, involving, however, not probate but proceedings on appeal from Industrial Accident Board we find the following:

"The requirement contained in I. C. A., Section 5-306, that an infant "must appear either by his general guardian or by a guardian ad litem" was not satisfied by the apopintment of a general guardian and the employment, by her, of an attorney to represent the ward. The statute does not permit the guardian to send the ward into the action, but requires that the ward appear by guardian. This means the guardian must be made a party to the action or proceeding and must appear therein for and on behalf of the ward."

In Trolinger v. Cluff 56 Idaho 570, 57 P. (2d) 333, a damage action, not a probate proceeding, Justice Budge has the following to say:

"Where the court has not obtained jurisdiction of the infant by service of process and no guardian ad litem has been appointed for him then the judgment is void."

" 'The appointment of a guardian ad litem for an infant defendant, like the appearance of a next friend for an infant plaintiff, is a matter of procedure and not of jurisdiction. That either plaintiff or defendant was without such representative makes the judgment erroneous, but not void.' 14 R. C. L. p. 286, Section 54."

" 'No effort appears to have been made to conform to the statute requiring the infant to appear hy guardian. The stipulation shows the probate court appointed his mother guardian for hm and that she qualified as such. This appointment was probably made pursuant to the provisions in the award requiring that the money therein mentioned be paid to a guardian for the minor. It is the duty of the guardian to collect and receive that money for the ward. Therefore she is, in her capacity as guardian for her son, an indispensible party to this proceeding and *is an adverse party within the meanings of I. C. A., Section 11-202, above quoted.* The notice of appeal was not served on her, nor was it addressed to her, nor is she therein named as respondent."

" 'The notice of appeal not having been served on the guardian for the infant respondent, and he not being represented here by any one having authority to represent him, we are without jurisdiction of the appeal and it is, therefore, dismissed.'

"It will be observed that the appeal was dismissed because of a failure to serve the guardian or any one having authority to represent the infant."

Naturally, it is to be anticipated that there are those of the Bar who will take the opposite view on this subject and this paper is submitted with the full realization that all legal questions are controversial subject to exceptions and different findings by various legal analyses.

It is quite probable that there are some who will question the analysis that I have made in view of the rule laid down in such cases as Connolly vs. Probate Court, 25 Idaho 35, and Walker B. & T. Company vs. Steely, 54 Idaho 591, which is in effect as follows:

"It is elementary that probate proceeding by which jurisdiction of a probate court is asserted over the estate of a decedent for the purpose of administering the same is in the nature of a proceeding *in rem*, and is therefore one as to which all the world is charged with notice."

Reference is now made to Title 15, Administration of Estates of Decedents and Wards, 15-1509:

"Rule of Practice.—Except as otherwise provided in this title, the provisions of titles 5 to 12 inclusive, are applicable to, and constitute the rules of practice in, the proceedings mentioned in this title."

It is true that the proceedings of administering an estate are in the nature of a proceeding in rem as laid down in the cases just cited and that after the probate court has obtained jurisdiction to the estate, then the notice mentioned in the cases quoted does give notice to the world. In view of the statutory requirements previously set out, my position is that in order for the probate court to obtain this jurisdiction, in the case of minors, it is necessary that a general guardian or a guardian ad litem be appointed to represent the minors in order that the probate court may have full jurisdiction to administer the estate.

Or to put it another way, *if all the statutory requirements have been met protecting the rights of those who are unable to present their claims or defend their rights,* then and in that event, the proceeding becomes one in rem and will stand against the world.

Just one further reference and that is to I. C. A. 15-1514, relating to the appointment of an attorney for devisees, legatees, heirs and creditors in the administration of an estate; the last sentence is as follows:

"The non-appointment of an attorney will not affect the validity of the proceedings."

While the sentence just quoted seems to be a contradiction of the previous citations and holdings, it is my opinion that should a controversy arise testing the strength of conflicting statutes, I believe that the provisions for the protection for the rights of the minors would prevail.

From these statutes and cases it appears very definitely that when a minor's interests are not protected, he, upon reaching majority, can come into court and demand his rights.

It would be impossible in a paper of this length to give a complete brief of the law upon this subject and I have merely attempted to outline the fundamental law. However, I would like to set up just one hypothetical situation for you.

Suppose that in the examination of an abstract of title to real property, you find the record of the probate of an estate in which certain minors are named; and suppose further, that you find no record of the appointment of either a general guardian or a guardian ad litem for those minors. Query—Would you pass title to that property as being clear? Answer—The title should not be passed as being clear because one of the minors, upon reaching majority, would have the right to come in and might come in and claim his interests in the property because of the fact that his interests were not protected at the time when he was unable to protect himself and certainly that would put a cloud on the title.

It therefore follows, as a matter of practice that in estate matters, every lawyer should diligently observe the statutes requiring the appointment of either a general guardian or a guardian ad litem to protect the interests of all minor beirs who are named or who have an interest in the estate.

PRES. KNUDSON: The next topic will be percentage leases, by Mr. Carl Burke.

MR. BURKE: A percentage lease is one wherein the tenant is required to pay as rental a specified percentage of the gross income from the total sales made upon the premises. To the ordinary covenants of a lease are added certain clauses governing the manner in which business may be conducted, how the percentage is estimated, and, finally, how it is paid to the landlord.

My first contact with the so-called "Percentage Leases" was several months ago when a tenant asked me to check a renewal lease which provided for monthly rental at the same rate as in his original lease, plus six per cent on gross income over a certain amount. The tenant seemed to be entirely happy with this arrangement, his view being that if his gross income amounted to the figure at which the percentage rate would apply he could afford to pay the extra rental. This line of reasoning also appeared logical to me.

However, in making inquiry and checking with authorities I could find, I learned that this type of lease was definitely all in favor of the landlord. It gave him his monthly rental at a rate at which his premises had previously been rented, plus a chance to cash in on a business boom. It left the tenant without any similar protection in case of a business recession.

Most authorities seem to agree that a fair percentage lease should carry a guaranteed monthly rental of some twenty to thirty per cent less than the normal rental value, but sufficient to carry the landlord's fixed charges and a small return on his investment.

Percentage leasing as applied to business property dates back to 1906 when the first lease was said to have been used on the Grand Central Terminal in New York City. Leases of this type became popular during the thirties and many merchants thought they were intended as a device to aid them in surviving the depression years. During the prosperous war years they began to evince a desire to get back to flat leases, where the landlord would not collect so much rent for the premises that were producing the fat incomes.

There appear to be five commonly accepted types of percentage leases:

1. Lease calling for a definitely stated percentage of gross sales as rental with no minimum or maximum stated.
2. Lease with a definitely indicated rental to which is added a stated percentage of gross sales over and above a given amount.

3. Lease calling for a stated percentage of gross sales as rental with a guaranteed minimum.
4. Lease with rental based on percentage of gross sales with both minimum and maximum guarantees provided.
5. Lease providing that a landlord shall receive as rental a percentage of all profits arising from occupancy.

The first type of lease should not be used except in cases where the landlord is dealing with an exceptionally strong business concern which is assured of a steady and satisfactory business. Many chain stores and strong local business concerns are in this category.

In type 2 the landlord sets a certain rental, usually sufficient to meet carrying expenses of the property, and a reasonable return on his appraisal investment, and then collects an additional percentage after a certain volume of business has been done. This is the type of lease that I was called upon to examine. The authorities seem to be agreed that this is not a satisfactory type of lease from the standpoint of the tenant for the reasons above explained.

Type 3 in which a tenant operates under a stated percentage of gross income with a minimum guarantee as to rent, seems to be the commonest and most satisfactory form of percentage leases.

Type 4 is used where the tenant wants to put a ceiling on his maximum rent.

Type 5, where the landlord collects as rental a percentage of all profits arising from the occupancy is seldom used, and a question may be raised that this type of lease takes the form of a partnership between the landlord and tenant.

A percentage lease is not recommended for all types of tenants. It can be applied successfully to those who are well established and financially responsible, have proved business records, and can successfully carry on. Also important is the class of property on which percentage leases may be imposed. Usually this is most successful in retail districts of thriving cities and towns. Secondary and low-grade property does not readily lend itself to this type of tenancy.

Some of the earlier types of percentage leases proved unsatisfactory because the tenant simply paid as minimum rental the amount the landlord would have received on a straight lease. If the tenant had a good run of business, the landlord profited. If the business did not develop, the tenant went right along paying about the same rent he would have been obligated to pay under a flat lease. The only thing the tenant benefitted from was the fact that he was not subjected to a graded lease with periodic step-ups. Most seasoned brokers maintain that a fair percentage lease should carry a minimum guarantee of from 20 per cent to 30 per cent less than the market value of the premises, but sufficient to carry the landlord's charges and a fair return on his investment.

Ever since percentage leases came into general use there has been great speculation as to whether they favored the landlord more than the tenant, or vice versa. As a matter of fact, the percentage leasing system seems to be much more equitable to both parties than the old flat or graded leasing system. In the latter, the landlord demanded all that the traffic would bear, and if the location was a choice one important firms would bid each other up into rental brackets which a great many concerns could not afford. With the percentage lease, this fault is done away with. The landlord, after being guaranteed enough to carry on his investment, gambles with the tenant as to how much rent his property will earn. If the tenant is a live

aggressive merchant, has good merchandising methods and connections, and works hard, he will win his reward, a portion of which goes to the landlord. If the merchant does not meet these standards, the landlord suffers.

Among the incidental things many percentage leases demand are:

1. Require the tenant to keep open the same hours as other competing merchants in the vicinity.

2. Require tenant to carry stocks comparable with competitors' lines.

3. Prohibit tenant from owning and operating another store in the same locality.

4. Limit tenant's right to assign his lease or to sublet without the property owner's consent.

5. Require monthly or quarterly reports on volume of business done.

6. Provide for right to audit books and check records.

7. Provide that percentages shall apply to both merchandise and service.

8. Require tenant to provide for a fixed expenditure for advertising to the end that a satisfactory volume of business is maintained.

The question of selecting a percentage rate nearly always bas two answers—one furnished by the tenant and the other by the landlord.

From the standpoint of the tenant, the percentage rate is usually arrived at by figuring what he can afford to pay for rent in a competitive market, but more frequently by what he can talk some landlord or agent into giving him. In cities where competition is excessive in the higher grade districts, either through too many competitors or competitors who have very low percentage rates, the tenant cannot afford to pay as much as in cities where these conditions do not exist.

The National Institute of Real Estate Brokers has compiled a table of percentage rates applicable to many types of businesses. This table is compiled from a survey conducted in representative small and large cities over a period of twelve months. I am inserting this table in this paper because it might be of some value as a guide to percentage rates to be applied to various types of businesses.

Types of Business	*Range*
Amusement Parks	4
Antiques	5-10
Art and Gift Shops	6-12
Auto Accessories	1-10
Auto Agencies	2-4
Auto Parts	1
Bakeries	2-9
Barber Shops	10-15
Beauty Shops	10-20
Books, Second Hand	12-15
Books and Stationery	5-12
Bowling Alleys and Pool Rooms	10-12
Business Schools	12-12½
Bus Terminals	5-7
Cameras and Supplies (See also Photographers)	7-9
Candy and Nuts	8-15
Children's and Infants' Wear	4-10
China and Glassware	6-8
Cigars, Cigarettes, and Tobacco	2-1
Dental Supplies	5
Department Stores	1-6
Department Stores, Men's	3½
Department Stores, Women's	5-8
Drugs	3-10
Drugs, Prescription	8-15
Electrical Goods	5-7
Engineers & Architectural Supplies	12½
Five and Ten or Twenty-five cents to $2 Stores	4-8
Fish and Sea Food Markets	6
Floor Coverings, see Rugs, Domestic and Floor Coverings	
Florists	6-12

Types of Business	*Range*
Fruit and Vegetable Stores	3-15
Fruit Juices	10
Furniture	2-8
Furs	6-12
Cigars, Cigaretts, and Tobacco with Luncheonette & Fountain	8
Cleaning and Dyeing	8-10
Clothing	5-8
Cocktail Lounges (see also Taverns)	8-10
Cosmetics	10-12
Cutlery Stores	7½
Delicatessens and Dairy Products	5-7
Hotels	20-40
Household Appliances and Radios	6
Ice Cream Stores	6
Interior Decorating and Home Furnishings	4½
Jewelry	6-15
Jewelry, Costume	5-15
Leather Goods	6-10
Linens	6-15
Liquor Stores	5-10
Markets, Super	1-3
Meat Markets	2-6
Men's Clothing	4-8
Men's Furnishings	6-15
Men's Hats	8-12½
Men's Shoes	5-10
Men's Tailors	6-10
Motion Pictures	12½-25
Musical Instruments	6-10
Music Dept. in Dept. Store	10
Office Appliances	5
Opticians, Optometrists and Optical Stores	8-20
Paint and Wallpaper Supplies	4-10
Parking Lots	40-60
Pens, Cards and Specialties	5-10
Pets	7
Photographers (See also Cameras and Supplies)	8-12½
Pianos	6-10
Pool Rooms: See also Bowling Alleys and Pool Rooms	10
Radios: See also Household Appliances and Radios; Pianos and Musical Instruments	5-9
Radios and Electrical	6-8
Radios and Records	6
Records, See Radios and Records	
Restaurants	4-10
Cafeterias	4-8
Garages	40-50
Garages, Sale of Gas and Oil	8-10
Garages, Storage	40-45
Gas Stations	1-1½c a gal.
Grocery Stores, Chain	1-4
Grocery Stores, Ordinary	2-8
Hardware	5-8
Health Foods	8
Hosiery, Lingerie and Gloves (See under Women's Wearing Apparel)	
Luncheonettes, Lunchrooms and Fountain Lunches	6-10
Tea Rooms	5-10
Rugs, Domestic and Floor Coverings	8
Rugs, Oriental	4-8
Seeds	7
Shoe Repairing	10-15
Shoes (See also Men's Shoes; Women's Shoes)	5-10
Shoes, Orthopedic	8
Silverware	8-10
Specialty Stores (Non-advertising)	7-10
Sporting Goods	6-10
Stationery (See also Books and Stationery)	8-10
Surgical Supplies	6
Tailors, see Men's Tailors	
Taverns, see also Cocktail Lounges	6-10
Theaters, see Motion Pictures	12½-25
Tobacco, see Cigars, Cigarettes and Tobacco	
Toys	10
Trunks and Leather Goods	6-10
Women's Wearing Apparel-Cotton Wear	7-10
Dresses, Suits, Coats	1-9
Popular Price	5-7
Higher Price	6-8
With Millinery, Hosiery	6-8
Foundation Garments	8
Furnishings	6-10
Hosiery	6-10
Millinery	10-15
Popular Price	8-20
Higher Price	10-15
Shoes	6-10
Popular Price	5-8
Higher Price	6-10

Those who should know appear to be of the opinion that there will be an expansion in the use of percentage leases in the coming years, due largely to an anticipated growth in the numerous kinds of chain stores and other large mercantile establishments. Expansion of this type of business to smaller cities and towns will be witoessed on a large scale by many new organizations which will gradually grow and widen their operations.

The business of negotiating and handling leases establishing percentage rates seems now to be largely in the hands of real estate brokers. In fact, real estate brokers and agents generally seem to be bettr informed and have more information on the subject than the average lawyer. The ideal combination would appear to be a broker with specialized knowledge of property values and an attorney for the drafting of actual leases and advice on legal phases thereof.

PRES. KNUDSON: Thank you, Mr. Burke. Our next topic on the program is a discussion by Fred M. Taylor of Boise of required forms in legislative drafting. Mr. Taylor.

MR. TAYLOR: The various Legislatures of Idaho have been, and will continue to be, severely criticized for cluttering up our codes with uncertain, ambiguous and conflicting laws. It seems to me that it is incumbent upon us to ascertain where the responsibility lies for such laws. We must realize that every Act which is considered and passed by the Legislature is drafted by a lawyer in or out of the Legislature. Such being the situation, we must take the responsibility for faultily drafted Legislation and should make every effort to improve the condition.

Many of you know a great deal more about the subject assigned to me than I do because of your having served in the Legislature or in drafting and lobbying bills. I do not profess to be an expert on the subject, but for the benefit of those who may know less about drafting Legislation than I, I should like to offer a few suggestions. My remarks will only have to do with the rules prescribed by the Legislature and other fundamentals. I am assuming that all of us check the Constitution and decisions when drafting a bill, so there is no need for me to discuss the requirements contained therein.

In amending an existing statute, you should not only refer to the original by Section number, but also should refer to all amendments thereto by referring to the Chapter Number and Session Laws. This makes it easier to check the history of the legislation and the various changes that have been made. If words are deleted or changed, one asterisk is used to designate the deletion or change of one word, two asterisks for two words, and three asterisks for three or more words. This same rule applies to figures and punctuation. All new or additional words, figures and punctuation must be underscored.

If the Act is entirely new matter, it is not necessary to underscore, but if a new Section is added to a Chapter, then the whole of such new Section should be underscored. Although not fatal, it is not proper to use quotation marks when amending because the statute would be changed by the new matter and consequently not identical and subject to being quoted.

In repealing a section of the Code again you should specifically refer to the original statute and amendments thereto, if any. It is quite common for us to employ an ombnibus provision by providing "that all laws and parts of laws in conflict herewith are repealed." Such phraseology tends to confuse and bewilder the lawyers and courts and sometimes results in repealing something which is not intended. The title to any repeal measure should state generally the subject of the section which is being repealed.

In drafting legislation we should nse words and phrases that have a common, ordinary meaning, not ouly for the benefit of the Legislators, but so we and the courts can understand what the Legislature meant and intended. Our Courts are always endeavoring to ascertain wbat the Legislature intended and I sometimes wonder if it would not be more proper to try and determine what the draftsman and sponsors intended. In this connection it is very appropriate and beneficial to submit a short and concise brief with your bill so that the Legislators or Committee can better understand and explain it. This is particularly true in regard to long and complicated bills.

It is true that all bills are not read by all the Legislators. As most of you know, it is humanly impossible for a Legislator to read, study and thoronghly understand each and every bill, and consequently, whenever a member of the Legislature is sponsoring a measure he must study and understand it so as to explain it to the others. We, more than anyone else, realize how important punctuation is in regard to interpreting a law. Nevertheless some of us get careless with commas and semicolons and oftentimes are shocked to find someone who places a different interpretation on an Act than we intended. It is well to have a Secretary who is proficient in grammar because most of us have forgotten whatever we knew about it.

I cannot stress too much the importance of proof reading a piece of legislation before submitting it to the Legislature. A bill should be read, re-read, proofed and re-proofed, because no matter how cautious we try to be, there will nevertheless be some mistakes. In drafting legislation we must be exact, because if proposed legislation should become law, it will be scrutimized very carefully for defects and meaning by the members of the Bar and the Courts. I might add that well and carefully drafted legislation submitted to the Legislature is the exception rather than the rule. A great deal of time is consumed in the Legislature in re-drafting and amending legislation which has been submitted. It has been my experience that too mnch time is consumed in the Committee of the Whole correcting errors in bills after they have been printed, a great deal of which is due to poor drafting in the first instance. I dare say that most every bill submitted for introduction in the Senate at the last session had to be corrected in one or more particulars for spelling, punctuation, underscoring, and general form. Sometimes sections would not be numbered and even the enacting clause would be omitted.

It is very important insofar as Legislators are concerned, aside from the legal aspects, that the title to a bill generally covers what is contained in the various sections. If a Legislator has been informed in regard to a bill, but cannot recognize it by referring to the title, he may vote contrary to the way he intended. It is good practise to prepare the bill and then the title, which should be a general outline of the contents of the bill. If the title is prepared first, it may not be complete enough so as to cover all the provisions contained in the bill.

All bills should be double spaced and well typed so as to be easily read. The original and at least six copies should be submitted, because the Press and Radio are entitled to copies on introduction of the bill.

As you all know, wben a section of the Code is amended, the entire section must be set out at length, as amended, which sometimes results in a very lengthy bill just to make a minor amendment. In order to avoid time and expense of printing, we should, when possible, divide bills into sbort sections. Also, short sections aid the draftsman in preparing the title.

When amending a section of a Chapter in the Session Laws, it is good practise to refer to the section by number as well as the Chapter. So far as I know, this is not required by law or rule, but it is of considerable assistance to the Legislators.

We are prone to use the Emergency Clause rather loosely. And it is my opinion that such a clause should be used only where an emergency actually exists.

I cannot emphasize too much the importance of thoroughly checking the statutes and Session Laws to determine whether the bill which you have prepared is in conflict with or affects other sections or chapters of the Code. Very often an Act becomes a law and thereafter we find other sections of the Code which should have been amended or repealed so as to avoid conflicts and general confusion as to what the law is. Many times, because of haste, not enough time and study are given by way of research before drafting legislation. This is not only true with reference to checking other sections of the Code, but applies as well to the subject of the legislation.

If we as lawyers will apprize ourselves of the legal requirements and the simple rules and fundamentals of legislation and devote more time and study to the legislation which we submit to the Legislature, we will have better laws. The Legislature looks to us for advice and guidance, so we should measure up to the responsibility and confidence reposed in us. If our laws are poorly drafted, confusing and conflicting, we should not criticize the Legislature, but the members of our own profession.

For reference purposes, I am submitting herewith for the record bills which I believe were properly prepared--one amending a section of the Code; one adding a new section; an Act creating an entirely new law; and a repealing Act. These were drafted for the Senate, but could be for the House by changing "In the Senate" to "In the House of Representatives" and "S. B. No....." to "H. B. No....."

Legislature of the State of Idaho.) (Twenty-Ninth Session

IN THE SENATE

S. B. No.....

By.....

AN ACT

AMENDING SECTION 15-716, IDAHO CODE ANNOTATED, AS AMENDED BY SECTION 3 OF CHAPTER 131, 1941 SESSION LAWS OF IDAHO, BY CHANGING THE REQUIREMENT OF THE NUMBER OF PLACES OF POSTING NOTICE OF SALE OF REAL PROPERTY BELONGING TO DECEDENT'S ESTATE, FROM THREE PLACES TO ONE PLACE.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 15-716, Idaho Code Annotated, as amended by Section 3 of Chapter 131, 1941 Session Laws of Idaho, be, and the same is hereby, amended to read as follows:

Section 15-716. NOTICE OF SALE.—When a sale is to be made at public auction, one notice of the time and place must be posted * * * in a public place at or near the courthouse door in the county in which the real estate involved is situated, and published in a newspaper, if there be one printed in the same county, but if none, then in such paper as the court may direct, for at least once a week for not less than two consecutive weeks, within thirty days prior to the sale; provided, however, that when it appears from the inventory and appraisement that the value of the whole estate does not exceed $500 the court may in his discretion dispense with the publication in a newspaper and order * one notice to be posted. The real estate and tenements, or the part thereof or interest therein, to be sold must be described with common certainty in the notice.

Legislature of the State of Idaho) (Twenty-Ninth Session

IN THE SENATE

S. B. No.....

By.....

AN ACT

AMENDING CHAPTER 13, TITLE 40, IDAHO CODE ANNOTATED, RELATING TO LIFE, ACCIDENT, AND HEALTH INSURANCE—SPECIAL PROVISIONS—BY ADDING A NEW SECTION THERETO TO BE KNOWN AS SECTION 40-1320 TO PROVIDE FOR THE PAYMENT OF PREMIUMS ON LIFE INSURANCE CONTRACTS BY PERSONS HAVING NO INSURABLE INTEREST IN THE LIFE OF THE ASSURED WHEN SUCH ASSURED MAKES AS BENEFICIARY SOME CHARITABLE, FRATERNAL, EDUCATIONAL OR RELIGIOUS INSTITUTION; PROVIDING METHOD OF COMPLETING APPLICATION; DESIGNATING RIGHTS OF PAYOR OF PREMIUMS ON SUCH CONTRACTS.

Be it Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 13, Title 40, of the Idaho Code Annotated be, and the same is hereby, amended by adding a new section to be designated as Section 40-1320 and to read as follows:

SECTION 40-1320. LIFE INSURANCE CONTRACTS ON PERSONS WHERE NO INSURABLE INTEREST EXISTS — INSTITUTIONAL BENEFICIARIES REQUIRED; APPLICATION; RIGHTS OF PAYOR IN CONTRACT.—Contracts of life insurance may be made and entered into in which the person paying the consideration for such insurance has no insurable interest in the life of the person insured, where charitable, benevolent, educational, or religious institutions are designed irrevocably as the beneficiaries thereof. In making such contracts the person paying the premium shall make and sign the application therefor as owner and shall designate a charitable, benevolent, educational, or religious institution irrevocably as the beneficiary or beneficiaries of such policy. The application also shall be signed by the person whose life is to be insured. Such a contract shall be valid and binding between and among all of the parties thereto, and the person paying the consideration for such insurance shall have all rights conferred by the contract to loan value at any time during the premium paying period, but not at maturity, notwithstanding such person has no insurable interest in the life of the person insured.

Legislature of the State of Idaho) (Twenty-Ninth Session

IN THE SENATE

S. B. No.....

By.....

AN ACT

PROVIDING FOR THE SECRETARY OF THE SENATE AND CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES OF THE LEGISLATURE OF THE STATE OF IDAHO CERTIFYING TO AND FILING WITH THE

SECRETARY OF STATE A PRINTED COPY OF ALL PRINTED BILLS AND AMENDMENTS THERETO INTRODUCED IN THEIR RESPECTIVE HOUSES OF EACH SESSION OF SAID LEGISLATURE; PROVIDING FOR THE SECRETARY OF STATE RETAINING CUSTODY OF SUCH BILLS AND AMENDMENTS THERETO AS OFFICIAL RECORDS OF THE STATE OF IDAHO; AND DECLARING AN EMERGENCY.

Be it Enacted by the Legislature of the State of Idaho:

SECTION 1. At the close of each session, general or special, of the Legislature of the State of Idaho the Secretary of the Senate and the Chief Clerk of the House of Representatives shall compile and certify true and correct printed copies of all printed bills and all amendments thereto introduced in their respective houses and file such printed copies with the Secretary of State of the State of Idaho. The Secretary of State shall retain the custody of such printed bills and amendments thereto and the same shall constitute official records of the State of Idaho.

SECTION 2. An emergency existing therefor, which emergency is hereby declared to exist, this Act shall take effect and be in force from and after its passage and approval.

Legislature of the State of Idaho) (Twenty-Ninth Session

IN THE SENATE

S. B. No.....

By.....

AN ACT

REPEALING CHAPTER 97 OF THE 1937 SESSION LAWS OF IDAHO, AS AMENDED BY SECTION 1 OF CHAPTER 55 OF THE 1941 SESSION LAWS OF IDAHO, WHICH PROVIDED FOR A SPECIAL TAX TO BE LEVIED BY A HIGHWAY DISTRICT FOR TRUNK HIGHWAYS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 97 of the 1937 Session Laws of Idaho, as amended by Section 1 of Chapter 55 of the 1941 Session Laws of Idaho, be, and the same is hereby, repealed.

PRES.: Thank you, Mr. Taylor.

Next on our program is a discussion by an attorney from a neighboring state, Mr. Creek Wells, on the subject of patents and trademarks. Mr. Wells.

CREEK WELLS: Mr. President, Commissioners, members of the Bar and guests: Probably a great number of you hear about this subject once or twice a year. Others of you, I have found, get a lot of this type of business, because in the short time I have been in Spokane, I have had a tremendous amount of patent work from the State of Idaho. There is far more than I thought existed, and I know that there will be more and more of it each year.

I should start out by defining what we mean when we talk about patents and trademarks and copyrights. I do this because I get letters from people, or they come to the office, and say they want to copyright a name. A name or mark is something under which goods are identified with the originator or the men who certify the quality of the goods. Or, in the case of a labor union, it is the mark which shows the goods are made by the labor union in union shops. A copyright, on the other

hand, covers an entirely different matter. You copyright books, literary accomplishments, musical accomplishments, works of art, maps and things of that sort. Patents, which embrace the greatest amount of my activity, are granted on material things.

The statute for the grant of patents states that anyone who has invented or discovered any new and useful article, machine, manufacture or composition of matter, may, upon application therefor, in accordance with the rules, and after due examination, obtain letters patent.

Art, as it is used in the statute, means a process or method of doing something. And there I run into another snag.

A fellow comes to me and says, "I have a new method of selling insurance. I want to patent it." That is not a process that can be patented, because it is not a process of making or accomplishing some material thing. It is a mental process. Mental processes, as such, are like vague ideas or desires to accomplish something. They do not come within the law.

A patent is in the nature of a contract. The government says that if the inventor will tell, in his application, what his invention is, describe a specific embodiment of it in such language, and show by drawings, if that is necessary, sufficient information to enable others to make or use the invention, then, if his invention is new, the government will grant to him the right to exclude others from its use for a limited length of time. His disclosure is the consideration of the grant. If his disclosure is faulty and men skilled in that field can't make it work, then his patent is invalid on the ground it is inoperative.

In trademarks, just as in patents, the grant is not the right to use but the right to exclude others from using. If, for example, you adopt a mark for your goods or you make a new machine, you have a right to use it, providing no one else has an excluding right against you. You do not need either a patent or a trademark to give you the right of use. But you do need a patent to give you the right to exclude others from using machines you have invented. You don't need to register a trademark to give you a right to exclude others from copying, because that is a part of the old common law brought into this country from the early days.

We are coming to the point of putting trademarks on the same basis as inventions in the new Trademark Act which goes into effect July 5th of this year, but we are still a long ways from taking it out of common law jurisdiction.

In trademarks, as contrasted to patents, the use is the important thing. As long as you use a mark and actively try to prevent others from using it, you have that exclusive right. When you cease to use the mark or abandon it, if it is a natural abandonment even for a short period of time, you have lost it. Someone else who takes it up is just as entitled to it as if you had never used it.

Now, the question of what you should do when a client comes to you to determine whether or not he has really made an invention, is one I find bothering a great many. The question is whether the client has just a mere idea or whether he has invented something. I could probably best explain that by telling an experience.

A young man came into the office. He said, "I have a new idea about radar. If I can control the electrons, and stop them at a certain point, then feed some more in from another direction, maybe I can measure the effect of one on the other and get a machine for measuring it." I asked him what he would measure. He said, "Oh, I want to discover gold wth it."

I told him that he still had just an idea; he couldn't tell me how he was going to

make it so that a reasonable man could understand it. Had he come in, as a man did last year, with pictures of a machine actually in operation and a letter saying this is what this thing does, and here is what it is made of, he would have had an invention. It may be something that has already been invented by somebody else, but he has completed it. He has a working machine, and he has tried it.

When your client comes to you, you must first determine whether he could have the thing made which he has in mind. He must describe it logically and in such fashion that you could reasonably expect a man to make it. If he has done that, then he has actually conceived an invention and is ready to find out whether or not he may have something patentable. He may go the rest of the way and complete the invention. If his idea is simple and it doesn't cost too much, I suggest that you advise him to try it out and see if it does what he thinks it will, before he spends his money investigating, because oftimes he can try it out for much less than the cost of determining whether or not it is patentable. If it doesn't work, he can forget it. If it works, then he wants to know whether it is patentable. If it is going to cost a considerable amount of money to build, before he goes to the trouble of spending the money, he may want to know whether he would have something patentable if he built it. In that case, I advise that you suggest that he have the prior patents investigated. He might find that he could buy such a machine that will do just as well, or he may find the thing has been patented but has never been put into practice, and after reading somebody else's trials and tribulations, he may not think so much of his own idea, and he may drop it entirely.

The most important and essential step for you men to urge upon your clients is the investigation to determine how much novelty the man has in his invention. The reason is this: Filing an application and prosecuting it through the patent office is a long and expensive procedure for the average inventor who does not have that kind of funds. It now takes more than 3 years, on the average, to obtain a patent after you file an application for it. If you can find out, before you enter into that kind of a deal, that your machine or your process or your article is not new, you save all of that grief. You may be able to make it. You may be able to sell it and make a lot of money without a patent. A vast majority of things we find on sale today are not covered by patents. The newer ones are, but the vast majority of patents have expired years ago.

When you make your investigation, you do two things. First you satisfy the man as to whether or not he has something new that will justify the expense. Secondly, you give him education by finding what has gone before. And by doing that, although his ideas may have been a bit nebulous in the first place, he may come up with some very valuable improvements. I have seen that happen at least a dozen times in the last two years.

In trademarks, when your cleint is adopting a name for his goods, it is even more imperative than in patents to find out whether somebody else is using a name so similar to his that if he adopts he will be called upon by other parties to stop. It is pretty tough, when you have spent a couple thousand dollars getting out nameplates and folders and things of that sort, to be told to destroy it all and stop using them, which is the usual thing that a man who has a trademark that you are infringing upon requires, together with a little money for the damages you have already done; if you are prompt in quitting, he usually forgets about the damages. It is not very expensive to find out if a trademark is in use, and it certainly saves you a lot of grief.

You may wonder why I stress preliminary investigations. I find that considerably more than 50% of the inventions that come to me, despite the fact that the man has canvassed the field with which he is acquainted, do not have enough novelty to justify filing a patent investigation. In over 75% of the trademarks submitted to me, I have to tell the man he can't use it, because there are prior conflicting marks.

If you submit an invention to anyone to make a search, you certainly should have their opinion as to whether or not it has novelty and of the facts on which they may base their opinion so that your client himself can check it.

I had hoped to be able to tell you a little more about the new procedure under the present Lanham Trademark Act which goes into effect July 5th. Only lately did the patent office issue any proposed rulings by which you could file applications under the new trademark act. They are still just proposed rules. It looks as though they will be changed a great deal. Your clients lost nothing by your waiting another month or two for clarification, because the new trademark act did not take anything away from the present existing registered trademarks. They give certain advantages which, for certain types of marks, particularly well established marks registered under the Act of 1905, will make your clients want to comply under the new Act. On the other hand, there are disadvantages to the so called descriptive marks, because they will not be registered under the new Act except possibly on a supplemental register. In many cases it would be to your client's advantage to let themselves remain under the old Act until they expire and then take a chance from that time on.

PRES.: Next for discussion is the subject of tax titles by E. R. Whitla of Coeur d'Alene.

E. R. WHITLA: Mr. Chairman and fellow members of the Bar: I was asked to speak on this matter of tax titles under the 1943 Act because I was a proponent of the bill, and I was particularly asked to explain the Act wth regard to the decision of Steward vs. Nelson, 54 Idaho 437, in which an Act limiting the time in which to foreclose mortgages to 10 years was involved and which the Supreme Court held to be unconstitutional.

I don't see any comparison whatever between the two acts. They are based upon entirely different propositions of law. The mortgage foreclosure decision is based upon a fundamental principle of constitutional law that the law of the land is incorporated in the mortgage, becomes a part of it, and no legislature can thereafter change that law so as to take any part of the mortgage holder's rights away and deprive him of his property without due process of the law.

That the law entered into and became a part of the contract, of course, was nothing new; that rule is as old as the law itself. I knew that from a sad experience in the Supreme Court of Idaho some years ago. I was on the losing end of Ditton against the First Exchange National Bank. Ditton held a mortgage; the mortgagor had left the country; the bank had come into possession of the property, had held it for some 15 years. The Statute of Limitations had long since apparently run against Ditton's note; he sued the bank to recover on that mortgage. The Supreme Court of this state, much to my dismay, held that the law providing that when the maker left the state it tolled the statute of limitations, became a part of the contract and therefore the maker, by leaving the state could toll the limitation; his mortgage didn't outlaw as long as the fellow left and kept outside of the state. That rule of law has no application to tax titles.

Tax titles are not based upon contract. The duty of the taxpayer to pay his taxes is an absolute duty. His right to pay the taxes after they become delinquent is permissive. If he allows it to go to deed, he has no right to take it back except as the statute gives him the right to pay the taxes and secure it back from the tax-

ing unit. The taxing unit holds title to that property. So the two are based upon altogether different rules of law.

The reason I drew this particular statute was because in our section of the country we had an immense amount of platted tracts, thousands of which had gone to tax deed. They were of little value. The county held the tax deeds. They were off of the tax rolls. No one would buy them and bring an action to quiet title on them. It wasn't worth it. If people were going to get that property and make use of it, there had to be some method whereby, when they got a deed, it would be worth something.

I wanted some way to fix these titles without bringing actions to quiet title. In drafting this bill I took laws of various states regarding this matter and used them as a basis. The law of Washington provided that a tax deed that stood for 3 years should be uncontestable and no action could remain. It, however, didn't give the fellow that formerly held the property any right except that if he had actually paid the taxes, or if the tax deed had been obtained by fraud, he could contest it. If the purchaser from the tax unit didn't take possession of the land, if he didn't pay any subsequent taxes on it at all or if the tax deed had been issued without notice to the tax payer, that made no difference. He got the property just the same. It seemed to me there should be something else to give the owner notice that his land had been sold for taxes.

Oregon had practically the same law. Washington held that its law was good. In a case a man had allowed his property to be sold; notice had been published of the sale as provded by law, but the notice was fatally defective, because it didn't contain the matters provided by the statute. However, the purchaser at the tax sale, had secured the possession of the land. An action was brought to set aside the tax deed. The Court cited this statute and held that the tax deed having been issued for the period of 3 years mentioned in the statute, that statute of limitation absolutely applied. There was no decision on the Oregon statute at the time this bill was adopted.

We decided 3 years was not enough. We gave the owner of the land the full period of limitations which he would have on a general matter of adverse possession. And then we put into the bill something that makes it very much different from either the Oregon or Washington law and gives the tax payer a much greater advantage. That was the fact that the purchaser had to take possession and hold the peaceable possession of the property for 6 years and pay all taxes levied and assessed against the property. If that was done, and if the former owner of the land didn't know of the fact that his property had been sold, certainly he was so grossly negligent that he didn't have any kick coming.

In Oregon a case arose where the officers had failed to publish the notice altogether. The purchaser had never been in possession and never paid any taxes. The Oregon Court held, as to him, under those circumstances, the law was void, based upon a rule that Oregon has always followed, that a void written instrument was not basis for a title by adverse possession. That rule is not followed in very many other States. It is not the law in Idaho nor in Washington. In Idaho you can gain adverse title by a verbal title. You don't bave to have a written title.

Our law provides that if you have color of title by a written instrument, stay in possession of it 5 years and pay the taxes, then you are entitled to adverse possession.

So we wrote into this law not only the rule of adverse possession, but we gave a year additional, or 6 years to comply with all the rules of adverse possession. We

think that no Court would ever hold that it is unconstitutional under those circumstances. I know of no Court anywhere that has gone as far as the Oregon Court.

The law simply provides a method of getting these small tracts and less valuable pieces of land back into private ownership and on the tax rolls so that somebody can use them. They should bear their proper share of the burden of taxation.

Any statute of limitations usually provides for a reasonably short period after the Act goes into effect for persons affected to have their rights determined. So we put into this statute the provision that if the limitations had already expired at the time the Act went into effect, the owner should have a year in which to bring the action, but thereafter the 6 year limitation should apply.

The way to make the statutory facts appear is one thing that has bothered attorneys. An affivadit that the taxes had been paid by the parties in possession for the period of limitation and that the persons had been in possession of it for that period of time has been accepted in our part of the state. With that affidavit the lawyers in the northern section of Idaho are quite uniformly passing titles based upon this Act.

I was very much interested in Mr. Swanstrom's paper, because he referred to absolute titles. There is no such thing as determining absolute title from examination of abstracts, because outside of the record there are hundreds of things that can exist that will affect actual title. I have a good illustration. Bob Elder of Coeur d'Alene told me that when he was practicing in Kansas he examined an abstract which showed a party had an interest in a piece of property; the party had moved to Idaho. He wrote and offered him a fair price if he would give him a quit claim deed to that property. In due time he received a letter, signed by this fellow, stating he would accept the offer; to prepare a deed and send it out. But before Bob sent the deed the fellow came back to Kansas, and Bob looked him up and told him that he received his letter about the land, that he had the deed prepared and that he would pay him the money and they would close the deal. The fellow said, "What letter do you refer to?" Bob said, "The one I got from you out at so and so in Idaho where you live." He said, "I left Idaho two years ago and haven't been there since. I had no letter from you."

They looked it up, and a man of exactly the same name lived in this same town in Idaho, and he had written back and accepted Bob's proposition, and if the fellow had not drifted into town, Bob would have sent the wrong man the money.

Another example, which will show that you cannot always depend on an abstract, happened in Washington. A man sold a valuable piece of property in Spokane. He and his wife signed the deed. The purchasers checked the abstract and found the wife's name was exactly the same all down through the abstract. So they paid and took possession. It wasn't very long until some people came along and started probate proceedings on the grantor's first wife's estate. It developed that his second wife had exactly the same name as his first wife, and the second wife signed the deed, but the heirs of the first wife got half interest in that property.

So there is no such a thing as an absolute title. All are dealing in with abstracts is a record merchantable title. We take what appears on the face of the abstract, and if the abstract appears to show merchantable title, that is what we pass upon.

RALPH BRESHEARS: In 25 Idaho did not our Supreme Court hold that the legislature cannot make a tax deed conclusive?

E. R. WHITLA: That is correct under the law as it was then. You can't cut off all right to contest it. We are not attempting to do that. At the time the deed is issued you cannot cut off the man's right to contest it, but after it has been out for a time it can become conclusive.

HARRY BENOIT: This law has been very perplexing to me. I noticed your statement that the attorneys in the northern part of the state accepted affidavits. Couldn't you also get an affidavit from someone who had a color of title by reason of the deed they had to the effect that they held the property openly and notoriously for a period of five years and they paid the taxes for five years, and you would not be required to bring an action to quiet title? Would you pass that on adverse possession as well as you would under this?

E. R. WHITLA: If you didn't have something back of it to show that it is conclusive after a period of so many years, I doubt if I would take anybody's affidavit alone on the question.

HARRY BENOIT: I don't question the constitutionality, but I do question the matter of how you are going to determine the point, with the particular facts that are provided, without submitting it to the Court and having the Court determine it.

E. R. WHITLA: Of course, you can easily do that by having the tax collector make a showing of who paid the taxes. I think most people accept any affidavit of that kind after that long just the same as they accept an affidavit that J. E. is the same as John E.

CARL SWANSTRON: Do your attorneys, your bankers, your lending agencies in north Idaho regard titles based on tax deeds more than six years old a merchantable title so they will accept them in the ordinary course of trade?

E. R. WHITLA: I think they do. I know of no one that has turned one down.

FROM THE FLOOR: This law only affects the procedure in securing the deed and not anything pertaining to any other entanglement that might involve that particular property such as vested rights, does it not? Surely no vested right that hasn't ripened within the six-year period can be stricken by legislative action. You can't legislate vested rights.

E. R. WHITLA: A tax deed creates an entirely new title, and from the time of its issuance, it cuts off everything preceding that time.

PRES.: We will now ask for the report of the Resolution Committee, Judge Baker.

JUDGE BAKER: Mr. President and members of the Bar: The report of the Resolutions Committee is as follows:

(After reading each resolution, Judge Baker moved its adoption, the motion was duly seconded from the floor, was put to a vote and carried.

RESOLUTION NO. 1

BE IT RESOLVED, That the names, works, opinions, abilities, and characteristics of the late James F. Ailshie have been for more than fifty years the polar star by which the members of the Idaho State Bar have been guided. His counsel and suggestions have bulwarked the ideals and objectives and made possible the bar organization as it exists in Idaho today. His liasson with the American Bar Association brought to Idaho national recognition in the legal world.

His clarity of thought was tempered by a humane application of the law to the problem at hand. He recognized the frailty of humankind and yet preserved the sovereignty of the State.

The word "Justice" is synonymous with the name James F. Ailshie, and the position of esteem which he held in the minds and hearts of the lawyers and laymen of Idaho will forever remain as the guiding light of members of the Bar of Idaho.

We reverently and sorrowfully extend to the members of his family our sincere condolences.

RESOLUTION NO. 2

The success of this, the 1947 Idaho State Bar Convention, is attributed to the several excellent addresses and discussions by both members and non-members, lawyers and laymen; and to the excellent services and entertainments provided by the management of Sun Valley.

NOW THEREFORE BE IT RESOLVERD, That the Idaho State Bar hereby says "thanks" to all who have contributed to the success of this convention, and particularly to Gov. C. A. Robins, Glenn R. Winters, Harry L. Elcock, Barney Glavin and Greek Wells.

The Bar recommends to the Commissioners that they endeavor to hold the 1948 Convention at Sun Valley.

RESOLUTION NO. 3

We hereby express our appreciation to the Commissioners of the Idaho State Bar and their Secretary for the generous contributions of time and talent in the interest of the Bar and for their accomplishments during the past year.

The Bar regrets the unavoidable absence of Secretary Sam S. Griffin from this Convention. His absence has denied to us the benefit of his advice and experience, and emphasized his contributions to the Bar.

RESOLUTION NO. 4

The Bar of the State of Idaho expresses its appreciation to the members of the 1947 Session of the Legislature for enacting, and Honorable C. A. Robins, Governor of the State of Idaho for approving, the Judicial Retirement Law sponsored by the Bar.

RESOLUTION NO. 5

WHEREAS, the Internal Revenue Act of 1942 imposes new and revolutionary federal estate tax on a decedent's estate by basing the tax on the entire community partnership property (except property received as compensation for personal services actually rendered by the surviving spouse or property derived originally from the survivor's separate property); and,

WHEREAS, under the guise of an excise tax on the surrender of the incidents of property by a decedent and the acquisition of new incidents by the surviving spouse, the federal estate tax in effect imposes a levy upon property that the decedent never owned, was not subject to his testamentary disposition, and was not transmitted on his death; measures one taxpayer's tax by another taxpayer's property; treats two taxpayers as owning the same property; and,

WHEREAS, this levy ignores the Idaho laws governing the community partnership system, an institution that is not a tax dodge but one of the crowning glories

of the civil law, an honored institution that is older than federal estate taxes, older than the nation, older than the common law; and,

WHEREAS, the community partnership is a highly civilized, democratic, and enlightened institution, in which the wife is recognized not as a chattel but as an individual in her own right and a real partner having a present vested ownership of one-half of all the community property; and,

WHEREAS, this enlightened view of the marital relationship tends to preserve the home and to advance the status of married women; and

WHEREAS, the federal estate tax ignores, discourages, and undermines the community partnership system in Idaho and in the eight other community partnership states; and,

WHEREAS, the tax was enacted under the assumption that it would tend to eliminate the lack of uniformity in estate taxation, but in fact has resulted in gross discrimination and creates a further lack of uniformity in that husbands and wives in community partnership states bear a heavier estate tax burden than husbands and wives in non-community partnership states; and,

WHEREAS, the federal estate tax is inequitable, discriminatory, and in some cases confiscatory, in its effect on taxpayers in community partuership states; therefore, be it

RESOLVED, that the Idaho State Bar deplores and condemns Section 402 (b) of the Internal Revenue Act of 1942, amending Section 811 (e) of the Internal Revenue Code, and Section 404 (a) of the Act, amending Section 811 (g) of the Internal Revenue Code; and be it further

RESOLVED, that the Idaho State Bar urges upon the Congress of the United States that these amendments to the Internal Revenue Code be repealed; and be it further

RESOLVED, that copies of this resolution be sent to the Secretary of the Treasury Department, the Chairman of the Ways and Means Committee of the Honse of Representatives, and to each Senator and Representative of the State of Idaho in the Congress of the United States.

RESOLUTION NO. 6

WHEREAS, Under the Federal Employers' Liability Act, the practice has arisen of personal injury suits being brought in jurisdictions far removed from the State or locality either where the injured employee is a resident or where the cause of action arose; and

WHEREAS, this practice is unfair and is burdensome on and expensive to the parties; and

WHEREAS, in the 79th Congress a bill was introduced to amend the Federal Employers' Liability Act so as to prevent the practice mentioned, being known as H. R. 6345 and commonly known as the "Jennings Bill"; and

WHEREAS, Representative Jennings has re-introduced a similar bill, known as H. R. 1639, 80th Congress, First Session.

NOW, THEREFORE, BE IT RESOLVED by the Idaho State Bar that it and its members do hereby support the proposed amendment which will limit the venue of actions under the Federal Employers' Liability Act to the County or the Federal

Judicial District in which the canse of action arose, or where the person suffering death or injury resided at the time it arose, provided that defendant can be served in such places, and provided further that if the defendant cannot be so served, then and only then, the action may be brought at a place where the defendant shall be doing business at the time of the commencement of the action.

BE IT FURTHER RESOLVED that the Idaho State Bar urges our Senators and Representatives in Congress to support such an amendment, and that copies of this resolution be forwarded by the Secretary of the Idaho State Bar to each of our United States Senators and Representatives.

RESOLUTION NO. 7

WHEREAS, It appears that realtors, trust companies, banks and others are engaged in the preparation and drawing of trust instruments, wills, contracts, agreements and conveyances of real and personal property, and

WHEREAS, It manifestly appears that such instruments should be prepared and drawn only by those acquainted with the legal effect of such instruments and the liabilities and obligations incurred thereby, including the application of income, inheritance, estate and other tax laws; and that the preparation of such instruments in fact involves the practice of law, in which only those experience, qualified and licensed, should engage; that the preparation of such instruments by those not qualified frequently subjects the parties thereto to liabilities not known or contemplated and constitutes the unauthorized practice of law;

NOW, THEREFORE, BE IT RESOLVED, That the Commissioners of the Idaho State Bar appoint a committee of such number as the Commissioners may determine, with the duty of preparation of a circular defining the practice of law in such cases for general distribution.

RESOLUTION NO. 8

WHEREAS, it appears that persons not licensed to practice law in the State of Idaho frequently appear before the Industrial Accident Board, Public Utilities Commission, and perhaps other administrative boards or officers in cases or issues pending before such boards and offices,

AND WHEREAS, it appears that the appearance before such boards and commissions is in fact the practice of law,

NOW, THEREFORE BE IT RESOLVED, that the Officers of the Idaho State Bar endeavor to obtain from the Public Utility Commission and Industrial Accident Board and other administrative boards, rules requiring that parties interested in such proceedings, if appearing by attorney, be represented by attorneys licensed to practice law in the State of Idaho.

RESOLUTION NO. 9

WHEREAS, It appears that the non-partisan judiciary law is unsatisfactory for a variety of reasons and other methods for the nomination of Judges and filling of vacancies have been adopted or proposed in the various States of the United States:

NOW THEREFORE BE IT RESOLVED, That the Commissioners of the Idaho State Bar appoint a committee of not less than three members charged with the duty to investigate the various methods adopted and proposed for the selection of Judges, and to report with recommendations for the selection of Judges, and to

report with recommendations to the 1948 convention of the Idaho State Bar; that prior to such meeting it cause to be mailed to each member of the Bar of this State a copy of its recommendations and proposals; and

BE IT FURTHER RESOLVED, That a second and additional committee of not less than three persons be named and appointed by the Commissioners of the Idaho State Bar to work cooperatively with the committee hereinbefore referred to and to report to the 1948 Convention of the Idaho State Bar such legislative and constitutional changes as may be necessary to accomplish the recommendations of the first committee.

RESOLUTION NO. 10

WHEREAS, it appears likely that certain economies might be practiced through the reduction in the number of Judicial Districts and of District Judges and perhaps of Justices of the Supreme Court, but that the feasibility, extent and manner of such reduction and redistricting can be accurately determined only after a detailed survey has been made of the various District Courts and the Supreme Court of the State of Idaho;

NOW, THEREFORE BE IT RESOLVED, That the Commissioners in person or by committee survey the entire matter, bring to reasonably current date the data obtained by the Judicial Council of 1929-1932 and furnished to the 1932 convention and file its complete report and recommendations to the 1948 convention for action by it, and that a copy of the report, findings and recommendations be delivered to the Secretary of each district bar association well in advance of the 1948 convention.

E. B. SMITH: That resolution imposes a tremendous duty upon the coming Commission. I am wondering if the time element is sufficient The data which the 1929-32 Council gathered and presented at the 1932 meeting was in process for two years. Personally I would like to have the resolution changed just slightly, if this convention would be willing, that the work be completed in so far as is reasonably possible to do.

PRES.: The resolution merely asks the committee to report. It doesn't say you have to complete your work.

E. B. SMITH: Mr. Baker, does that resolution contemplate the completion of the gathering of all the data that may be necessary by the next convention?

JUDGE BAKER: Yes, it contemplates that.

E. B. SMITH: Since it took two years before, I am wondering if we can complete it. We will do everything in our power, however, to do so.

FROM THE FLOOR: It appears to me that if it isn't completed in 1948, with the legislature meeting in 1949, you wouldn't be able to do much about what you are going to make the investigation for.

PRES.: At this time a distinguished gentleman of the Bar will be presented. Justice Raymond Givens, will you approach the rostrum? And Judge Hawkins and Judge Baker, will you please present Mr. Paul Hyatt to the rostrum?

JUSTICE GIVENS: Mr. President and members of the Idaho Bar and Bench: It is an honor to present as a worthy successor to that preeminent jurist, the late departed Justice James F. Ailshie, Honorable Paul Hyatt of Lewiston. We bespeak and forecast for him a long and honorable career on the Bench, and it is my pleasure to introduce to you, as Justice Appoint of the Supreme Court of the State of Idaho, Justice Hyatt. (Standing applause).

JUSTICE HYATT: Thank you very much, gentlemen. I have a lot of limitations, I know, but I will try to do the best I can. Thank you very much (Applause).

PRES.: It is now my privilege to introduce to you the new President of the Idaho State Bar, E. B. Smith of Boise. (Standing applause).

PRES. SMITH: Everett Hunt, you may make your first speech now, if you desire, as the new Commissioner of the Idaho State Bar from the Northern Division.

EVERETT HUNT: My first speech will be very, very short. I appreciate the fact that I have been honored by the members of the Bar and to have been given the opportunity to serve on the Commission. I hope that after the first year I will be able to be of some use to the integrated Bar. (Applause).

PRES. SMITH: The convention will be adjourned.

ADDENDA

Mr. E. B. Smith, President
Idaho State Bar
Boise, Idaho

Dear Mr. Smith: ° ° °

One of the most troublesome questions locally involves the status of interspouse deeds in the light of the 1943 amendment to Sec. 31-907 I. C. A. in the examination of abstracts of title to determine their marketability. The Bar of the Eighth Judicial District is split wide open on this question, with a portion of the attorneys passing such interspouse deeds on the basis that the 1943 amendment raises a presumption that the grantee spouse takes and keeps the property as his or her sole and separate property and that unless something affirmatively appears of record in the abstract itself to rebut that presumption, the grantee later can convey good, marketable title without joinder of the grantor spouse.

The other viewpoint is very ably set forth in a memorandum entitled "Interspouse Deed Statute," which was prepared by Mr. J. Ward Arney at my request, and a copy of which follows. ° ° ° Perhaps we can get response from attorneys in other sections of the State giving their viewpoints on this question, which appears so frequently in title examinations.

Respectfully Yours,

CLAY D. SPEAR
Secretary, Eighth Judicial District Bar Association

INTER-SPOUSE DEED STATUTE

(Prepared by J. Ward Arney, Coeur d'Alene)

QUERY: To what extent may Chapter 23 of the 1943 Session Laws (1943 Laws 51) be indulged in considering marketability of title?

FACTS: The husband acknowledges a deed of gift in 1928, naming his wife as the grantee. The deed was recorded in 1931.

Monetary consideration is not mentioned or involved. The inter-spouse deed contains the statutory separate property recital (§31-907). The deed by which the husband and wife acquired title did not contain any separate property recitals and was based on a recited valuable consideration.

STATUTES: "All other property acquired after marriage ° ° is community property. ° ° Real property *conveyed* by one spouse to the other shall be *presumed* to be the ° ° separate estate of the grantee and only the *grantor*-spouse need execute and acknowledge the deed ° ° notwithstanding ° ° §31-913 ° °. All deeds ° ° heretofore made in conformity ° ° are ° ° validated." (emphasized) (§31-907, amended 1943 Laws 51).

"The husband ° ° cannot ° ° convey ° ° community real estate unless the wife join in ° ° acknowledging ° °." (§31-913)

POINTS: The writer believes that there are six points, appearing under the stated facts, preventing the title being deemed marketable:

(1). *Delivery*: There is no evidence of record as to the date of delivery. The intervening period of approximately three years between acknowledgment and recording indicates the possibility, if not probability, that the deed was not so delivered by the husband as to pass dominion over the title; but was held until his death before being recorded, necessitating probate. Even if the record is augmented to show immediate delivery, the remaining points to be discussed point to non-marketability. It is quite apparent that delivery before death of the grantor-husband must affirmatively appear; otherwise, there was no effective delivery of the deed.

(2). *Financial condition of grantor-husband*: Even a pure deed of gift based on no recited monetary consideration is open to question. Bank of Orofino vs. Wellman (26 I. 425; 143 P. 1169) is to the effect that whether a deed from husband to wife is in fraud of creditors and, therefore, ineffective, is a question to be determined by the trier of facts. If the husband-grantor were then in debt and not liquid, the inter-spouse deed is a fraud on creditors.

It is, therefore, a question of *fact in* each instance as to whether the grantor-husband were financially equipped to give a valid deed to his wife.

(3). *Improvement or enhancement*: Assuming immediate final delivery of the inter-spouse deed and that the husband-grantor were financially liquid: Another question then arises against marketability.

To accent this point, let us assume the husband-grantor conveys to his wife a vacant lot worth then $2,000.00. In the interim, between her reception of that deed and her conveyance of the property to a third party, there has been an increase in the value of that lot. Assume a $5,000.00 home has been built out of community funds. Assume a general increase of value in that area. The wife sells for $7,500.00.

It is apparent that only $2,000.00 of that sale price is the separate estate of the wife. The husband must join in acknowledging the deed since the $5,000.00 is derived from community property and the $500.00 enhanced value itself becomes community property.

(4). *Inheritance taxes*: If it appears that the husband has died before the wife conveys the property, there remains the liability for inheritance and transfer taxes.

(5). *Presumption*: The statute only makes the inter-spouse deed *presumptively* valid. The presumption that all property acquired during marriage is community property is coupled with another presumption that an inter-spouse deed is valid. Two presumptions do not make a conclusion.

(6). *Terms and effect of 1943 amendment*: The statute in question (1943 Laws 51) does not even impliedly dispense with the necessity for the husband joining the wife in disposing of the property.

§31-907 gives the wife the *management* and disposal of *rents* and *profits*. That section says that such *rents* and *profits* are not liable for the debts of the husband. The statute, in its original or present form, does not say that the property conveyed by the husband to the wife should not be liable for the debts of the husband or particularly the debts of the community.

1943 Laws 51, in amending that section, states but three points:

(1.) The property is *presumed* to be the sole and separate estate of the grantee.

(2). Only the *grantor*-spouse need execute and acknowledge despite §31-913.

(3). *Previous* inter-spouse deeds are valid.

It is noteworthy that this *amendment does not state* that only the *grantee*-spouse need execute and acknowledge in *conveying* the property, subsequent to the inter-spouse deed.

It is limited to *relieving* the *grantee*-spouse from executing and acknowledging the deed (under §31-913), by which that grantee takes title to the property.

There is no doubt under this amendment that it is not now necessary for both the husband and wife to execute and acknowledge an inter-spouse deed by which one of the spouses takes title; something that was requisite before the 1943 Law 51 amendment.

We cannot read into the 1943 amendment a statement which is not there to the effect that the spouse who has been recipient of the property need not be joined by the other spouse in reconveying it. Even the Legislature hasn't gone to the extent of saying that where the husband deeds to the wife, she and she alone may reconvey without joinder of the husband.

All the 1943 amendment does is to state that at the time the inter-spouse deed is delivered to the grantee-spouse, the latter bcomes the sole owner of the property. That statute does not state that it *continues* to be her separate property.

Before the amendment, §31-907 states that all property acquired after marriage is community property. It is always a question of fact as to whether property acquired by either the husband or wife is community or separate or mixed. It is presumed to be community. That presumption is rebuttable.

Now, in the amendment, the grantee-spouse is presumed to take the property as the separate estate of the grantee. Thereafter, however, it is a question of fact as to whether the property continues to be separate or community or mixed. The presumption again is rebuttable and only a presumption.

Bank vs. Wellman, supra, and its citing cases (°), seems to result in the following rule:

(°) Printz vs. Brown, (31 I. 443, 174 P. 1013)
Oylear vs. Oylear, (35 I. 732, 208 P. 857)
Boise Ass. vs. Glenns Ferry, (48 I. 600, 283 P. 1038)
Prescott vs. Snell, (50 I. 644, 299 P. 1079)
McMillan vs. McMillan, (42 I. 170, 245 P. 98)
Hill vs. Porter, (38 I. 574, 223 P. 538)
Sassaman vs. Root, (37 I. 588, 218 P. 374)
Glover vs. Brown, (32 I. 426, 184 P. 651)

A husband, if solvent, and without actually defrauding creditors, conveys to the wife. The property thus conveyed is ber separate property. The validity of the conveyance can only be challenged by one who is a creditor of the husband or the community before the conveyance was made or a subsequent purchaser without notice. If the property, becoming the separate estate of the wife through the inter-spouse deed, is subsequently improved by community funds and there is no defrauding of creditors intended or effected by that investment, the improvements thus made are the separate estate of the wife.

Boiled down, it means that there are questions of fact to be determined in connection with inter-spouse deeds: Was the husband solvent when he gave the deed to his wife? Did she know, when that instrument was made, that her husband was solvent or intended defrauding creditors? Title examiners are not privileged to determine disputed fact questions.

The statute, of course, (1943 Laws 51) states that we must *presume* the title to remain the separate estate of the wife. Must we presume that the value of any real estate remains stationary? Why should we take a chance for our client and presume that no improvement or increase in value occurred during the tenure of the wife? Why should we presume that the deed was, in fact, delivered during the lifetime of the husband? Why should we presume that the estate of the husband had paid or was exempt from payment of inheritance taxes (of course, creditors cannot *petition* for administration after four years from the death of the husband; Glover vs. Brown, supra; hut they may file claims against his estate if someone else institutes probate).

It is one thing to indulge the presumption that all property is community. We then require the joinder of the husband and wife in executing and acknowledging. That is entirely safe to the purchaser and the examiner.

It is another thing to indulge the statutory presumption of separate estate and advise the purchaser or mortgagee to rest on that presumption with only the signature and acknowledgment of one of the spouses.

Following one presumption is perfectly safe; following the other is dangerous.

It is fair to compare 1943 Laws 51 as to inter-spouse deeds with 1943 Laws 177 as to tax deeds. The first makes the deed *presumptive;* The second, conclusive.

The tax deed statute invited attention to 51 Am. Jur. 952, §1095, which somewhat sums up the preceding sections on this subject. The result appears to be that a conclusive statute must be coupled with one of limitations; it is a judicial and not a legislative function to determine jurisdiction; the legislation can only affect directory matters.

Thus, we see that legislative fiat cannot create a controlling presumption or conclusion on a jurisdictional matter; that being the province of courts.

It is the conclusion of this memorandum that inter-spouse deeds are only presumed to be valid and that the only safe course for an examiner is to require either the joinder of the husband in the subsequent conveyance or encumbrance or, if the husband be deceased, court proceedings to negative interests on the part of his heirs or creditors or of the taxing entities.

Determination of the effect of inter-spouse deeds is a judicial function not to be settled by legislative fiat. The trier of facts and not the title examiner, must determine certain controversial points in each inter-spouse transfer.

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