PAST COMMISSIONERS

WESTERN DIVISION

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, 1930-42.
E. B. SMITH, Boise, 1942-45.

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.

NORTHERN DIVISION

ROB'T. D. LEEPER, Lewiston, 1923-26.
C. H. POTTS, Coeur d'Alene, 1926-28.
WARREN TRUITT, Moscow, 1928-32.
A. L. MORGAN, Moscow, 1935-38.
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.

PRESENT COMMISSIONERS AND OFFICERS

E. B. SMITH, Boise, (1942-), President.
PAUL T. PETERSON, Idaho Falls, (1943-), Vice President.
E. T. KNUDSON, Coeur d'Alene, (1944-).
SAM S. GRIFFIN, Boise, Secretary.

LOCAL BAR ASSOCIATION

Shoshone County—H. J. Hull, President, Wallace; James E. Gyde, Jr., Secretary, Wallace.
Clearwater (2nd and 10th Jud. Dists.)—Ed. F. Butler, President, Lewiston; Thos. A. Feeney, Secretary, Lewiston.
Third Judicial District—Homer Martin, President, Boise; Pete Leguineche, Secretary, Boise.
Fifth District (5th and 6th Dists.)—P. J. Evans, President, Preston; R. D. Merrill, Secretary, Pocatello.
Seventh District—George Van de Steeg, President, Nampa; Earl Garrity, Secretary, Nampa.
Eighth District—E. T. Knudson, President, Coeur d'Alene; Wm. Hawkins, Secretary, Coeur d'Alene.
Ninth District—A. A. Merrill, President, Idaho Falls; Gladys Dennis, Secretary, Idaho Falls.
Eleventh District (11th and 4th)—Frank L. Stephan, President, Twin Falls; Gordon Gray, Secretary, Twin Falls.

PROCEEDINGS

Vol. XIX

NINETEENTH ANNUAL MEETING

of the

IDAHO STATE BAR

1 9 4 4

COMMISSIONERS OF THE IDAHO STATE BAR

PAUL W. HYATT, President, Lewiston
E. B. SMITH, Vice President, Boise
PAUL T. PETERSON, Idaho Falls, (succeeding L. E. Glennon, Pocatello, resigned)
SAM S. GRIFFIN, Secretary, Boise

NOTE: Due to war conditions no meeting of the Bar was held in, and no Proceedings published for, 1943. In lieu thereof the Bar published and distributed free to members "The Law of Community Property in Idaho" by Francis W. Jacob, annotated to June 1, 1943 by Weldon Schimke. Additional copies of that publication may be secured from the Secretary at $1.50 per copy.

NOTE: The Commissioners regret that because of limitations of finances, paper, and other war conditions, it has been necessary to eliminate practically all discussion, and severely to edit or digest many of the papers presented. Endeavor has been made to retain substance; resulting detraction from readibility must be charged to the Board, not to the authors, to whom apologies are offered.

THURSDAY, JULY 6, 1944

PRESIDENT: PAUL W. HYATT: We will now have the report of the Secretary. (Note—the Secretary's report is on file and is here summarized).

The report covers the activities of the Bar Commission and the Bar since the last Bar meeting (1942). L. E. Glennon was President from July, 1942 to July, 1943, and having been re-elected as Commissioner, Eastern Division, resigned in October, 1943 upon his appointment as District Judge for the 5th Judicial District. Paul T. Peterson of Idaho Falls was appointed to the vacancy. In July, 1943, Paul W. Hyatt of Lewiston became President of the Bar.

The Board held eight meetings. Four examinations of 24 applicants (some repeaters) were held. Ten applicants were recommended for admission to practice. Several applicants were rejected for failure at examinations, insufficient residence, educational in-

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sufficiencies or late filings. Special arrangements permitted four applicants in military service to be examined. Rules concerning examination fees were revised.

Numerous informal complaints against attorneys were adjusted. Ten formal complaints were disposed of after investigation. One suspended lawyer was reinstated. Two opinions on ethical questions were rendered.

Committees were appointed. The War Work Commitee under Wm. F. Galloway, (now in service) and J. W. Galloway, Chairmen, did outstanding work.

Jacob's Community Property Law in Idaho, annotated to date, was printed and distributed to Bar members. Other annotated publications are contemplated when and if finances permit. The Idaho Bar joined other community property state Bars in litigation respecting discriminatory Federal Tax laws. An unsuccessful attempt was made to set up special Income Tax Courses for Idaho lawyers.

Licensed lawyers dropped to 409 with resulting decrease in Bar revenue.

PRES. HYATT: Will the secretaries of local bar associations notify the Secretary when any member enters the service or dies; so that he can keep his list up to date?

I will appoint as a canvassing committee for the Northern Division election, Harry J. Hanley of Grangeville, E. V. Boughton of Coeur d'Alene and Frank F. Kimble of Orofino.

I will appoint as a resolutions committee Laurel E. Elam of Boise, Frank F. Kibler of Nampa and S. H. Atchley of Driggs.

* * * *

PRES. HYATT: Our lawyers in the service have each given up a law practice built through hard work and time. When they return, they will ordinarily have to start over again, unless we render them our help. It is the duty of us who remained at home to assist these men when they return in replacing to them their former business, turning back to them their clients, and in doing everything we possibly can to aid them in reestablishing themselves in the practice within the least time possible. This will call for generosity and time on our part. In spite of lawyers' differences, there is a tie that binds the members of our profession together, which I know will result in the proper spirit of cooperation and help toward these men when they return.

I have decided to talk to you about some things which are of a practical, though perhaps uninspiring, nature.

Your Bar Commission has had in mind in its work three main purposes: **FIRST:** The control and supervision of admissions to the practice; **SECOND:** The handling of disciplinary matters and proceedings; **THIRD:** The furtherance of the general welfare of the individual lawyer and assistance to him in the practice.

This latter purpose the commission has been trying to accomplish in various ways. Publications like Jacob's Community Property Law, brought down to date by Mr. Weldon Schimke, and distributed to the members of the Idaho Bar; another publication such as a handbook on examination of titles; the holding of a practical annual program and publication of the proceedings, including the various addresses, with citations included; the stimulation of the work of Local Bar Associations; planning the future to bring to the lawyers of Idaho, practical law institutes in various legal subjects, such as the course in taxation sponsored by the American Bar Association in conjunction with the American Law Institute.

These programs cannot, of course, give the answer to the problems confronting you, but perhaps can point the trends in fields with which you must deal, and give the key by which you may work out the solution.

To accomplish this latter purpose, the officers of the Bar need something from you: **FIRST:** An active interest in your Local Bar Association; **SECOND:** Your time and service in working faithfully on any committee to which you may be appointed, or your acceptance of a place on the annual program when asked. Give gladly of your time and effort in this regard, and in contributing something worth while to your profession; **THIRD:** If the Idaho State Bar is to continue to function as it should in all its purposes, it must have more money. This may be a distasteful subject with which to deal, or about which you would probably rather not hear, but I feel sure that when our members fully understand how much money is raised, and how much money is spent, and for what it is spent, they will see the need in this regard, and I, as a retiring member of the Commission, can speak to you better upon this subject than any one else. In fact, I would be derelict in my duty to the Bar if I did not do so.

Unfortunately, the work on the examination of titles which I have referred to before, has not yet been published because of the shortage of current receipts and uncertainty as to the future as to whether or not this Bar shall have an increased income. No halfway job with this publication would be acceptable to the author or to the Bar.

The Idaho Bar has had to be, and will have to continue to be in the future, self-sustaining. It receives no appropriation from any

general funds of the State raised by taxation. Its appropriations come entirely from the members' license fees and examination fees paid by applicants. Receipts from examinations are and will be small because there will be only a few graduates from law schools. Most men of law school age are in the military service. Examination fees have not paid the cost of examinations.

Since 1925, there has been a continuous gradual decrease in the number of lawyers in Idaho. That year we had 625 practicing lawyers paying license fees. Today we have 409 such lawyers. Our 23 judges are exempted from payment. You are now paying $7.50 per year as the cost of your license to practice law. This is just a little over 2c per day. Did you ever stop to consider that each day you are contributing only this small amount to the work of the organized Bar? You gladly pay lodge and other dues in excess of this. This license fee is the lowest item of overhead which you have in your legal practice. Do you not think it possible that you could stand at least a fraction over 3c, or at least 4c per day in the furtherance of the work of the organized Bar in the State of Idaho, and in behalf of the legal profession?

The fees of the men in the armed services are being remitted, and properly so, during the period of their service. From license fees we are receiving now just a little over $3000.00 per year. Our Secretary is a practicing lawyer, is paid $125.00 per month, averages at least a third or more of his time on the work of the Bar and furnishes offices, office equipment, and his own travel expense above the amount which the State will pay. His stenographer receives $50.00 per month from the Bar. He pays the balance of her salary. In addition, there are necessary items, such as stationery, stamps, office supplies and long distance telephone calls. A paid Secretary is absolutely essential to keep up the work of the Bar. A central clearing house must always be had. Other State Associations are paying much more for a part time Secretary. Oregon, for instance, pays $250.00 per month, beside office rent and help.

Thus, you can see that the initial expense of the Bar runs from $2400.00 to $2500.00 annually. Roughly, we have left about $500.00 per year. The Commissioners must meet at least four times per year, and of course the examining committee must meet also. The members of the Commission and the examining committee give from 30 to 60 days of their time each year, without pay, receiving only their actual travel expenses and an expense account while away from home of $5.00 per day. They do not begin to break even on this, but neither they nor our Secretary are asking for any more, but are gladly doing their work under the present arrangement, even at a deficit to themselves, and I am not here asking for more on their behalf.

The expenses of travel and the per diem for the Commissioners and various committees, including the program committee, take from $750.00 to $1000.00 per year. At this point, under our present income, we have a deficit of anywhere from $150.00 to $500.00.

It costs money to print the publications mentioned, and it also costs money to put on a good program. The kind of an annual meeting we need and should have, with publication of the proceedings, will cost around $1500.00. In order to obtain good speakers, leaders in their field,—and who are not members of the Idaho Bar, we should pay expenses and an honorarium, and we have been embarrassed to have to offer small and meager honorariums to such able men as we have appearing on the program. Will the Idaho Bar have to longer apologize for such a condition?

You want and are entitled to good programs. You want the Bar to progress. To insure doing the job, your Bar Association should have an income of $5000.00 per year, and at the very least, $4500.00. Last year we had no annual meeting, so of course the $900.00 to $1000.00 usually spent for program and for publication of the proceedings was not used.

In times past, the Commission has kept a reserve of around $4500.00 to $5000.00 as a safe-guard in case of unusual or extraordinary disciplinary proceedings, which cost money, and upon which expense cannot be spared if the work of the Bar in disciplinary matters is to be done right. We would be admitting defeat in one of our main objectives if we were compelled to dismiss disciplinary proceedings or fail to initiate them, simply because we had no money with which to do the job. We have been digging into this reserve until at the end of this year, our funds on hand will run below $3000.00 . Do not misunderstand the report of our Secretary, which shows $4313.00 on hand. All income for this year has been received, and from the funds on hand, we must pay the expense of this program and the publication of the proceedings, and carry on the work of the Bar Commissioners and examiners until the end of June, 1945. It will be dangerous to let this reserve be depleted any lower than it will be at the end of this year. We must keep this reserve. We cannot expect increase in the number of lawyers. While we will have a good number of our men returning from the armed forces, we cannot expect that all of them will return. Perhaps we can safely count on a paying membership of 450 to 460 lawyers after the war is over, but not in excess of that. New admissions will be low, and in all probability will not keep up with losses from deaths. We cannot and will not lower the standards of admission attained through long years of work simply to swell the membership in the Idaho Bar.

To hold our own and to do our work, and to accomplish something practical and worth while for our Bar, we must simply now plan to raise more money, and this is something we must do ourselves because we have no one else to do it for us. I hope, therefore, that before this meeting ends, that you will vote for an increase in your annual license fees from the present $7.50 to $10.00 or $12.00—only $1.00 a month.

I would like to see this meeting take definite action on the matter of judicial salaries. These salaries should be doubled; they were fixed years and years ago, when a dollar would buy twice as much as it does now. The salaries of our judges should be sufficient to attract able lawyers, and should be sufficient not only to permit a judge to have a good living, but to save something while on the job. A man going upon the bench gives up his practice, and usually all his business connections, and therefore finds it impossible to retire from the bench into private practice without years of rebuilding what he has given up.

I am afraid in view of past experience, that from a practical standpoint, it will be impossible to expect to have some kind of a retirement plan for our judges. I doubt if such legislation can be passed, but we must make the start somewhere to better financially the judiciary.

In conclusion, I hope that you will enjoy the program to follow. Next year under the leadership of that very able gentleman, Mr. E. B. Smith, and with some financial and other help from the rest of us, I know that you will see a bigger and better program.

PRES. HYATT: Mr. E. B. Smith, Vice President will take charge.

VICE-PRES. SMITH: The next subject is "How Federal Taxes Affect Your Daily Practice," by Lawrence E. Huff of Moscow.

MR. HUFF: * * * The individual Income Tax Act of 1944, by its schedule of rates, placed a limit, reached in the $200,000.00 net income brackets, of $37,720.00 upon individual incomes regardless of source ($6,000.00 normal tax plus $156,280.00 surtax, total tax $162,280.00). The State of Idaho exacts a tax of $2,982.00, leaving a retained income limit of $34,738.00 for a citizen of the State of Idaho, earning a $200,000.00 net income.

Upon incomes over $200,000.00 the normal tax rate is 3%, the surtax rate is 91% and Idaho's tax is 8%, which would at first glance make a total tax of 102%. However Section 12 (g) of the law provides that in no event shall the taxes imposed exceed in the aggregate, 90% of the net income of the taxpayer for the taxable year.

Federal income taxes are a deductible item from gross income for the purpose of determining the net taxable income in the State of Idaho, and this has the practical effect of making the Idaho income tax rate .8 of 1% of the Federal surtax income. An Idaho taxpayer having a million dollar net income pays a tax of $900,000.00 which is deductible for Idaho income tax purposes, leaving him a $100,000.00 net taxable income for Idaho, 8% of which is $8,000.00, or .8 of 1% of the million dollar Federal net income.

The political approach to the tax problem was best typified by the enactment of the Victory tax. Under the tax schedule adopted in the same law with the Victory tax, the rates of Federal Taxation ran from 73% on $200,000.00 to 83% on $500,000.00 and upward, and adding 8% Idaho tax, made a scale from 81% to 91% in the upper brackets. The standard formula for taxation is "soak the rich" and "fool the poor". Under this tax schedule, there wasn't much room to place additional taxes upon the rich, and the pressure of war expense demanded an additional tax income, and the only available source of taxation for such additional income was in the very low brackets. To raise the normal tax from 6% to 10% would have been very simple and would have avoided confusion, but also would have invited tremendous political opposition to the law makers from the voters in low income brackets. Therefore, it was necessary to "sugar-coat the pill" and call it a Victory tax, and season it with a promise of post-war refunds and lighten the immediate load by giving certain deductions for old debts and life insurance premiums.

Apparently it was not deemed politically expedient to adopt a 7% Victory tax and make all income tax exemptions and deductions applicable to the Victory tax. Instead a 5% schedule was adopted and extra tax money was raised by eliminating exemptions of dependents and personal deductions, such as personal interest, taxes on the home and donations, as Victory tax deductions. This increased the tax income, sugar-coated the pill and together with the so-called "forgiveness feature," which forgave exactly nothing and enabled the Government to assess 1¼ years' taxes in one year, threw the entire tax situation into a muddle and a national up-roar, from which has emerged a so-called "simplified" law of 1944, which, while it may simplify the matter of making returns for certain individuals, has, in fact, further confused the situation for the lawyer and the accountant for the reason that it is an individual income law only, and does not apply to estates, trusts or corporations.

Many lawyers have told me in private conversations that they do not bother with the income tax law, that the matter of income taxes is for accountants and not for lawyers. This might not be so bad in itself, if the income tax problems of the people were cared

for only by certified public accountants and if there were a sufficient number of qualified accountants to care for the needs of the people; but under present conditions, when any person not a certified public accountant or a lawyer, and not restricted by the ethics of the two professions, can set himself up as an accountant, and run any sort of advertising in the papers, it is indeed a situation which challenges the lawyer to take his proper place in his profession by thoroughly familiarizing himself with the tax laws, and be in a position to offer his services to his clients and the public. If you intend to depend on an accountant, take your problems to him before the transaction is completed. When the completed transaction comes to him, there is relatively little that he can do about the situation. If you take your income and inheritance tax figures to an accountant after the transactions are completed in an estate, he can advise you, for instance, that it might be better to take the attorney's fees and executor's fees as a deduction against income taxes rather than as a deduction against inheritance taxes, but if you have permitted your appraisers to under-appraise the property and you later sold the property of the estate at a profit, or if you have not separately appraised the land and buildings so that the accountant can set up depreciation schedules for the buildings of the estate, there is nothing much that the accountant can do to save taxes for your client; or if you have failed to have a family allowance set aside by the Court at the proper time in Probate, there is nothing that you or the accountant can do in the way of claiming the amount of the family allowance as a deduction against the inheritance taxes.

Admission to practice as an attorney in the federal courts of the United States does not in itself give the attorney the right to practice before the Treasury Department and before the Tax Court of the United States, formerly the Board of Tax Appeals. The rules and requirements for practice by attorneys and agents before the income tax unit of the Treasury Department on appeals and hearings are different from the rules for practice before the Tax Court. Admission before the Treasury Department does not give the right to practice before the Tax Court and admission to practice before the Tax Court does not give the right to practice before the Treasury Department. (For rules of practice before the Treasury Department, see Prentice Hall, hereinafter referred to as P-H, Section 21,251 et sec.).

* * * *

Every claim, affidavit, written argument, brief or statement of fact prepared or filed by an enrolled attorney or agent in any matter before the Treasury Department must be verified by such attorney or agent showing whether he prepared such document and whether or not he knows of his own knowledge that the statement of facts therein contained are true. Under the provision of the Treasury Regulations, an enrolled person who is a notary public is prohibited from taking any acknowledgment, oath, or certification as a notary public in connection with any tax return, protest, or other document which he has prepared.

If an enrolled agent or attorney contracts with his client in tax matters on a contingent fee basis, he must file with his papers, a statement containing the terms of the contract, as it relates to compensation; however, this is not necessary where his authority is limited to the filing of tax or information returns. An enrolled attorney or agent must, in addition, file in every matter a power of attorney, or certified copy thereof, from his principal in proper form, authorizing him to prosecute the case, claim or matter, and evidence of his enrollment as an attorney or agent. At first blush, this seems an unusual requirement to practicing attorneys; however, much can be said in its favor and it might be well for the Idaho Bar to seriously consider a like requirement before attorneys could appear in matters before Idaho Courts. The enrolled attorney is required to conduct his practice in accordance with the canons of ethics of the American Bar Association, and enrolled agents must observe the ethical standards of the accounting profession.

* * * *

The lawyer can readily inform himself as to the effect of the regulations and rulings of the Commissioner of Internal Revenue, the constitutionality thereof and the weight to be given to them by the courts. For a full discussion of this matter, see P-H 21201 et sec. However, the weight which the Department will give to the court decisions is a matter with which we are not familiar. The Treasury Department may follow a decision of a Circuit Court of Appeals or a District Court but it is not bound to do so. It may refuse to acquiese in the decision, and in the meantime, until the Supreme Court has said the last word on the subject, follow its own rulings in similar cases.

Brewster vs. Walsch 268 Fed. 207 AFTR 1248 Reversed by Supreme Court in Walsch vs. Brewster 255 U. S. 536, 65 L. Ed. 762, 41 S. Ct. 393.

* * * *

Since the name Victory tax was eliminated from the law, it was necessary to find a new name for Victory tax net income. Under the new law it is called "Adjusted Gross Income," which

is defined in Section 8(a) as gross income minus the following (to the extent specifically prescribed):

(1) Trade and business deductions;

(2) Expenses of travel, meals and lodging while away from home in connection with employment;

(3) Reimbursed expenses in connection with employment;

(4) Deductions attributable to rents and royalties;

(5) Certain deductions of life tenants and income beneficiaries of property;

(6) Losses (other than business losses) from sales or exchange of property.

The recognition of expenses of travel, meals and lodging while away from home in connection with employment, in the Individual Income Tax Act of 1944, is significant, and a wide departure from the previous viewpoint of the Treasury Department. Section 23 (a) (1) of the Act provided generally that all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on business were deductible and specifically prescribed that traveling expenses, including the entire amount expended for meals and lodging while away from home in pursuit of a trade or business, were deductible. Traveling expenses to be deductible, therefore, had to be incurred in connection with a trade or business. (P-H 11,266 et sec.) REG 111, Sec. 29, 23(a)-2.

* * * *

All expenses of every business transaction are not deductible under the statute permitting necessary expenses paid or incurred in carrying on any business or trade to be deducted in computing taxable net income, but only those are deductible which relate to carrying on a business.

Revenue Act 1932, Sec. 23(a), 26 U. S. C. A.
Internal Revenue Code, Sec. 23(a).
Higgins v. Commissioner of Internal Revenue
312 U. S. 212; 61 S. Ct. 475.

However, Congress changed this rule in the Revenue Act of 1942, by providing "in the case of an individual, **all** the ordinary and necessary expenses paid or incured during the taxable year for the production or collection of income * * *," are deductible.

I. R. C. Sec. 23(a) (2).

While the deduction of "traveling expenses (including the entire amount spent for meals and lodging) while away from home, * * *" continued in the law without change as to trade or business, with the restriction that such expenses must be incurred "while away from home," this restriction does not appear in the new provision contained in Section 2, said Section allowing "**all** ordinary and necessary expenses * * * for the production * * * of income * * *".

The exigencies of war caused a tremendous dislocation of home life in the United States and a tremendous necessity of a shift in population to centers of defense industry, accompanied by attendant shortage of living quarters in such centers. Great numbers of mechanics and artisans accepted amployment generally transitory in nature in defense centers and left their families in their home towns.

I had occasion to prepare income tax returns for a number of such Moscow residents in the early spring of 1943 for the 1942 income tax year. While the Internal Revenue Department did not make any new regulation in regard to the matter of traveling expenses away from home, the collectors took the attitude that in order that a person should be entitled to a deduction for such expenses, he must have been engaged in a trade or business and the usual mechanic or artisan working for wages was not so engaged, and therefore, the collectors refused to permit deductions for traveling expenses of laboring men living away from home. Usually persons assisting in the preparation of income tax returns, because of the informal ruling of the collector, did not take a deduction for such expenses for employees working away from their usual established homes.

I believed, at the time, that when Congress said in the 1942 Act that in case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production of income were deductible, that it meant exactly what it said, and, therefore, I took deductions in twenty cases for traveling expenses of laboring men and mechanics working on temporary jobs in defense centers and maintaining their homes in Moscow. In one case, the collector disallowed such deductions and assessed an additional tax, which we did not pay, and my client received the usual 30-day letter, and we appealed to the Revenue Agent in charge.

My client had lived in Moscow continuously since the year 1895, was married in 1915, he and his wife had ten children, five of whom were dependents in the year 1942. His wife was afflicted with cancer, was confined to her home or the hospital during the year, and died in April of 1943. He worked as an expert motor

mechanic in three different camps of the Potlatch Forests, Inc., in two different counties for about seven months, in Moscow in a garage in which he was a partner, for one month, and for the last four months of the year as a teacher of diesel engineering for the Armed Forces at Fort Lewis, and at no place was there any facilities to house a family. The Revenue Agent in Charge sustained my appeal and cancelled the tax. I hope they never find the other nineteen cases. It is a matter of some gratification to me to note the official recognition of the situation in the 1944 Act, which permits the deduction of traveling expenses away from home in connection with employment.

Incidently, the traveling expenses of a lawyer, attending a Bar Association meeting are deductible.

Wade H. Ellis, 15 B. T. A. 1075, Affirmed 60 App. D. C. 193, 50 Fed. (2d) 343, 9 AFTR 1662.

But, the expenses of your wives are not a deductible item.

* * * *

Let us turn now to some specific situations in the applications of the income tax laws.

Mr. X bought a 200-acre farm during the high prices of 1920 for $190.00 an acre, and sold it in 1943 for $150.00 an acre, and experienced a gross loss of $8,000.00 and an adjusted net loss of $7,200.00 after proper credits and adjustments had been made for capital improvements, repair and depeciation; the question immediately arose as to in what manner this loss could be used against the taxpayer's gains in that year or other years.

First, was it a long term capital loss or was it a net operating loss. Capital gains and losses fall in two classes:

(1) short term—sale or exchange of a capital asset held not more than 6 months, and

(2) long term—sale or exchange of a capital asset held for more than 6 months.

(P-H 4901, et sec.)

The amount of the actual gain or loss to be taken into account in computing net income is short term 100% and long term 50%.

If Mr. X's loss of $7,200.00 was a long term capital loss, his net deductible loss was $3,600.00, (50% of the $7,200.00). Such a loss is deductible against his other income only to the extent of

$1,0000.00 or his net income, whichever is lower. The disallowed portion of such net loss may be carried over to the five succeeding years and applied first against a net gain from sale or exchange of capital assets in each of those years, and then against other income to the extent of a maximum of $1,000.00.

If, on the other hand, Mr. X's loss was a net operating loss, he could apply the entire loss, that is, $7,200.00, instead of $3,600.00 against his gain from other sources (with certain limited exceptions) for the year in which the loss occurred, and any remaining loss not thus absorbed could be carried back to the two preceding years. However, it must be carried back to the second preceding year first, and applied against the net income of that year, and then any remaining loss could be applied against the net gain of the next preceding year. Any net loss not thus absorbed could be applied against the net gain in the two next succeeding years in the order of their occurrence. (P-H 13,766 REG 111, Sec. 29,122-4).

Therefore, if the loss suffered by Mr. X was a net operating loss instead of a long term capital loss, it was much to his advantage, since he could apply the entire loss, and not 50% of it against the net gains of that year and the two preceding and two succeeding years. While, if it was a long term capital loss, he could apply it only to the extent of $1,000.00 a year plus the amount of net capital gains for a period of five years and if the loss had been a $25,000.00 or $50,000.00 loss, a great amount of the credit therefore would probably have been lost.

I. R. C. Sec. 117 was amended in 1942 to expressly exclude "real property used in the trade or business of the taxpayer" from the category of capital assets. Mr. X had been farming his farm for 15 years and farming is a trade or business; therefore, we were able to apply the entire $7,200.00 loss suffered by Mr. X against his current net operating gain and amend his returns for 1941 and 1942 and absorb the entire loss. Incidently, however, it is to be noted that Mr. X lost the benefit of his personal and family exemptions for all three years because net operating losses are applied against net gains without reference to personal exemptions.

Had Mr. X, on the other hand enjoyed a net operating gain from the sale of his farm, only 50% of the gain would have been subject to the tax, instead of the 100%, due to the provisions of Sec. 117 (j) as added by Sec. 151(b) of the Revenue Act of 1942, which provided that recognized gains and losses from the sale, exchange or involuntary conversion of property used in the trade or business of the taxpayer at the time of such sale etc., held for more than six months, which is of a character subject to the allowance for depreciation or real property, shall be treated as gains and losses from the sale or exchange of capital assets held more

than six months, if the aggregate of such gains exceeds the aggregate of such losses.

If, however, the aggregate of such gains does not exceed the aggregate of such losses, such gains and losses should not be treated as gains and losses from the sale or exchange of capital assets. Therefore, if your clients are contemplating the sale of machinery, equipment, or real estate, used in the business, at a profit, it is advisable that they arrange that the sale shall not be made less than six months from the date of the purchase thereof.

A net gain from the sale or exchange of capital assets is included in gross taxable income. However, the 1942 law provides an alternative tax in respect to a long term capital gain, which in effect, limits the tax on such gain to an effective rate of 25%. That is, a tax of 50% of the recognized gain which is 50% of the actual gain, (P-H 4981).

Hence, it is important again that the taxpayer watch the holding period of his capital assets in order to take advantage of this provision.

Perhaps the probate of estates affords the attorney the greatest opportunity for practical application of the income tax laws and requires of him a thorough understanding thereof. It is interesting to note that a bequest in the will to the executor is a gift and not a taxable income, even though the will expressly provides that such bequest is made in lieu of his commission as such executor.

U. S. v. Merriam, 44 S. Ct. p. 69, 263 U. S. 179
68 L. Ed. 240, 4 AFTR 3673.

A husband dies in Idaho, leaving 50 head of cattle, which he has raised. The wife is appointed administratrix and intends to sell the cattle during the period of probate. Had the husband sold the cattle during his lifetime, the entire sales price would have been income in the year of the sale. If the wife sells the cattle during the period of probate, is the entire sales price, or any part of it, income to the estate? I. R. C. A. Sec. 22 B provides that the value of property acquired by gift, bequest, devise or inheritance is not income to the recipient. The general rule is that the basis of property acquired by bequest, devise or inheritance is a fair market value of the property at the time of such acquisition, that is, value at the date of death. (Sec. 113(a) (5) P-H 10,737, REG 103 Sec. 19,113(a) (5)-1.)

Therefore, **your appraisers should appraise all property of the estate as nearly as they know how, at the value it will actually bring** upon a sale from a willing seller to a willing buyer. In this instance, if the cattle were appraised at $4,500.00 and sell for $4,500.00, there is no taxable income. However, if they are appraised at $3,500.00, and sell for $4,500.00 within six months after the date of the death of the testator, the taxable income is $1,000.00. However, if they are sold more than six months after the date of the death of the testator, the taxable income is $500.00 (50% of $1,000.00). In this connection, **it is highly important that the value of buildings should be separately appraised from the value of land,** so that the personal representative, will have a basis of determining depreciation upon the buildings, and the heir to whom the real property is decreed will have a like basis. (P-H 14,096, et sec.).

It is to be remembered in this connection that the heir, when he receives depreciable property in the distribution of an estate, starts a new depreciation schedule from that date without regard to any schedule which may have been used by the deceased.

In general, all of the income of an estate during the period of administration is taxable to the fiduciary, except that which is "properly paid or credited" to the beneficiaries. The income which is so paid or credited, is deductible on the return of the fiduciary, and must be included in the income of the beneficiary.

Charles J. Coulter, 6 BTA 426
Est. of A. G. Bartlett, 21 BTA 751
Peoples Pittsburg Tr. Co., Ex. (Est. of Fisher) v.
U. S., 79 Ct. Cl. 233, 6 F. Supp. 447, 13 AFTR 1123.

Failure of the estate to claim the deduction for income so paid or credited, does not absolve the beneficiary from tax on it.

Riker vs. Commissioner (C. C. A.-2), Ct. D. 264,
C. B. 1930, p. 366, 42F.(2d) 150, 8 AFTR 11064,
affirming Harmon W. Hendricks, 16 BTA 193.
Little v. White (C. C. A.-1) Ct. D. 326. C. B.
June 1931, p. 317, 47 F. (2d) 512, 9 AFTR 927.

Above rules apply, even though the will does not expressly provide for the payment of income to the beneficiaries during the period of administration. (Riker v. Commissioner above.).

In this connection, the estate is held not taxable on income from Texas community property distributed to the surviving spouse, who was the sole legatee of the estate.

Est. of Lucile Grury, 42 BTA 1279.

However, in another Texas case, the entire community income of the estate was held taxable to the estate.

J. H. Trippett Adm. 25 BTA 69.

In California, the income from the surviving wife's share of the estate was taxable to the estate.

A. J. Rosenburg, Adm. Memo. BTA 1-31-40
(affirmed C. C. A.-9-1940) 115 Fed. (2d) 910
25 AFTR 1100.

In Washington, the entire income from community property, after the death of one spouse, was taxable to the estate and no part taxable to the surviving spouse.

Rose B. Lason, et al. 44 BTA 1094 N. A. C. B.
1942-1 p. 26 Pending C. C. A. 9.

A joint return including the incomes of husband and wife may not be filed for the year in which a spouse dies.

Gertrude H. Thompson 30 BTA 30.
Katherine B. Bliss 29 BTA 1037 affirmed
(C. C. A.-3) 76 Fed. (2d) 101.

The allowance paid to a widow for her support during the period of administration is payable from the corpus of the estate and is not an income tax deduction. (P-H 15,187).

However, such family allowance is a deduction against inheritance and transfer taxes. It is important therefore, particularly if the widow is the sole recipient of the estate to cause a substantial family allowance to be set over to her and the sum thereof can be taken as a deduction against the inheritance tax.

In a community property state, the surviving spouse's income consists of one-half of the community net income for the period of the year prior to the death of the deceased spouse and the survivor's individual income for the balance of the year.

Minnie Felber, 45 BTA 197.

Whether rents from real estate of a decedent are taxable to the decedent's estate or to the devisees or heirs is dependent upon the decedent's will and the state law. A decedent died in New York January 3, 1930. Since realty vests in the devisee immediately upon the death of the decedent, under the law of New York, the rents therefrom collected by the executor of the estate

and the expenses incurred in connection therewith and paid by it were not taxable income nor expenses of the estate.

Guaranty Trust Co., Ex., 30 BTA 314.

Since both New York and Idaho have adopted the Field's Code and the statutes in the two states on the subject are identical or at least similar, the above rule would seem to be controlling in Idaho.

Section 14-102 I. C. A. provides that the property, both real and personal of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the Probate Court and to the possession of any administrator appointed by the court for the purposes of administration.

Section 14-324 I. C. A. provides that every devise of land in a will conveys all the estate of a devisor therein, which he could lawfully devise unless it clearly appears by the will that he intended to convey a less estate.

Section 15-410 provides that the executor or administrator is entitled to the possession of all of the real and personal estate of the decedent, and to receive the rents and profits of the real estate until settled or until delivered over by order of the Probate Court to the heirs or devisees.

However, this section is silent in regard to the question to whom such rents and profits shall be distributed, whether to a specific devisee or to the residuary legatee.

Section 15-411 commands the Probate Court to direct the executor to deliver possession of all real estate to the heirs-at-law or devisees at the expiration of the time limited for presentation of claims against the estate unless it appears to the court that the rents, issues and profits of the real estate for a longer period are necessary for the payment of the debts of the decedent.

A testator makes a specific devise of a piece of real estate renting for $100.00 a month and encumbered by a mortgage for $3,000.00 and one year's delinquent taxes, but makes no mention of the mortgage or the taxes in his will, there being sufficient personal property not specifically devised to pay all debts and expenses. Does the specific legatee receive the propery free and

clear of all encumbrance, and must the encumbrance be paid out of the residium or does the legatee receive the land subject to the encumbrances? Is the interest on the mortgage and taxes paid by the executor chargeable to the specific legatee or to the residuary legatee?

Does the executor return the income from rents as a part of the income of the estate or is it the duty of the specific legatee to return the income from rents as a part of his personal income? To whom should the rents be distributed, the specific devisee or the residuary legatee?

It would seem under the New York tax case quoted above, our statutes, and from the logic of the situation, that the specific devisee takes the property subject to the mortgage and the taxes. The payment of the interest on the mortgage and the taxes by the executor are chargeable to the specific devisee against the rental income. That the net rental income is distributable to the specific devisee rather than to the residuary legatee, and that the executor should not return such rent as income to the estate, but that it should be returned, and the tax thereon paid by the residuary legatee.

Prior to the 1942 Act, the law required that the income of a decedent for the tax period in which he dies must include all income accrued up to the date of his death. For example, it would include all fees due to a lawyer at the time of his death even though, had he lived, the fees would have been paid over a period of years. The result was that the taxable income in that period was frequently abnormally high.

This was changed by the 1942 Act. The law now provides that such amounts shall not be included in the decedent's income, but will be treated as income in the hands of the person receiving them to the same extent as those amounts would have been income if the decedent had lived and received them.

Such income, when received, will be includible in the income of the person receiving it by inheritance or survivorship, including the decedent's estate. If the estate does not collect these amounts, but distributes the right to receive them to heirs or legatees, the latter will be taxed on the income. They will, however, deduct an amount equal to the portion of the estate tax which is attributable to the inclusion in the estate of such income.

The general rule is that income tax of the estate is payable by the executor or administrator from estate funds. Under certain conditions, however, the executor may become personally

liable. Also liability for unpaid taxes follow the assets of the estate distributed to the beneficiaries. (P-H 15,189).

However, the claim of such unpaid taxes is not a lien upon the property. (P-H Sec. 19,502, I. R. C. Sec. 311).

The lawyer will find an important and lucrative field of endeavor in the matter of advice to his clients upon methods of tax savings. This is particularly true in the corporate field, with particular regard to net operating loss carry-backs, under the carry-back of unused excess profit credits. This is a complicated field of the law, but if you have any clients facing a loss on account of re-tooling their plants for post-war production of civilian products, you should examine the law with the greatest of care.

Special relief also is available where a corporation received income in an excess profits tax year and such income is in reality due to activities or expenditures originating in other years. To prevent the imposition of an excessive amount of tax on income which in substance is "piled up" in a single year, this special rule permits spreading the income over the various years in which it may be found to have originated. (Sec. 721 I. R. C. P-H 48,115, et sec.)

The effect is to reduce (and in some case to eliminate entirely) the excess profits tax on income which can be classed as "abnormal" and which can be allocated either in whole or in part to other taxable years.

Those of you who have a clientele among the mining and forestry industries, should familiarize yourselves with the provisions of the 1943 Revenue Act, with reference to certain excess profits exemption provisions, which are made retroactive to prior years. The exemptions are available to producers of minerals or logs or lumber, with respect to non-taxable income from accelerated production, and apply also to a lessor of mineral property or of a timber block and to certain natural gas companies.

Expense deductions of investors and other individual taxpayers were broadened in the 1942 Act by an allowance for ordinary and necessary expenses paid or incurred either for the production or collection of income or for the management, conservation or maintenance of property held for the production of income. The effect is to permit the deductions of many expenses formerly disallowed because the individual's activities were not incurred in carrying on a "trade or business." Such expenses include trustees', custodians' and managements' fees, safety deposit box rental, fees paid to investment advisory services, loose-leaf tax services and security services. (P-H 11,140).

Beginning 1942, alimony and separate maintenance payments paid to a wife are, under certain conditions, deductible by the husband. (P-H 7,851 et sec.· P-H 12,401 et sec.). These conditions are:

1. The husband must be divorced or legally separated from his wife under a court order or decree. The fact that the divorce occurred prior to 1942 does not preclude the deduction in 1942 and subsequent years. Temporary alimony paid pending the final decree is not deductible.

2. The deduction is allowed only if made under a decree or under a written instrument incident to the divorce or legal separation. However, the income from a trust established by a husband may be taxable to a divorced or separated wife, and not to the husband or the trust, even where the trust was set up before divorce or separation and not in contemplation of either. (P-H 15,355).

3. The payment must be a periodic payment which may be at regular or irregular intervals. Where the decree provides for a fixed amount payable in installments, the installments are considered periodic (a) if the principal sum is to be paid over a period of more than ten years from the date of the decree and (b) to the extent that the payments for the taxable year do not exceed 10% of the principal sum (P-H 12,401 et seq.; P-H 7852).

   For example, if the decree provides for a lump-sum settlement of $30,000 (cash or property), no deduction is allowed.

   If the $30,000 is to be paid over 10 years at the rate of $3,000 a year, $3,000 is an allowable deduction to the husband.

   If the $30,000 was paid $10,000 in 1943 and the balance ($20,000) over 10 years, the husband's deduction in 1943 is limited to $3000 (10% of $30,000). In the remaining years, the full $2,000 is deductible each year.

4. Payments specifically designated for the support of minor children are not deductible. Where the decree does not specifically designate what portion is pure alimony and what portion is for support of minor children, the whole payment is deductible by the husband.

5. No deduction is allowed where in lieu of cash or property payment of alimony, the husband creates a trust to produce the income to pay the alimony or the husband purchases or transfers an insurance or annuity policy to cover such payments (but see 2 above). Actual payment is necessary. Thus, no deduction is permited where the husband accrues the amount. If the money is not available, the payment with borrowed funds allows the husband to take advantage of the deduction. Any interest paid on the loan is deductible by the husband.

* * * *

Under the law, as amended by the 1942 Act, a bad debt was deductible only in the year in which it became worthless. While this was an important change, since under prior law there was the dual requirement that the debt must be ascertained to be worthless and charged off within the taxable year, the major amendment was the extension of the statute of limitations to seven years. This amendment was made retroactive to taxable years beginning after December 31, 1937, by the 1943 Act. (P-H 13,805; 20,301).

Under the 1942 Act and the present law, the lessor receives no taxable income upon the termination of the lease by forfeiture or otherwise and the repossession of the property on which the lessee made improvements (P-H 8341). Hence, no longer will a potential tax on the value of improvements be a controlling factor in the exercise of sound business judgment when a lesser it faced with the problem of whether to accede to the demands of the lessee or let him default and then repossess the property. Gain or loss will be recognized only at the time the property is sold or otherwise disposed of.

Proceeds of life insurance policies paid as the result of the death of the insured are not taxable.

Controversy arose when proceeds were left with insurance companies to be paid in installments. Originally the Bureau held that the excess of the amounts paid, over the amount which would have been payable immediately on the death of the insured, was taxable income to the beneficiary.

(1) Circuit Court decisions, involving cases where the insured exercised the option prior to his death, held that the full amount of the installments payable to the beneficiaries was tax-exempt (P-H 8220). The regulation was amended so as not to be in conflict with these decisions but continues the old rule with respect to cases where the beneficiary exercised the option (P-H 8218).

(2) The Tax Court subsequently held that no part of the insurance proceeds, paid in installments to a beneficiary who exercised such an option after the date of death of the insured, was taxable income to her (Katherine C. Pierce, P-H 64,016).

The Commissioner has filed a petition for review of the Pierce case. Pending the outcome of this litigation, taxpayers exercising the option to take insurance proceeds in installments after the death of the insured should protect their rights to any refunds which may be due if the Tax Court decision is affirmed.

Your corporate client has built up a surplus and desires to transfer such surplus to capital, and issue a stock dividend or another corporate client desires to effect a reorganization and issue additional stock. The question arises as to the taxability of the value of such stock in the hands of the recipients thereof. Whether such stock dividends or rights to subscribe stock constitutes income when they are received, depends upon whether they are income wihin the meaning of the 16th Amendment of the Constitution. (Sec. 115 F. P-H 9352.)

During the year 1943, the U. S. Supreme Court held that the dividends of common stock is non-taxable.

Helvering, Com'r. of Internal Revenue, v. Griffiths.
63 Sup. Ct. 636, 318 U. S. 371.

The Supreme Court also held that dividends of non-voting common on common and a preferred on common are non-taxable where the proportional interests of stockholders are not changed thereby. (P-H 62,017; 9357).

The effect of the receipt of non-taxable stock dividends or stock right is to require an allocation of the cost of the old stock, so that a gain or loss on a subsequent sale of the old stock or a new stock or right gives effect to the previous receipt of the non-taxable distribution (P-H 9414).

However, the recipient of the new stock can make a gift of it to his son, John, to help him with his college education, instead of money, or to his daughter, Mary, as a wedding present, and when sold by them the income is non-taxable because it was received by gift. Of course, Papa should not make a gift in any one year in excess of the permissible exempt limit for gift taxes.

* * * *

I have not discussed the so-called forgiveness feature of the 1943 Act. Time has eliminated its importance except in instances

where it is necessary to amend or re-compute the 1942 or 1943 tax returns. Amendments for these years will be occasioned principally in connection with Net Operating Loss Carrybacks.

However, recomputation of the taxes for these years will be important for some years to come in connection with the tax situations of persons who were in the military and naval forces of the United States or any of the other United Nations at any time during the taxable years of 1942 or 1943.

Section 6(d) (1) provides a special formula for computation of the 1942 tax in event the income of such persons in the military service was greater in the year 1942 than in the year 1943, by the elimination of earned income from the 1942 gross income.

If the 1942 tax so recomputed, eliminating earned income, is less than the 1943 tax, then the 1943 tax is paid. Also in all cases where the original 1942 tax, before computation, was the higher, 25% of the 1943 tax is added except that where the 1943 tax was less than $66.67, when only the amount by which it exceeds $50.00, if at all, is added.

Earned income constituted a major portion, if not all, of the income of most of the persons entering the Armed Forces, and in most cases, the 1942 income was greater than the 1943 income. Persons in the Armed Services had and have a special additional exemption of $1,500.00 of the money earned from the Government, and this together with their family and personal exemptions, in most cases, absorbed their entire 1943 income and the practical effect is to give great numbers of servicemen and women the right to a refund of a very large portion, if not all, of the tax which they actually paid on account of the tax year of 1942.

The laws contained other special provisions in regard to service men and women, such as deferment of the necessity to file returns for persons serving outside of the continental limits of the United States, upon the last day of the taxable year, and the forgiveness of tax liability of persons who die while in the service.

I commend to your attention an article by Lieutenant Thomas Todd, U. S. N. R., entitled "Special Benefits to Members of the Armed Forces," published in the Washington Law Review and State Bar Journal for November, 1943, for a thorough and scholarly discussion of the subject.

Whether you as lawyers care to familiarize yourselves generally with the provisions of the Federal Income Tax Laws or not, I urge you to study and familiarize yourselves with those provisions of the law having to do with the income tax problems of

servicemen and servicewomen. There is no moral duty to pay taxes, it is a duty imposed by law only. I sincerely hope that no serviceman or woman is ever compelled to pay more than the law requires because of the lack of knowledge on the part of their attorneys, to properly advise them.

AFTERNOON SESSION

July 6, 1944

VICE PRES. SMITH: We are going to put Mr. Sam S. Griffin's paper first on the program this afternoon.

LESS TECHNICAL LEGAL FORMS

SAM S. GRIFFIN: Forms, both the legal and feminine varieties, are probably God's gift to lawyers, and I would be the last to disparage either of them. On the contrary, I admire the utility and labor saving of the one, and the ease of understanding of the other in its modern dress or undress. But I do think that each could adopt from the other and work improvement in the net result.

As to what the gals could adopt I refuse to discuss for the reason that discretion is the better part of valor, and in addition I cannot cite authority. But it is easy enough to see and say what legal forms could adopt with profit from the gals.

Glance at your family album and pick out great grandma with her six petticoats, high shoes, laces and furbaloes. Great grandma had a form all right, but she surely frustrated anyone who might want to know what it meant. Now look at a Vargas pin-up girl. She is simplicity personified. Unless you've broken your bifocals you not only can read the form but you can see and understand the substance.

That's what we ought to do to legal forms. Strip 'em! Take out Blackstone's petticoat "whereases," Lytleton's commas, Coke's "parties of the first, second and third parts" and even more modern and misleading words, and get down to the skin.

I don't mean that we should leave out essential words, nor use less accurate English, nor even legal English. As a matter of fact, we could probably employ more accurate American. What I do mean is that so far as possible we should, where laymen are involved, endeavor to use American as the layman understands it.

Actually, however, many of the forms that are intended for

the notice and use of laymen are either useless for the accomplishment of their purpose, or incapable of interpretation by those who execute them, and in some instances direct a layman to do something he isn't required to do.

It is not the purpose of this paper to do more than arouse interest in the subject. I am not going to draft forms, nor to try to support by legal authority. I am probably as conservative as any of you—revolution is not in my blood. And yet I have often thought it was pure cowardice and laziness on my part not to throw some of the old things out the window, take a chance and start over.

Perhaps your secretary has said to you as I have had secretaries say to me, "Did I get that right?" and when I answered "yes", she would say 'I didn't think it could be, it sounds so silly."

Have you had clients read an instrument and say "Well, I guess it's all right, though I don't understand it." Did you ever have (as I have) a farmer, his wife, a brother-in-law, and three children come into your office on the 20th day after service of summons and tell you they had to be in the court room that day because the paper served said for them to appear there.

I know that a summons is a statutory form but does it have to start out like a Christmas card "The State of Idaho sends greetings to the above named defendant," and then proceed to sock Mr. Defendant between the eyes with words and threats which you and I understand but Mr. Defendant does not?

It tells him a "complaint" has been filed against him and he must "appear and plead to the complaint" and if he doesn't the plaintiff "will take judgment * * * as prayed in said complaint." Does he know what a "complaint" is; what "appear and plead" is; what "as prayed" is? You do—but you are sending this to a layman who doesn't.

Without attempting accurately to draw a form, why not say something like this:

> "This will notify you that John Jones (called plaintiff above) has sued you in the Court named above by filing with the Clerk of that Court a written statement of his claims against you and asking the Court to give him the relief he asks. A copy of this statement is handed you with this notice, or may be seen, read and copied by you or your attorney at the Clerk's office at the Ada County, Idaho, Court House in Boise.
>
> "Unless you are willing that the Court give a judgment to the plaintiff and against you, as he asks, you must file

with the Clerk your written objections in legal form, pay the Clerk $3.00 and deliver a copy to the plaintiff's attorney not later than 5:00 p. m. on the 20th day after you receive this notice. The name and address of the plaintiff's attorney is ....

(SEAL) ....
Clerk of the above Court."

That could be improved, but I submit it comes more nearly telling a defendant what has happened, what will happen, and what he has to do.

Let us take the common printed form of real estate mortgage. Many of you have already discarded it, but too many have not—and of course, most bankers, real estate men, and lenders continue to use it.

For the special purpose of recording statutes a mortgage is a conveyance, but otherwise it is merely a contract hypothecating property to secure performance of an act. (Sec. 44-801). It certainly does not transfer title. It must be foreclosed or performed. Yet the printed forms persist in making it read what it 'aint. It says that "the parties of the first part" (why not just "mortgagors" or "borrowers?") "grant, bargain, sell and convey," when they do no such thing. In fact the form itself afterwards turns around and with a mixture of truth and untruth says: "This grant (it isn't a grant) is intended as a mortgage." If it is so intended why not say so in the first place. The form says that if the debt is paid, "these presents shall be void" and that isn't true either.

Further the form reads that if the debt isn't paid the "party of the second part, his executors, administrators or assigns" may immediately enter, and sell the property—and he or they can't do any such thing—he or they must commence an action in court to foreclose, and that is far from "immediate" entry and sale as you all know.

Further, the short form I am looking at reads that having sold what the mortgagee can't sell, he can retain from sale proceeds "costs and charges of foreclosure suit, including counsel fees, taxes, assessments, incumbrances or insurance" yet nowhere in this short printed form does the mortgagor agree to pay any of those items, nor does the mortgage purport to secure their payment, if paid by the mortgagee, nor is there any provision for a default or foreclosure or sale if the mortgagor fails to pay them. I doubt if in the case of a contest the decree could include them—they are not in the contract. The long printed form is better in this respect.

Many attorneys are now leaving the deed out of the mortgage, and cutting out "parties of the first part, etc." I have seen forms which in effect merely read that John Jones and Mary Jones, husband and wife, mortgagors, mortgage certain real estate to Arthur Smith, mortgagee, to secure the payment of principal and interest according to the terms of a described note, and also taxes, attorneys fees, insurance costs and abstract charges which mortgagors agree to pay, but if they do not, the mortgagee may pay — if mortgagors default the mortgagee may foreclose as provided by law. More words are used but that is the substance of it.

One of the most common and most useless forms is notice of sale of real estate in probate. If the idea is to secure a buyer at the most favorable terms, and I suppose it is, most of us do everything possible to defeat the purpose. We pick out the most obscure section of the most isolated newspaper, use the smallest type, and most involved legal langugage with the least attractive description, for the cheapest price we can possibly find. I doubt if the notice has ever caused the sale of one out of ten properties. Most of the time the executor has already found a buyer or the neighbors have spread the word that old man Jones is dead and the widow is going to have to sell the farm, and it can be picked up cheap. The notice is a mere formality.

But even though it has to be given as a matter of law, why should it not aid in selling the property at perhaps a better price?

Some years ago I was jolted out of my laziness in this connection and I think I woke up at least partially. A businessman client was administrator of an estate I was handling. In the estate was a vacant Boise lot, fairly well located for business property, which had to be sold. I prepared the usual form of notice of private sale and sent it to the administrator for signature and publication. Back came this letter—

"Dear Sam:

I received your form of notice of sale. I suppose the law requires me to publish it at the expense of the estate, but can't I run a display ad also? I have no prospects and I really want to sell this property. I would like to say something good about it in a 2 column 6 inch ad out of the legal notice section in the .... paper where as many prospects as possible will see it."

Now that was just what one might expect from a layman! It was rank heresy and toppled the grandest traditions of the law. Besides, it made work for me, and what would the purchaser's attorney say about it when he examined the abstract? It was radical, unheard of (at least by me), might blast my professional reputation, if any, ruin my career, and cause the finger of scorn to be pointed at me forever by my brethern at the Bar.

I studied the matter over for hours—briefed it and finally threw away the form I had loved and used for 25 years, and came forth with something like this:

ADMINISTRATOR'S SALE

75 foot frontage on South Side of Main Street between .... and .... Streets. Vacant lots. Desirable location for grocery or service station. (Lots .... and ...., Block ...., Original

Townsite, Boise, Ada County, Idaho.)

Private probate sale to highest bidder for cash. Sale subject to confirmation by Probate Court, Ada County, Idaho in the estate of .... deceased. Abstract of title furnished. Only written bids will be considered. Sale will be made on or after June 10, 1941.

Deliver written signed bids to me, or leave them at .... St., Boise, Idaho, or with the Clerk of Probate Court, Ada County Court House, Boise, Idaho, at any time after May 20, 1941, date of first publication of this advertisement.

Sam S. Griffin, Attorney, John Jones, Adm.,
309 Idaho Bldg., Boise, Idaho Estate of ...., deceased"

This was published the requisite legal period, affidavit of such publication filed, and it constituted the only notice of sale. We received three bids, sold the property, and much to my surprise and relief the examining attorney approved the proceedings.

Take note that I attached my own name to the ad as an acceptance of responsibility, and not as self advertising.

Since that experience I have taken indecent delight in editing some of your notices as they appear in the newspapers in sober, heavy treaded, legal style and sized type. In the latest I have eliminated 118 words and inserted 3, a net gain of 115 words out of a total of 375 words used. The name and full title of the executor and decedent appeared four times, of the Court three times and of the attorney with his office address twice. It is still a very poor invitation to prospective buyers.

Why do we say "Notice is hereby given"; "terms and conditions hereinafter mentioned, set forth and described"; "Tuesday, the 11th day of July, A. D. 1944"; "all the right, title, interest and estate"; "said John Johns, said decedent"; "in and to that certain tract or parcel of land, situated, lying and being in Boise City, in the County of Ada, and State of Idaho, and more particularly described as follows, to-wit"? Why not "Notice"—just set forth the terms; "July 11, 1944"—"an undivided one half interest in Lot 7, Block 10, Original Townsite of Boise, Idaho", etc? Why not describe the hardwood floors, stoker, full basement and other virtues of the property in large, black type? Of course work in what the statute says you must, but otherwise try to put some sex appeal in the notice.

One more form and I am through. Notice to creditors in probate is not long, but it is stilted. It can be cut in half and actually give clearer notice to the grocer, butcher, etc. than it does now. Now it really does not tell a claimant what to do—it doesn't even fully describe what the statutes require of a claimant. Wouldn't it be better to notify creditors and other claimants that Jones died on a certain date; that if they have claims of any kind, whether due or not, they must set them forth fully in writing, swearing to their truth, and deliver them to the administrator, (giving his address) before a fixed date, otherwise the claim can't legally be approved or paid?

Many, many other legal forms and papers could be improved vastly. I could do it myself, and would if I were not too habituated and lazy after 30 years of practice. But you are younger than I am, and less set in your ways. So **you** do it—I'll try to trail along as best I can.

And lastly, just because I am slow to change, please don't mark up my next legal document and say "Practice what you preach." I know I am as vulnerable as you are.

PRES. HYATT: The next subject is "The Bar Reexamines Its Position on Courts," by Z. Reed Millar of Boise, a committee report.

MR. Z. REED MILLAR: The printed program thus titles this subject. However, the previous committee appointment named it The Committee on Re-examination of Reorganization of Courts, Judicial Salary and Judicial Retirements.

This paper and its recommendations may appear by some to be radical, and others to be reactionary.

* * * *

Much has been said in recent years about the increase of bureaucracy and administrative adjudication of rights and it is apparent to anyone, who has had even brief experience with administrative adjudication, that there is a process of administration of **something** in this country, which is an innovation, and which definitely parallels, and, in many instances, exceeds the adjudication of rights long believed solely the jurisdiction of the Judicial Department of the Government.

We are not discussing a policy or partisan issue, but a fundamental change, which is taking place, and which did not just begin ten or twelve years ago; but which began twenty or thirty years ago and has been extended largely only in the past ten years.

This committee desires to point out what we think is severe condemnation of Courts, the administration of law, the adjudication of rights generally, in the accomplishment of which lawyers and courts equally must assume obligation for the fundamental changes. * * *

In the guise of war powers, there has been a tremendous increase in the administrative process, whereby the executive, by decree, may prescribe rules which have the force of law; determine, by the same process, who violates these decrees; punish by depriving him of the right to do business, to buy food, property or any of a hundred things, all within the same branch of the Government.

In proof of the threat to our courts and the judicial determination of all rights and controversies, we call attention to an article appearing in the June 1944 number of the American Bar Association Journal, in the form of a letter of Everett C. McKeage, Chief Hearing Commissioner in the office of the Administrative hearings, Region VIII at San Francisco, who states:

> "As a lawyer and as a former judge of the Superior Court of the State of California, I may say that lawyers will have to do much better than they have in the past — and this applies also to judges—if they expect to arrest—much less reverse — the rapid growth of the administrative process.* * * The fact remains this type of administration of justice is gradually gaining ascendency over the courts and unless lawyers and judges turn in a far better score in the future than they have in the past, we may rest assured that the bench and the bar will continue to retreat along the whole front of the administration of justice and that the administrative process will become paramount."

In answer to this letter, Dean Pound severely indicts the courts of the day when he said:

> "We have got to learn that a good many of Circuit Courts of Appeal nowadays feel bound to sustain anything that any government agency does." * * * "this subject of administrative absolutism is not a matter of any one agency or any one officer of one agency. It is a matter of a system, which has grown up and has been attaining continually increasing proportions."

In the article referred to in the March issue of the Journal, Dean Pound makes in part these comments:

> "From the beginnings of our polity, our common law has denounced allowing any one to be judge in his own case. The seventeenth century English courts refused to allow even Parliament to provide for this. Courts today refuse to allow it where policies of insurance or contracts or by-laws of associations provide for it. Yet the regime in which complaint is made to an administrative agency which takes it up, investigates it, orders a hearing before itself on the complaint it has made its own, advocates it at the hearing by its own counsel before one of its staff as trial examiner or hearing commissioner, and renders an order depriving some individual of a valuable right, amounts in practice to the agency judging its own case. * * *.
>
> I have spoken of administrative adjudication. But administrative rule-making is in no less need of the check of effective judicial review such as the modern device of the declaratory judgment can readily provide. Even the least important statute must be formally introduced as a bill, printed, referred to a committee and reported on, often after hearing, read three times before each house, discussed in committee of the whole, passed by each house and approved by the executive. * * * Rules of court are drafted by committees of judges, practising lawyers, and law teachers, or by judicial councils, referred for criticism to bar association committees or committees of the bar in different circuits, discussed before bar associations and in legal periodicals, and only adopted after every one having an interest

has been fully heard. Administrative rule-making is in striking contrast in its want of checks, in its failure to give those to be affected opportunity to be heard, in its ignoring of interests which have constitutional title to be kept in mind. Too often it seems to make rules for the convenience of the agency at the expense of the citizen. * * * Rules made without affording an opportunity of hearing to those who are to be bound have the essential vice of taxation without representation of absentee government. They are certain to be arbitrary. * * * But * * * if what was preserved then is to be preserved also in our day, lawyers must press for the legislation which will impose upon exercise of administrative powers reasonable limits such as the courts may effectively enforce."

In line with Dean Pound's reasoning, we desire to point out our position in this state, and call attention to encroachments that have been permitted, and which should be corrected.

Section 13—Article I, Idaho Constitution, in pertinent part provides "no person shall * * * be deprived of life, liberty or property without due process of law."

Section 18—Article provides "Courts of justice shall be open to every person, and a speedy remedy afforded for injury of person, property or character, and right and justice shall be administered without sale, denial, delay or prejudice."

Article II of the Constitution provides "The powers of the Government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others except as in this constitution expressly directed or permitted."

Article V—Section 13 in part provides "The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate branch of the Government * * *".

In 1917, the severest and first real violation of these fundamentals began in the Workmen's Compensation Law, which in the second section provides (Sec. 43-902 I. C. A.):

"The common law system governing the remedy of workmen against employers for injuries received in industrial and public work is inconsistent with modern industrial conditions. The administration of the common law system in such cases has produced the result that little of the cost to the employer has reached the injured workman, and that little at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. * * * all civil actions and civil causes of action for such personal injuries, and all jurisdiction of the courts of the state over such causes are hereby abolished, except as is in this act provided."

This was held constitutional in the case of Brady vs. Place, 41 Idaho 747, 242 Pac. 314, in a half-hearted and evasive opinion.

Whoever conceived the original idea of the Workmen's Compensation Act certainly conceived a noble thing, so far as the rights of employees and employers were concerned; but he missed the "boat", when he prescribed that the administration of the duties and responsibilities and adjudication of the rights and privileges prescribed in those acts could not and would not be determined by Courts, and abolished all jurisdiction of the courts. Instead of abolishing application of the common law, the thing complained of, jurisdiction of the courts was abolished, as though the old common law and the coordinate branch of the government were one and the same thing. To get at the vermin, they just burned the house down.

If the remedy for employees was slow and inadequate, was it the result of the law or the court failing to assume its proper jurisdiction? Could the adjudication of rights under this act be determined with more efficiency in the executive branch of the Government, when it has been the rule, with little exception, that men who were appointed as members of the board should have legal training and know legal procedure? Are the bar and the courts so tied to form and formality that substance is destroyed and rather than bend to a change in rules of procedure necessitated by ever changing industrial and social changes, the determination of these rights must be transferred to another department of the Government?

It has been said that our courts are jealous of the invasion of the judiciary by other branches of the Government. Let us examine this question. Was the court in Brady vs. Place jealous of its prerogatives, when it upheld the functions of a legislatively created board charged with this administration of judicial functions through the executive branch of the Government? Is the fact that new industrial and social conditions bring about new and different rights or remedies not in existence or contemplated at the time the Constitution was adopted, an answer to and justification for transfer of the powers of the judiciary to the executive.

Following this piece of legislation, comes the Un-Employment Compensation law, which likewise under a declaration of the po-

lice power of the State, removes the determination of highly judicial controversies from the judiciary and places the determination of those rights and duties under the executive branch.

Under this law, it is now contended that the same body which administers that act has the power to determine the amount of the tax, the judicial question of relationship of employer and employee on its own motion, and seek to enforce it as a foreclosed determination without a hearing and without a chance of the judicial question being heard and determined in the courts of the land.

Does the changing of industrial and social conditions of our country impose upon the executive department only the necessity of change to administer justice under **new** rights, even to the assumption of determination of private rights by setting up its own tribunals and bodies to try and determine these matters? Do the constitutional provisions against encroachment pertain to the executive department differently than to the judiciary. In Wright v. Callahan, 61 Ida. 167, 99 P. 2, 961 (which we think is good law), it is said "The legislature can not take from a constitutional officer a portion of the **characteristic** duties belonging to that office, and devolve them upon an officer of its own creation. * * * To permit the legislature to create an office and vest in the appointee the powers and duties conferred upon a constitutional officer, would be to permit the legislature to nullify the constitution and reduce it to a mere scrap of paper".

If these are good rules of constitutional law, why aren't they as applicable to the judiciary as to the executive?

Now to review what the Idaho State Bar has done and what it has not done in the past decade:

In 1935, a judicial council had been organized and only a part of the District and Supreme Court judges met with the purpose of adopting uniform rules.

In 1936, these rules had been formulated and accepted by the judicial council, and presented to the bar, who immediately, in lawyer fashion, knocked them into a "cocked hat." I am not able to find whether they have actually been adopted and are in use in the various districts of the state now. Judge Koelsch, after making the report and after much "anti" discussion by the bar, said "after the experience with the rules I have had just now, I think it is wise not to report what the (Judicial) section agreed upon."

In 1937, P. 19, the judicial section of the bar passed a resolution to draft an act requiring District Judges and Supreme Court

Judges to annually confer on problems of improving and simplifying practice of Courts and requesting an appropriation to pay for their expenses.

In 1938, the judicial retirement bill put in its appearance, but the statute for annual meeting of judges was postponed. The legislature likewise postponed the retirement bill that year.

In 1939, the only subject pertaining to courts was an article by Wilbur Campbell at P. 26, "Is the bar satisfied with the judiciary", which should be read often by the Bar and the courts.

In 1940, the problem of the rule making power being vested in the Supreme Court was proposed, P. 69. This was approved by the Bar and a statute draw (P. 146). This statute became law in 1941, (Chap. -90, 1941) but carried no appropriation for payment of expenses, and little has been done by the court concerning it. It is hoped that such an appropriation will be obtained in order that it may be completed, and these constitutional duties reassumed by the court. The delay in exercising these prerogatives and responsibilities is one reason for the growth of administrative process away from judicial process.

In 1941, a thorough paper on abolition of probate courts, and the transfer of its powers and duties to the District Court was presented, but no action was taken on the proposal.

In 1942, a committee was to be appointed and report on improved methods of selection of judges.

In 1943, no meeting was held.

Here then is the story of our progress in ten years of study —a number of statutes pertaining to substantive law have been enacted at the behest of the bar—some changes affected in procedure, but, on the whole, little fundamental change in our courts has taken place. Now to return to the original question of encroachment upon the judiciary.

Why aren't these plain provisions of the constitution given effect, and why isn't the court on guard against these encroachments?

We do not mean that there should be a wholesale declaring of these laws unconstitutional, but there should be a sane and sound movement to return jurisdiction rightly belonging to it back to the judiciary, and that, by force of law the judiciary assume its responsibilities. Let us check this dangerous departure. Let us do it in the orderly constitutional manner.

If the legislative had the power to create the Industrial Accident Board, and take its duties away from the judiciary, it has the power to put it back, and to create a judicial tribunal to exercise the duties rightfully belonging to it.

Certainly in the future, rights and duties as pertains to labor, industry, rationing and many fields of activity now unknown, will require administering of justice, in which rights of life, liberty and property will require due process of law, and no person or collection of persons should be charged with the exorcise of these judicial powers but a free and independent judiciary, if our representative government is to endure. Can the courts come out of their (rigor mortis) formalities, and, by exercise of their rule making power, extend their functions to include the determination of these new rights in a vigorous, complex and ever changing State and National life?

Courts in our state are being paid too little; but it has been suggested that, considering the encroachments all courts have permitted and their refusal to keep abreast of the time in the administration of justice and new rights, they have been much overpaid.

Instead of changing the form of our government, we recommend that the respective coordinate branches of the Government, particularly the judiciary, function in their own sphere, and be thoroughly overhauled to meet in those spheres the exigencies of the time. Here is a ripe field for the Bench and Bar alike, and in that connection, we further recommend that the Bar favor and set up machinery to bring about the following:

1. Create an Industrial Court with equal dignity of our district courts to consist of three men, members of the Bar, and learned in that phase of the law, with state wide jurisdiction over Workmen's Compensation, Unemployment Compensation, labor disputes, duties of Public Utilities Commission, and any other matter specially pertaining to industry, employer and employee, and new social or industrial problems arising. Appeals should be taken directly to the Supreme Court as a matter of course. Salaries for these positions should be $6,000 per year.

2. We call attention to and recommend a change in the present method of election of Supreme Court and District Judges, in lieu of possibility of a retirement law. Missouri has recently instituted an interesting and carefully thought out system for choosing their higher judges. A council or committee, composed of a certain number of the Bar and a certain number of laymen, recommend three names to the governor who must choose one of them. At the end of the term for such appointee, he runs on his record. There are no other candidates; the only question being, "Should .... retain his office"? Such a system has a lot of merit, and we recommend it to you.

3. Abolish all justice of peace courts and create a county wide county court, having full jurisdiction in all matters now in Justice Courts, and continue existing Probate, Juvenile, and Criminal jurisdiction. Require a legal training and Bar membership for the Judges and fix a salary at not less than $2,400 per year.

4. The most effective method of bringing about these changes, since most of such changes will require constitutional amendments, will be to call a constitutional convention. Other problems which have arisen in recent times may require constitutional changes, and we believe the Bar should take the lead in calling such a convention, and preparing proper amendments.

5. We should propose the enactment of a statute providing for the creation of a judicial council to expedite the work entailed under the rule making power, with membership consisting of the Bench, Bar and Legislature, with an appropriation for its expenses.

6. Instead of a retirement law, raise salaries of District Judges to $6,000 per year and of Supreme Court Judges to $7,500 per year.

Lastly, we cannot improve our administration of justice and secure speedy and expeditious determination of litigation merely by reshuffling our courts or raising their salaries. This is the other side of our Judicial System that cries out for speedy and simple solution, and we call upon our courts to join in the orderly process of fitting judicial process to current needs, and of fully assuming their responsibility as a coordinate branch of the Government whose duties characteristic of that office,—adjudication of rights and administration of justice,—cannot and must not be exericed by any other branch of the Government. The Bar must not just file this report, and do no more than has been done in the past on these matters. We must not only arrest, but we must reverse the administrative process, or as a bar and a coordinate branch of the Government, we shall cease to exist, and with that demise will go the freedom and liberty of the people as a whole.

The question is, Shall we be governed by law or by men? "We cannot exist half slave and half free."

Respectfully submitted,

Z. REED MILLAR,
CLAUDE MARCUS,
JAMES F. BUTLER,
Committee.

PRES. HYATT: I request that Mr. Millar attend with the resolutions committee and properly carry this matter to us by way of resolution. The next subject is "Is That Title Really Unmarketable?" by Mr. Frank Davison.

MR. FRANK DAVISON: * * * The term "marketable title" is used in a comprehensive sense to cover all cases involving the duty of the seller as to the quality of title he is to furnish under an executory contract of sale. In this sense the terms "good", "marketable", "perfect", and even "such a title be approved by purchasers attorney" have been by the court regarded as synonymous or indicative of the same character of title.

The term "marketable title," in Bell vs. Stadler, 31 Ida. 568, is defined as, "Such a title is one as free from apparent defects as from actual defects, one in which there is no doubt involved, either as a matter of law or fact." To be marketable a title must be free of any reasonable objection and of a character to insure the buyer quiet and peaceable enjoyment of the property. It need not be absolutely without flaw. The courts recognize the fact that it would be seldom where a case could not arise where some state of facts might be imagined which, if it existed, would defeat a title. Therefore, a title is not unmarketable because of a mere possibility, but an objection to title must be based upon a logical probability sufficient to create a reasonable doubt, which some courts have defined as being a "judicial doubt". Therefore, presumptions cannot be relied upon to establish a defect in title unless the facts shown in the title clearly warrant it, nor do mere suspicion or speculative possibilities that something might appear in the title in the future render the title unmarketable. Moral and not mathematical certainty is all that is required in a marketable title. Consequently, some courts have held that the duty is on the buyer, who refuses to accept the title because of defects, to give proof tending to raise such reasonable doubt as to render the title unmarketable.

Under judicial definitions of "marketable title", we find many irregularities, flaws and defects which do not render a title unmarketable. Some encumbrances of record have been held not

to be defects. For example, it has been held that lapse of time raises a presumption of payment of an unreleased mortgage; also, where the statute of limitations has run against an action to enforce a mortgage it is no defect. Judgments being a lien on real property only by virtue of statute, an unpaid judgment which is older than the lien period provided by law does not constitute a defect in the title and consequently a purchaser can make no valid objection to a judgment which is not enforcible against the land involved. An Iowa court has gone so far as to hold that a judgment entered after the execution of an executory contract is not a lien against the land.

Generally speaking, building restrictions which run with the land have been held to constitute a cloud on a title, regardless of their beneficial effect, unless they can be shown to be of mutual benefit to the different owners of adjoining lands. Contrary, however, restrictions set up in zoning ordinances have been held not to constitute an objection to the title.

The general rule regarding easements is, that to constitute an encumbrance the easement must operate to diminish the value of the land. Hence, contracts to convey land, giving title "free and clear of all encumbrances", are generally held not to refer to visible physical burdens upon the land. Sewers, water mains, gas pipes and power and telephone lines along the highway have been regarded as incidental to the use of and not an encumbrance upon adjoining lands. Public roadways have been considered as being beneficial and not encumbrance, but private roadways over the land in question, for the benefit of a third person, have been held to be encumbrances which renders the title unmarketable, unless the contract provides for this exception and the purchaser understands that he is receiving the property subject to private road right of way.

A question which frequently confronts the title examiner is the variation of names appearing in the chain of title. * * * The general rule is that identity, or substantial identity of names in successive conveyances creates a presumption of identity of persons; the rule applies both to christian and surname. Comparison of names with initials cannot be presumed, particularly where the christian name is used in the instrument by which the person receives title or departs with it and initials are used in the other of the two instruments. However, there are certain abbreviations and nicknames for the more common christian names which the courts have long recognized as inter-changeable, and in such instances title can be received or conveyed by the use of nickname and conveyed or received by the true christian name, and the variation is not a material defect.

The doctrine of idem sonans, which applies principally to surnames, is: "There is a presumption that differently spelled names refer to the same person where they sound alike or where the attentive ear finds difficulty in distinguishing them, or where common useage has by corruption or abbreviation made their pronunciation identical." Therefore, variations in the chain of title which can be considered as idem sonans do not constitute a valid objection so as to render a title unmarketable. Should this question arise in examination of an abstract reference might be made for comparison to cases which have decided the question of idem sonans. Patton on Titles contains a large list of names which have been passed upon, and a list of nicknames which have been held to be inter-changeable.

Where the signature differs from the name of the owner, identity will be presumed where the owner's name is correctly shown in the acknowledgment.

The courts have also held that, although variations in names does not fall under the above set forth rules, lapse of time does create a presumption of identity where no adverse claim appears in the chain of title because of such variation.

Variations of the residence of the parties in instruments constituting the chain of title has been uniformly held not to be material.

Certain errors in descriptions have been held not to be material. Variations in different instruments constituting the chain of title are not material provided they cover the same land, and where there is more than one description of the land in an instrument in the chain and they are inconsistent, courts have indulged in the presumption that the portion of the description which is inconsistent with known lines, boundaries, courses or distances is erroneous if by this means the lands intended to be included in the contract may be clearly ascertained, and in order to make clear the course of survey the course may be reversed and the lines run in the opposite direction. If a description is so certain by reason of fixed monuments referred to as to justify the rejection of certain descriptive terms as erroneously and inadvertently used the misdescription is regarded as immaterial. Furthermore, the omission of one boundary is immaterial where the other boundaries are correctly given and from them the one omitted can with certainty be ascertained. Also, where the town, county and state are left out but the correct plat designation is given, or the correct section, township, range and relation to base line and meridian are given so that the property can be definitely located, the omission is immaterial.

It has also been held that where the wrong direction from the base line or meridian is given, thus placing the land in a township or range, the recitation of a wrong direction is immaterial.

Interloping instruments or strays in the chain of title have been uniformly held to be immaterial and should be disregarded.

Lapse of time is a great doctor in curing defects in titles. It will cure variations in name. It will raise presumptions which will operate to overcome objections to the marketability of a title, based upon defects which if it were not for the presumption would effect its marketable quality. For example, defects in tax sales proceedings have been held to be cured by the lapse of time specified by statute in which the validity of deeds executed under authority of such proceedings may be attacked. Lis pendens, attachments and other hostile claims against the title are rendered immaterial by the lapse of sufficient time so that such instruments cannot be enforced at law. Defective execution and acknowledgement of instruments have been held to be immaterial where possession has been held for a sufficient period of time.

There are many other matters which could be discussed but time does not permit. Many statements herein contained are not based upon opinions of our own Supreme Court, although upon other Supreme Court holdings; largely they appear to be based upon the weight of authority. Most of the material of this paper was taken from the annotation in 57 A. L. R., pp. 1253 et seq, and Patton on Titles. I acknowledge the great aid they have given me in preparing this paper and recommend that both of them be used as constant references on title problems.

PRES. HYATT: We will take up the next subject "Personal Injuries—Backs and Neurosis—A Medico-Legal Paper". Dr. T. E. P. Gocher of San Francisco, isn't able to be here, but Mr. E. B. Smith will read his paper.

BACKS AND NEUROSIS

by

T. E. P. Gocher, M. D., San Francisco, Calif.

The spine is a very complicated bony structure. In this area there are ligaments, joints, muscles, tendons, nerves and the discs between the vertebrae, which may be injured and cause symptoms.

There are many different types of injuries, that can be present. At times a mild injury may develop into a serious case and treatment greatly prolonged. In the aged, it should be remembered that mild symptoms may hide a serious injury because these people do not react to pain and sensation in the ordinary manner, in many instances.

The diagnosis of a back injury is often difficult. Too often the injury is diagnosed as a "sprain" and it is let go at that. If the diagnosis is not correct, treatment can be greatly prolonged. Pain may be referred, as, a fracture in the upper lumbar area may have the pain referred down in the sacro-iliac area. Pelvic and abdominal pathology may cause pain in the back.

Too much reliance is often placed on the x-ray diagnosis. The fact that the x-rays are negative does not mean that there is not an injury in the back. Often only one x-ray film is taken when, the least that should be taken, is two. In some instances, as many as ten films have had to be taken to demonstrate a fracture of the spine. It has been found that the lateral view of the spine shows about 72 percent more fractures than the antero-posterior film. In other instances, atrophic arthritis is called a fracture when the compression is not a fracture, but is due to the type of arthritis. X-rays must be centered correctly over the area of the trauma, in order to obtain the normal relationship to that area. In some instances, there may appear to be a joint separation, it is known that films taken of the sacro-iliac area, at an angle, will show that joint appears widened, but yet when taken correctly and directly over the area there is no separation or widening of the joint. In some cases, x-ray films may be negative to the first film but later, as in a month, they may show a fracture. An illustration of this is Kummel's disease. Care must be taken that the entire injured area of the spine is in the film. It is interesting to note that at times, the dorsal twelfth vertebrae is omitted entirely.

Another factor that is now being recognized as very important in back injuries is, that of injury to the intervertebral disc. These discs are situated between each of the vertebrae. They usually do not show up in the ordinary x-ray film. These discs may be traumatized or may have a hernia of the disc develop and protrude into the spinal canal causing nerve symptoms often referred. These disc herniae are mostly found in the lower lumbar area, often between the lumbar fourth and fifth and the lumbar fifth and the sacrum. They may be found elsewhere in the spine. The symptoms may be severe at first or they may be mild. They are often

very resistant to treatment and surgery is required; about 5% have a recurrence in surgery. Diagnosis of this condition should be made only after a careful individual study, as there are other conditions and injuries to the back that may cause similar symptoms, especially a lateral lumbo-sacral joint trauma.

Removal of the protruding section of the disc by surgery causes a reaction to the autonomic nerves and the symptoms that develop are at times called a "neurosis." If injury or disease of the disc is not recognized, then symtoms of a "neurosis" may develop. When the disc injury is recognized and treated, these symptoms usually disappear, if they are caused by the disc alone, and pain usually disappears fast, after surgery. In certain instances, compression fractures of the vertebrae may traumatize the discs and cause symptoms. One of the most common injuries that is frequently called a disc injury, but is not, is that of a strain of the lateral lumbo-sacral joint. This condition may cause practically all the same symptoms that a disc injury does. Careful diagnosis is needed in order to differentiate between them. The disc protusion causes pains in the great sciatic nerve; the disc pathology causes the back pains. The back pain just mentioned does not call for surgery.

The objective method of diagnosing back injuries is of great importance. One of the major symptoms is pain. If this is complained of, then one should make certain as to whether it is actual pain that is present or soreness, tenderness or discomfort. Is the pain referred or does it follow any nerve trunks? Does anything aggravate and cause the pain to become worse? Also, what is the relationship between the pain and the injured area? Is there any muscle spasm or limitation of motion? Also, is the pain continuous or only present at times?

When x-rays are taken, one should know if they were read by a general practitioner or x-ray specialist. X-ray reports should be in writing, even if they are negative. At least two views should be taken. If any abnormality is found, one should ascertain whether it is recent or chronic or congenital. If it is a fracture, a full description should be given.

In the examination of the patient, the doctor should consider as to whether the condition found is or may have been caused by the injury. If there is any loss of motion, to what degree and what motion is lost? Is there any evidence of increased nervousness and if so, to what degree and manner? A full descriptive medical report is needed. It should be remembered that pain may be referred to the back from elsewhere and the patient may believe that he has a back injury, but in reality it is a pain caused by

something else. It is interesting to note that a kidney abscess may be called a lumbo-sacral strain. Anterior Poliomyelitis may be called a sacro-iliac or lumbo-sacral sprain. Cancer of the prostate may be called a lumbo-sacral strain. Tuberculosis of the spine may be called a fracture. An infected prostate may cause back symptoms which are diagnosed either as a sacro-iliac strain or a lumbo-sacral strain and they may appear very suddenly. A neurosis may cause pain in the back and a diagnosis of spinal strain made from the pain alone.

It should be remembered that a high percentage of back injuries are due to soft tissue injuries, about 79.4% and they do not show up in the x-ray. The fact that an x-ray is negative does not mean that there is not a back injury. In these cases, they should be fully studied and x-rays studied. The mechanics of the accident should also be studied with respect to symptoms and complaints, and if the accident could or did cause them.

From the medical-legal standpoint, it should be ascertained first:

(1) Did an accident really occur? Was the claimed accident an after-thought? Could the accident cause the symptoms and just when did the first symptoms occur? What were the mechanics of the injury? Does the claimed injured area show evidence from a medical standpoint, that an injury did occur?

(2) It should be remembered that delayed symptoms may occur and they usually are as follows:

(a) Ruptured muscle fibers may have a delay of three days before symptoms appear.

(b) A bursitis or tenosynovitis may also have a three-day delay.

(c) Disc trauma may have a delay before symptoms appear and in the aged, they may be delayed a month.

In falls on the buttocks there may be disc trauma develop or even fractures which are usually between the dorsal 10 and the lumbar second vertebrae. In rear-end automobile collisions, there is often a severe jarring of the people in the cars and a severe neck jerk may be called a strain. This may cause trauma and symp toms develop that may be called a neurosis. This type of injury usually occurs in the cervico-dorsal area or in the lumbar area. It is really a disc trauma but not of necessity a hernia of disc.

Another question to be considered is an aggravation of a pre-existing condition present. If the patient has hypertrophic arthritis, the x-ray would show an increase of the arthritic spurs at the site of injury that is more than normal, usually after six months from the injury. The six months is what several of the state authorities believe to be the time required to show whether aggravation has occurred or not. The x-rays should be localized and taken as nearly as possible in the same manner to show the same spurs being present. The normal growth of these spurs should be considered.

A neurosis is considered to be a condition of the autonomic nerves usually, or an organic nerve and autonomic nerve condition, in which these nerves react to mild stimuli in a much greater than normal manner. This condition may be due to a brain or spinal disease of the nerves. A disc trauma may cause all symptoms and similar ones to that of a neurosis. A physician should be able to diagnose between the condition and if a disc condition is present. Many so-called "neurosis" are really disc trauma or disease. These discs are well-supplied by autonomic nerves. Irritation of these nerves may cause quite marked symptoms or even periodic "nerve explosions." Treatment of these discs will usually cause a subsidence of the neurosis symptoms in some cases, if done correctly. Disc trauma may cause marked nervousness, insomnia, ear, eye, nose, jaw pain, headache, backaches and many muscle and nerve disorders.

Disc trauma in the neck may cause pain referred up over the head and symtoms in the region of the head that may be diagnosed as a brain injury.

Sometimes this increased condition of the susceptibility to stimuli of the autonomic nerves may cause pain over large ganglia or nerve centers. This condition causes pain and the pain is often referred to the back, which may be called a back injury. In these cases, careful physical examination with x-rays and laboratory work can usually eliminate other conditions.

In litigation cases, the question of aggravation of a neurosis is very important. It should be remembered that worry, suggestions or comments from attorneys or doctors or relatives may readily aggravate these neurosis cases. In these type of cases, a cash settlement frequently causes a complete and full cure. Treatments may be very prolonged if litigation is prolonged.

Another question that should be considered is whether a leg is really short or not. This condition can only be told by accurate measurements and cannot be told by x rays alone. X-rays may show an apparent shortening, but measurement will show that this is not present. Spinal posture is a condition that frequently gives the impression that one of the legs is shorter than the other one,

At times, x-rays will demonstrate that an unknown or unsuspected condition is present in the spine. This does not mean that this condition found is the cause of symptoms or has been aggravated. A detailed history of symptoms and full examination by the physician will usually give the correct answer, or specialists may be called in for an opinion.

A very common diagnosis which may mean anything is that of a "sacro-iliac sprain." It usually means there is pain and soreness over this joint. These symptoms may be referred, may be due to an arthritis, may be a ligament sprain or a muscle strain. It may even be a disease of the brain or spinal cord referred to that area or it may be a fracture of the spine above the area, or other diseases.

In over twenty years I have never seen or had it demonstrated to me that there was such a thing as a sacro-iliac "slip". I have seen very severe fractures of the sacro-iliac area including the ilium and the sacrum, but yet no "slip." The "click" which is frequently felt or heard and which is frequently called a sacro-iliac slip is really a condition of the lateral lumbo-sacral joint which may be dislocated. A click also may be due to a dislocation or replacing of a intervertebral disc.

A good medical report in a litigation case is of great value and it should contain the following:

(1) A good full description of the trauma with respect to the injured area.

(2) A good descriptive report of the symptoms.

(3) A good physical examination report that is full and complete.

(4) A good opinion of the physician on the diagnosis of his findings and prognosis. He should not be swayed by other factors and by the fact that litigation is in progress. that litigation is in progress.

(5) If x-rays are taken, a descriptive report of them is necessary, even if negative.

(6) If necessary, the doctor should be asked as to whether the accident could have caused the injury found.

(7) Could the injury found cause the symptoms complained of or are the symptoms due to other conditions?

The doctor should have a clear conception of the difference between what may be "possible" and what may be "probable."

These are medical questions and the physician should be able to answer them best.

These medical reports should not read as has been found like the following: "Physical examination negative. Neurological examination negative. Man totally disabled." These statements clash, and are impossible.

A back or spinal condition may cause pain or have pain come on very quickly, but if not due to an accident, may be due to a sudden acuteness of a chronic, slow-acting disease, especially as to the prostate or pelvic diseases.

Another factor to be remembered is that the claimant may be a professional claimant or a malingerer. He may have actual breaks in his bones and dislocated joints. In these cases, though, by careful study and examination, it is found that the physical signs of trauma are too mild and do not show up as they should do for that type of injury. The reaction to treatment is very fast and by studying the mechanics of the accident, it is found that the claimant is a malinger because injuries always have a certain severity of soft tissue trauma.

It should be remembered that an injured person with a resulting or aggravated neurosis or emotional upset does feel pain in his mind even though he does not have an organic nerve lesion. This pain, though, is affected by the emotions, if it is a neurosis.

These people are affected by external stimuli as by suggestion, worries and opinions. They should not be told that they are "not injured"; that they are malingering or that nothing is the matter with them. Their confidence should be gained at first; if they have no confidence in the attending doctor, then the chances of good results are not good. These cases should not be seen by too many doctors or they get the idea that they are severely injured. In these cases the spine should be carefully examined for evidence of disc trauma or pain over a disc. Correct treatment of this disc can and very often will cure or practically cure these cases. One peculiar fact is that in an organic nerve injury pressure over the maximum tender spot will increase the pulse rate.

The coccyx or tail bone has many congenital anomalies. These may be called fractures at times or even dislocations. This bone is difficult to actually strike as it is well-protected by the pelvic bones. This area though is often the seat of pain. This pain is frequently referred down the sensory nerves. Treatment of these nerves will in many instances completely remove the pain of which

complaint is made. Pelvic diseases and some injuries and diseases of the spine will cause pain referred to this area. Treatment of the original cause will remove this.

In medical-legal cases, the question of x-ray diagnosis is very important. Often the question arises, "Is this a recent bone lesion, a chronic pre-existing condition or congenital anomoly?" In a fracture there is always an irregular line of fracture and/or separation of the bone. This fracture line is never smooth or round if it is recent. Sometimes the fracture may be what is known as a pathological one, namely, a condition due to a general systemic condition such as bone tumors, which have so weakened the resistance of the bone that a fracture occurs which may not be due, or have any relationship, to an injury. The x-rays will greatly assist in this diagnosis. On account of this, it is best to call in an x-ray specialist to take or at least read the films. Fibrous tissue which is hardened or hardened blood vessels or soft tissues may cause lines that are sometime called "fractures". At times there may be abnormal lines which show in the film and look like fractures but are due to defects in the films or congenital conditions. In elderly people, the question of fracture and atrophic arthritis often needs an expert in x-ray work to really give a correct diagnosis. Sometimes there is a thickened and fibrous condition of the lumbar fifth vertebra found. This is at times called a fracture, but it is really a normal condition if the claimant is, for example, a motorcycle rider. I have seen quite a number of these thickened lumbar fifths called fractures, yet the x-ray specialist says there is no fracture present. In spinal cases, there should always be two 90 degree views of the spine taken and the films should never be read while wet.

The fact that an abnormal condition is found in the spine in the x-ray films does not of necessity mean that such is the cause of the symptoms. I have noticed a tendency to forget that soft tissues may cause very severe symptoms in the back. There is always a possibility that an aggravation may be present and the physician is to decide this.

In some cases supposedly total cripples or people paralyzed have been known to get up and walk around very soon after litigation has been completed. Their condition may have been due to a "neurosis," or a disc injury which had not been recognized. Pathology of the autonomic nerves is present in these cases.

In spinal injuries, there may be an aggravation of a neurosis. If this is correct, then there is practically always found a painful area in the back over some disc, usually at the site of injury. A careful examination must be made to find this in many instances.

If no tender area is found, then the neurosis is probably a long-standing one that might have been aggravated, but careful case history and descriptive examination will usually demonstrate this. Some people have been nervous before the accident and the accident makes them more nervous. This does not of necessity mean a neurosis.

In considering the facts of the question, "Does an injury really exist?" the following should be ascertained:

(1) What was the claimed accident and the mechanics of it?

(2) What are the symptoms, fully describe? Describe especially the first symptoms.

(3) Did the accident cause the symptoms or were the symptoms present before to a minor degree?

(4) Could the symptoms be caused by anything else and if so, what?

(5) Was the patient immediately disabled and if not, when did symptoms first develop?

(6) When discharged by the doctor, was the patient fully cured or only healed?

(7) A full descriptive medical report and medical opinion is necessary and also a full x-ray report of the injured area.

(8) Do the physical signs found correspond with that of the claimed accident and could they cause the symptoms complained of?

(9) Has the patient any signs of increased nervousness or symptoms that would make the doctor suspect a neurosis was developing?

In back injuries, it is quite possible for a neurosis to develop. This is not a rule, however. The same injury in one person may cause a neurosis, while in another person there is no evidence of a neurosis. The nervous stability of the patient plays a big factor.

I consider the most common evidence of an emotional upset is the increase of nervous symptoms in an already nervous person. This may occur any time. I also consider that injuries of the intervertebral disc run a close second for causing emotional upsets. Due to the way of living in modern times, there is an increase of people having nervous or emotionally upset symptoms. The accident may aggravate the symptoms, but in many instances they get well by the time the injuries are cured. The majority of those,

that do not get well, are of the "emotionally upset" type. These people need a distinct type of treatment. A simple nervousness should never be called a "neurosis." Many blame an accident as the cause of increased symptoms of a nervous nature, when they really had these symptoms before the accident.

In studying 257 back pathology cases, it was found that trauma was the cause in 68% and disease in 32%. In studying 312 spinal trauma cases, it was found that 20.1% had congenital defects, of which 11.1% were aggravated by trauma. In the same study 21.7% had arthritic conditions aggravated by trauma.

In the healing of spinal fractures, the transverse and spinous processes take 8 to 12 weeks on the average and single vertebral body compression fractures take 6 to 12 months to heal and limber up. Multiple body fractures take 12 to 24 months on the average. These are for simple fractures. Much depends upon the location of the fracture.

The most commonly fractured vertebra is the dorsal twelfth, next, in order, the lumber first, and the lumbar second.

In atrophic spinal arthritis cases, I have found 32% with fractures, and 68% without fractures.

In spinal injuries in a large series of cases there was found:

(a) Great sciatic nerve involved—18.4% as a whole.
  1—In low back trauma—34.0%.
(b) Complications arise in 53.8% of cases.

  1—20.6% of cases had fractures;

  2—79.4% were soft tissue injuries.
  In a study of 116 cases of claimed spinal injuries, it was found:

  1—Disease was the cause in 16.3%.

  2—Trauma was the cause in 83.7%.

   (a) Muscle injuries in 47.4%.
   (b) Ligament injuries in 8.0%.
   (c) Joint injuries in 27.1%.
   (d) Fractures in 17.4%.

  In a study of 132 compensation spinal injury cases it was found:

  1—That about 55.2% developed neurosis of some degree in fractures,

  2—That about 43.9% developed neurosis of some degree in all cases.

PRES. HYATT: We shall now hear a discussion by Dr. Burton, of Boise.

DR. JEROME K. BURTON: Mr. President and Gentlemen of the Bar:

To discuss this excellent paper of Dr. Gocher's, so ably read by Mr. Smith, is indeed a privilege and I feel honored.

The first thing which we must do is to define the term "Neurosis", for this is a badly mishandled and misused word and its implications are quite far reaching. There are many forms of neurosis, but only one basic form—that is a functional disorder of the nervous system—a disorder of the nervous system where there is no actual pathology in the nervous system itself, but a disorder in the psychic constitution of the individual which does not affect the personality. This disorder lies in the unconscious realm of the patient's psyche.

The specialized forms of neurosis are many and only a few need be mentioned:

Accident Neurosis—A neurosis with hysterical symptoms caused by accident or injury.

Compensation Neurosis—A neurosis developing after an accident in people who are insured.

Occupational Neurosis—A neurosis due to the patient's employment.

Traumatic Neurosis—A neurosis which results from an injury.

We know what a neurosis is, but why does an individual develop one? There are several reasons why these people get into difficulties:

(1) The makeup of the individual—they are frequently looking for a crutch to lean on or an escape from their way of life. They are unstable mentally and emotionally.

(2) The uneducated—these have for years heard how fatal a fractured spine or broken back is and how lame and disabled a person is who has had a back injury. Once they have ascertained that they really have an injured back they are sure that there is no chance of ever recovering sufficiently to work again.

(3) Economic security—this is closely linked up with the second group. The majority of these people are of low economic status and as soon as their income stops they and their families are on the verge of disaster. Their fear of being permanently incapacitated, with loss of earning

power, is so disturbing to their simple way of life that they unconsciously (and at times consciously) seek monetary return for their injury. As soon as this money problem is settled they again begin to think in terms of productive activity.

(4) Undiscovered or undiagnosed injuries—in spite of all of the usual precautions, careful study, and examinations many real injuries are missed. It is not uncommon to find patients, who have made the rounds with the same complaints and who have been seen by many capable and competent men, labeled as a neurotic that have real pathology in their backs. If this pathology is corrected their so-called neurosis disappears.

We have not included in the foregoing classification the relatively small group of malingerers. A true malingerer is one who feigns illness or injury. There are some of these who think they are making the most of their situation by over-emphasizing their injuries and immediately seek ways and means to get financial reward out of all proportion to their injury. On more than one occasion I have arrived at the hospital a few moments after the patient—the victim of an accident—only to meet the patient's family and lawyer before I had even seen the patient. Fortunately for all concerned this is not too common an incident. True malingering is rare for it is considered dishonest and immoral and as a result the patient develops a mental conflict which sooner or later evolves into a functional disorder of the psyche.

Dr. Gocher has pointed out very ably the many points where trouble may arise in the spine. These may be placed into six main groups.

I.—Bony injuries;

A—Fractures;

1—Body of the vertebrae—Heal readily with few sequelae.

2—Articular Processes—Heal readily but are frequently followed by a post-traumatic arthritis of the site of the injury.

3—Lamina—i. e. the bony arch protecting the spinal cord. Heal readily with no sequelae unless cord is damaged at time of injury.

4—Transverse processes may or may not heal readily, but rarely have sequelae in either event.

II.—Ligamentous injuries;

A—Strains and Sprains—These heal readily but the back should be protected for 8-12 weeks by support or a "chronic" back results.

B—Dislocations—These are the affects of severe trauma and require immobilization for long periods. The greatest danger is cord damage. If the cord is not involved they get a very useful back, although they may have to have work adjustment.

IV.—Functional disorders—This is a point that has received too little attention generally. An individual should be physically suited to his work. A normal back will hold up indefinitely under a normal physical load. However the same back will give pain if under an overload of work or if used in a faulty mechanical position. A normal back over-loaded with work, or a weak back under a normal load will become decompensated and give trouble just the same as an overworked heart does. This situation can best be handled by work adjustment and better education and training in selection of life work.

V.—Congenital anomalies—Many of these are of no more than professional interest. Some, however, make an inherently weak back and sooner or later give way under normal stress and strain. Most of these are amendable to therapy with excellent results.

VI.—Pre existing diseases—Of these the most common is arthritis. The two great groups of arthritis are osteo arthritis or hyperhrophic arthritis and infectious or rheumatoid arthritis.

The first—osteo arthritis—is present in nearly all those who do heavy work for a living and give them no trouble except a gradual decrease in motion of the spine until injured. Then they have severe pain which grandually subsides with treatment over a period of 3-6 months.

Rheumatoid arthritis or infectious arthritis is usually not considered occupational in origin, but is of industrial importance because of its aggravation and because, due to its presence, the spine becomes decalcified and more easily injured.

The man with a back injury is best cared for by measures which give prompt relief from his pain and assurance that his injury is not permanent and that he will work again. One must not be over-optimistic in bis assurances, but be honest in the evaluation of the

future. There is nothing worse for the individual than to build his hopes up that he will be a normal individual and then jerk the props out from under him. This is one of the pitfalls that produce neuroses. Early return to work even though there must be adjustments to lighter work for a long time with restoration of the individual's sense of independence and earning power and prompt settlement of disability claims with the removal of long periods of worry over the outcome will reduce the incidence of neuroses tremendously. More careful and thorough search for the cause of the individual's complaints will eliminate many of the so-called neurotics completely by disclosing the true pathology. Closer cooperation between the personnel department of the employer and the employee will result in earlier return to work and less disability claimed whether real or imagined.

PRES. HYATT: Thank you, Dr. Burton. I will now call upon Mr. James Galloway, Chairman of our War Work Committee. "The Record of War Service by the Bar."

MR. GALLOWAY: It is the plan to have this an informal discussion. You are free to ask any questions. I have asked these gentlemen from the armed services to sit here during this discussion. In rendering legal assistance to the personnel of the Army and Navy we run across a great many problems. One of the most important is the problem of charge. We have discussed that in our local bar association here. I will tell you how I operate my office. I never make a charge of an inductee for anything. I have prepared powers of attorney, wills and made minor adjustments in straightening out the title to an automobile and things of that kind. I have been paid a thousand fold. Those boys come to the office with the expectation of paying some kind of fee and when I tell them no charge, "you are going in the army and I am staying home," they show their appreciation and their wives show their appreciation too.

A divorce is an entirely different matter. I have had one case in my office where it was necessary to obtain a divorce without charging a fee. I did that upon the request of this man's commanding officer. The boy's whole life was in bad shape and he wasn't a good soldier. Ordinarily I charge the minimum fee. I mention this so we will all have the same kind of picture. I am certain, from discussing this with the Commander that that is the theory upon which the Army and Navy operate. Today I got another questionnaire from the American Bar Association which seems to indicate that probably in a great many more cases we should not charge any fee.

With respect to divorces I have this to call to your minds. I understand in the northern Idaho counties it is necessary to have the plaintiff present in court before a divorce will be granted. The courts in this part of the state grant a divorce upon the deposition of the party if he is in the armed service.

The last legislature passed a law that it wasn't necessary to have corroborating testimony as to the merits of the cause of action. I think the judges are generally still insisting on corroboration. We have a great many cases where the testimony is so strong there is no question that the plaintiff is entitled to a divorce on her own testimony.

MR. PAINE: You understand they are demanding that as a matter of law?

MR. GALLOWAY: As a matter of practice.

I think we are very fortunate in having representatives of the Army and Navy here. I am going to call upon Colonel Blake.

COLONEL BLAKE: In dealing with the Soldiers and Sailors Civil Relief Act the problem that confronts all of us, and I think we are more conscious of it in Washington than you might be locally, is that we are trying to practice law in forty-eight states. It becomes rather complicated. Under the act the application and interpretation of the act lies almost exclusively in the hands of the local courts. I don't know what your local courts' views have been on the matter of waivers. Whatever they are, I would say it's within their discretion. We hope they use that discretion to do substantial justice in the case. That's the thing we cannot lose sight of; that substantial justice we hope lies on the side of service men. All reasonable doubt should be resolved in his favor. However, there are other people to be concerned with litigation and some courts have gone over-board trying to help the service man and have really come up with bad law, being too much on his side. On the other hand there are courts that have construed the law very strictly. Somewhere in between those two extremes there undoubtedly is the soundest position.

MR. GALLOWAY: Colonel, will you remark on the power of the court to appoint attorneys to represent a man in the service without the service man's consent?

COL. BLAKE: The Court can, on its own motion, appoint an attorney. However, there is also a prohibition that counsel cannot in any way commit the absent defendant. He is there in a protective capacity. He can't carry out the complete functions of the attorney without some contact with his soldier client. It's much better, of course, rather than rely on the court's appointment for the service man to obtain counsel to act for him. That is one of the reasons for our whole assistance program and why we want to

work with the civilian bar so that when a soldier needs assistance there is a legal assistance officer on the job. We can see that he gets adequate counsel back home who will take a real interest in his case and see his interests are fully protected and prosecuted.

JUDGE WINSTEAD: In connection with the acknowledgment or certification which our statute provides; that is, a service man desires to give an acknowledgment before certain officers. These come into our court from overseas with nothing on the face of the acknowledgment to show that the man who signs is an officer, where he is located or any identification. How are you going to determine whether or not that is a legitimate acknowledgment or whether he is officially entitled to sign his name and take the acknowledgement or verification?

COL. BLAKE: It will depend, of course, on your local statutes as to those requirements and your interpretation of them.

JUDGE WINSTEAD: Why in the interest of safety and protection shouldn't that instrument be more definitely made than it is under the present practice. The censors cut out everything. There is nothing on the record to show he is an officer.

COL. BLAKE: I'd say your difficulty there is practical. We have sent out directives and instructions that when an officer acts as a notary he always print his name and indicate his rank and branch of the service and his serial number. We have urged that all legal documents be so executed. If it were done that way your trouble would be over. The trouble is they don't. The reason is this. This war is on a world wide basis and in the far reaches of the Pacific these men do not have time to look up to see how they should do something. They may not have books or instructions available. Those you got in all probability are from people who just hoped it would work. They don't know how it should be done and they are doing the best they can. We are trying in every way we can to get that information distributed, but there is no way we can guarantee it because of military conditions. In Washington we can be of some service in that field. Either the instrument or a copy thereof can come either to my office or the Adjutant General's office and will be compared on the official record against the signature of the man taking the acknowledgment, and a certificate will be prepared stating that it is authentic and that the officer was an officer of certain rank at that time. That might be one way to cure those things.

MR. GALLOWAY: We have been discussing marriage by proxy. Commander De War, would you discuss the legality of proxy marriages in this state?

COMDR. DE WAR: I will call upon Lt. Codd.

LT. CODD: That is an embarrassing question for a Washington attorney. A couple of weeks ago a girl came to us; the legal assistance officers outside the United States had sent her a marriage contract. The man wanted to marry her. She was about to have a baby. The contract read: I do voluntarily take you as my wife and promise to love, honor and so on in general phraseology, and similar phraseology for her to sign. I looked up the Idaho law and came to the conclusion that if they agreed to be married, the law of the state where the last act making the contract was completed will govern. Therefore, if she accepted the contract in Idaho the marriage would be valid, assuming she complied with the remaining part of the statute which was to the effect, as I recall, that the marriage contract must have the added factor of the parties performing rights, duties or obligations relating to the marriage. My thought was, after looking up the cases, that this girl could go to Idaho, sign the contract, and then write him a letter; maybe send out some marriage announcements or get a wedding ring to fulfill the requirements of the statute. I thought it might pass muster and a declaratory judgment might be obtained later. But I called up the legal assistance officer at Farragut and he referred me to Mr. Ward Arny of Coeur d'Alene, a member of your Bar's War Work Committee. Mr. Arny had had three or four of them before, which rather surprised me. I thought proxy marriages were something from 1860. He said to get a certificate from a qualified medical officer as to the condition of the man in question and send the girl over and he would have her medical certificate and they would apply to the license clerk and have a marriage by proxy, which, of course, is preferable because you have the marriage ceremony and certificate. The girl went over Monday, and Tuesday she was married and I hope both of them will live happily ever after.

MR. LAWRENCE HUFF: The Civil Relief Act says affidavits must be filed in every case. What are they going to do in the next ten or fifteen years in probate matters. I am wondering what the effect in examining an abstract will be.

MR. GALLOWAY: I think our practice here in probate proceedings is absolutely to ignore the Soldiers Relief Act.

MEMBER: In Canyon County they are disregarding the military status of any of the heirs. I am not doing it. I am getting notice to every man in the military service. In every case thus far I have been able to get a waiver. I feel it's necessary under the law and I am doing it.

MR. HUFF: I either make the affidavit or get the waiver or get an attorney appointed.

MR. GALLOWAY: In respect to marriage by proxy, we are operating under the Statute in this state, Section 31-201 I. C. A.

COL. BLAKE: The problem of proxy marriages is one of terrific legal headaches. We have been studying it for a couple of years and our conclusions have been these in general: that they are of very doubtful validity and should be avoided unless there are circumstances involved that makes it necessary for the parties to take the legal risk. They should be warned of the doubtful legal effect and be willing to take that risk. We have yet to be cited to a case by a state court which specifically upholds proxy marriage. I think marriage by proxy is a bad term. We should say "marriage in absentia". Under the proxy marriage only the power of attorney is meant where someone stands up in place of the absent party. In the state of Pennsylvania they have a formal contract system. I merely mention the danger that we see in them. Not only must state law control his property rights but the Comptroller General will have a different rule and the office of Dependency another and the Veterans Administration perhaps another, all growing out of the marriage so created. All states will not recognize it. In the preparation of the pamphlet an opinion was obtained from the Attorney General of each state, and there was one there from Idaho, as Mr. Galloway mentioned. If there is no statutory law the opinions of the Attorneys General come the nearest to the official interpretation that we can get. However, it is not a court decision; it's merely an opinion. Other lawyers may differ. We are hoping some test cases may come along to clarify this. In New Jersey there was introduced in the legislature a bill authorizing proxy marriages. On the ground of public policy it was killed in the senate. We have not taken any position of recommendation because not only is there law involved but some very broad problems of public policy in the field of sociology and religion. There is a terrific problem. It's hard to cure. I don't think the numbers are so great. Whether or not you can do it in Idaho I am not going to say. We try to avoid it if entirely possible. We have even gone to the trouble of requesting the Adjutant General to return a man from overseas in order that a legal ceremonial marriage can be performed; just as a matter of policy.

MR. GALLOWAY: I am going to call upon Comdr. De War.

COMDR. DE WAR: I invite attention to this waiver matter in divorce cases. There is a provision in the Act that says you can't take a default judgment against a man in the service without service. Whether or not a waiver constitutes an appearance is a rather serious question. I think probably ninety-five percent of the divorces that are handled in the State of Washington are divorces

granted on waivers. Even when a man is represented by an attorney appointed by the Court the attorney can't bind the man in any way. It would seem to me there might be merit in considering a procedure which would recognize the appearance in all divorce cases, involving a man in the service. One attorney in Seattle has the practice of so wording his complaint so no money judgment is asked and that seems to be the primary objection in most of these cases. The divorce decree, in any event, doesn't ask support money. As far as the Navy is concerned where children are involved the Navy Department will require that the man support his children under the provisions of the Service Men's Dependency Act.

Another point is the provision of the Soldiers and Sailors Relief Act which more or less tolls the statute of limitations during the period of service. This question might come up in many cases. Some insurance companies might close their files on a man in the service figuring the case was closed. The Act provides, however, you must add to the statute the period of his service. I can visualize a lot of problems that are going to come up after this war.

We had a case here where a carrier was disclaiming liability on the theory that the statute had run and we invited their attention to the fact that the statute had been tolled and they paid the claim.

Another matter is as to who is covered by the Act. We had occasion to advise a party involved with the Merchant Marine and the Merchant Marines are not covered under this Act. The Public Health Service is covered while serving with the Army and Navy. Retired officers are not covered.

MR. PAINE: You doubt the validity of a judgment based on a waiver?

COMDR. DE WAR: The question is whether the waiver is an appearance. I don't know.

MR. PAINE: I draw mine expressly providing that they do appear and waive service of summons.

COMDR. DE WAR: Yes, well that is different. Many of the waivers we see are merely waiving the provisions of the Act without anything further. There is really no appearance under that instrument.

MEMBER: In the waivers I prepare I figure I have defendant's signed consent. That, of course, amounts not only to a waiver but consent that the court render a decree and the Courts I think consider that is the same as an appearance.

MR. GALLOWAY: I think you are right on that. I want to thank Lt. Codd, Col. Blake, Crmdrs. De War and Smith for appearing here today and making our program more interesting.

PRES. HYATT: Mr. Kitchen has an announcement to make.

MR. KARL KITCHEN (Capitol Securities Bldg., Boise): I will be glad to send to lawyers in the armed services advance sheets of the Idaho Supreme Court opinions as they are handed down. I have many on my list but there are many I do not have. If you will furnish me with the names and military addresses of boys who would be interested in receiving the advance sheets I will send them to them. That goes for law students in the service too.

PRES. HYATT: We will have the report of the Canvassing Committee for the Northern Division.

CHAIRMAN: Our report shows twenty-seven votes cast in the Northern Division of which Emery T. Knudson of Coeur d'Alene received twenty-two and five were scattered. We declare the election of Emery T. Knudson as Commissioner from the Northern Division.

PRES. HYATT: Mr. Knudson is declared elected.

MORNING SESSION

Friday, July 7, 1944

VICE PRES. E. B. SMITH: The Committee on Aeronautics Law has a report to make through Mr. A. L. Merrill of Pocatello.

MR. A. L. MERRILL: Your Committee on Aeronautics and Law begs leave to make the following brief report:

Your Committee has been studying this subject with considerable care. At the present time nearly all air activities are devoted to the war effort, and there is little, if anything, which gives need to any particular present action. However, it is well to watch current trends and to avoid, if possible, any unfortunate legislation which sometimes occur in the rapid development of a new industry. Aeronautics cannot be restricted within state boundaries. It is an industry which will cover the nation as a whole and cannot be confined to particular states. It seems, therefore, very desirable that such laws as may be enacted by the State Legislature be uniform with those of other states. This has been the policy of the past. We, therefore, refer to Chapter 100 of the 1931 Session Laws, Chapter 203 of the 1933 Session Laws, by which enactments the Idaho Legislature has endeavored to keep in harmony with other states. We further invite attention to H. R. 3420 pending in the Congress of the United States, which is a Bill to amend the Civil Aeronautics Act of 1938 by which a rather comprehensive plan will be enacted for the more efficient development and control of air navigation. It is most respectfully suggested that members of the Bar watch the development of legislation, both state and national, upon this point and advise your Committee.

Attention is further called to the fact that there is in process of organization in the State of Idaho an association to be known as Idaho Aviation Association, which has for its purpose the encouragement of the development of aeronautics. Members of your Committee are also members of this Association, and an effort will be made to work harmoniously with those actively interested in this project.

We recommend that the Committee be permited to continue its studies and to take such future action as the Bar Association might determine.

Respectfully submitted,
HARRY BENOIT
PAUL HYATT
A. L. MERRILL

VICE PRES. SMITH: We have a report of the Committee on Real Estate Titles.

Gentlemen: During the past several years a vast amount of meticulous and tedious labor has been performed by members of the Idaho State Bar with the ultimate purpose of bringing about state wide uniformity in the preparation of abstracts and also uniform standards for their examination in respect of identical problems which arise in nearly every title examination.

These labors were first crystalized and put in the form of definite recommendations at the 1942 Annual Meeting of the Idaho State Bar. At that meeting a distinguished group of title examiners submitted for examination of the Idaho State Bar thirteen "General Standards of Title Examination" (see pages 152-161, Proceedings, 1942), for guidance in making title examinations of real property situated in the State of Idaho.

Recognizing the importance and need of continuing the work so well begun, this committee was appointed. However, the war has brought about a curtailment of state and district Bar activities, with the result that it has been difficult to reach an agreement on the Standards of Title Examination submitted at the 1942 meeting.

It is axiomatic that the adoption of such standards should be had only after careful consideration and recommendation by the members of the Idaho State Bar through their local Bar Associations. A better set of Standards for Title Examination will result from the submission, consideration and recommendation of those standards heretofore submitted at the 1942 meeting, and in the consideration of these standards new ones will no doubt be suggested which can then be submitted to the Idaho State Bar for adoption, or by such method of adoption as the Idaho State Bar may approve.

With these matters in mind, your committee submits the following recommendations:

1. The adoption of additional Standards of Title Examination as follows:

Standard No. 14—Attorney's Attitude in Regard to Title Examination

An attorney making an examination of title should raise objections only to such matters as are substantial, material defects in the abstract of title, and should be prepared to show by legal authority that the matter complained of is a valid objection and of such character as would substantially and materially affect the merchantability of the title and would interfere with the ability of the owner to readily dispose of the same.

Standard No. 15—Affidavits—General Requirements

Affidavits shall show the affiant's means of knowledge, and the affidavit of an interested party may be accepted as curative evidence when the credibility and knowledge of the facts involved seem evident.

Standard No. 16—Decrees and Judgments—Thirty Years Old—Presumptions

Where a decree or judgment affecting the title to premises has been entered over thirty years, the proceedings shall be presumed to be valid and binding, and it shall be presumed that all parties concerned had due notice although the record does not affirmatively show that fact, and such proceedings shall be accepted as sufficient unless something affirmatively appears therein showing lack of jurisdiction by the court of the parties or subject matter.

2. That the Standards of Title Examination as submitted to the Idaho State Bar and reported at pages 152-161, incl., Proceedings of 1942, together with those Standards herein or at the 1944 Annual Meeting recommended, be mimeographed in suitable form and submitted to the local Bar Associations with the definite suggestion that the same be submitted, considered and acted upon at a stated meeting and the results thereof be reported to the Secretary of the Idaho State Bar before April 30, 1944.

3. That a resolution be submitted at the Idaho State Bar meeting for 1944 in substance and effect that whenever three-fourths of the local Bar Associations have agreed on any Standard or Standards of Title Examination and notice of such adoption shall have been given by the Secretary of the Idaho State Bar to the local Bar Associations and the members thereof, such Standard or Standards shall be deemed adopted by the Idaho State Bar and thereafter examiners of title shall be bound by such Standard or Standards in the examination of abstracts of title covering real property in the State of Idaho.

4. **Standards for Preparation of Abstracts.**

(1) All abstracts should be prepared on good, strong paper, not too heavy, which is either 8½ x 13 inches or 8½ x 11 inches in size, with not exceeding two entries to each page.

(2) All entries should be numbered.

(3) Printed or skeleton forms of abstracts requiring only the filling in of pertinent information by the abstractor should not be used, but each entire entry should be the original work of the abstractor.

(4) Entries of written instruments being abstracted, as distinguished from court or other proceedings, should show the following: Nature of the instrument, date of the instrument, date and time of filing, place of recording, names of grantors, names of grantees, consideration, description, signatures of grantors, date of acknowledgment, and official before whom acknowledgment made. The entry should also show the presence of revenue stamps, where there are such. If the instrument contains any unusual provisions or any restrictive covenants they should be set out verbatim.

(5) The abstract should show all grants, conveyances, or dedications of roads, highways and railroad rights-of-

way involving the subject of the abstract.

(6) Where the abstract includes a dedication of a town or city or additions thereto, the plat of such city or addition, or at least the portion thereof involved in the abstract, together with the location of the quarter corners, should be shown. The abstract should also contain a photostat plat or copied drawing of the property involved, and particularly where the descriptions are by metes and bounds, and/or a certificate by the abstractor that the premises involved are within the boundary lines of the plat referred to. All railroads, highways, streets, easements and set-back lines should be shown on such plat or drawing.

(7) Descriptions should not be shown at an entry by merely stating that it is the same as the description at some prior entry. All descriptions should be set out in full in each entry.

(6) Releases of mortgages should not be shown by the abstracter by merely stating that the mortgage is released or that it is released by a named person or corporation, or in any other such manner. The entry should give sufficient information so that the examiner may tell that it is a valid release.

(9) Releases and assignments of mortgages or other instruments should be abstracted immediately following the instrument which is released or assigned where it is possible to do so. This can be done where a new abstract is being prepared. Where it is not possible to do so, then the entry showing the mortgage or other instrument which is assigned or released should state at what entry the mortgage or other instrument is assigned or released.

(10) Where the abstract includes court proceedings less than thirty years old only part of the pleadings and other papers need be set out verbatim in the abstract. All other papers necessary to be included should either merely be noted as having been filed or should be abstracted only.

District Court Proceedings

The following instruments should be shown verbatim: complaint, any cross-complaint, counterclaim or intervention, summons and proof of service thereof, affidavit to obtain service by publication, order for publication, publication of notice of summons and proof thereof, all notices of sales and proof thereof, orders, judgments and decrees. Subsequent pleadings need only be noted as filed.

Probate Court Proceedings

The following instruments should be shown verbatim: petition for letters, order setting date for hearing, notice of hearing, proof of mailing and publication or posting, last will and codicils, letters testamentary or of administration, final account, report and petition for distribution, order fixing hearing, notice of hearing and proof of posting. The following instruments and papers should be abstracted in sufficient detail so that the examiner may determine the jurisdiction of the court: testimony of petitioner and subscribing witnesses, order admitting will to probate, certificate of proof of will and facts found, order appointing executor or administrator, order for publication of notice to creditors, notice to creditors with proof of publication thereof and decree showing due notice to creditors, order appointing appraisers and inventory and appraisement of property involved, order fixing gross market value of estate, order fixing value of inheritances and tax thereon, inheritance tax receipts, order settling final account and decree of distribution, decree of final discharge.

Where the title to the property devolves through a probate sale or setting apart of a probate homestead, then the examiner of the title should specify the papers and instruments which are to be abstracted verbatim or abstracted, and the extent thereof.

Bankruptcy Proceedings

The following instruments should be shown verbatim: part of petition together with property involved, adjudication, trustee's appointment and acceptance, notice of first meeting of creditors and proof thereof, notice of hearing of petition to sell property and proof thereof, order of sale, notice of time and place of sale and proof thereof, order of confirmation, trustee's discharge of bankrupt, discharge of trustee. The remainder of the proceedings, including trustee's deed, may be abstracted.

(11) Court proceedings should be included as an entry of the abstract in the same chronological order as the other instructions are included in the abstract.

(12) Where the abstract shows a court proceeding

in which there has been a judgment rendered the abstract should show whether or not an execution has ever been issued thereon.

(13) All abstracts should be certified upon a uniform certificate, preferably adopted by legislative action or by agreement between the Idaho State Bar and the Idaho State Abstractors' Association.

(14) The certificate should show the payment of taxes by stating that "taxes for.................... (year) and all prior years paid in full," or some similar language, instead of showing only the status of the taxes affected by the abstract involved.

(15) When an abstract is brought up to date the abstracter may either certify to the portion prepared by him on a new certificate or may use an extension certificate. Whether the abstracter should be required to furnish a complete new certificate to cover the entire abstract as distinguished from the portion prepared by him should be governed considerably by the reputation and ability of the abstracters who prepared the earlier entries therein.

(16) Obvious defects in instruments should be underlined by the abstracter to call the attention of the examiner to the fact that the error is in the instrument and not on the part of the abstracter.

(17) Original affidavits, former opinions of attorneys, old tax receipts, mortgages and other papers should not be clipped, stapled or otherwise affixed to abstracts. If they are proper instruments to be included in the abstract and are not already shown therein they should be recorded and either the original instrument inserted in the abstract as an entry or an entry should be made of the recorded instrument. Papers which are not properly part of the abstract should be detached from the abstract—with the permission of the owner of the abstract, of course,—and not considered by the examiner in his title examination.

(18) The use of worn out, faded and obliterated abstracts should be discouraged. Where the abstract is in such shape that part of the information shown thereon is either obliterated or torn off, a new abstract, or at least a portion thereof, should be required.

(19) The abstracters should proofread abstracts for errors before delivering them to their client.

(20) After an abstract has been examined and returned to the purchaser or owner with the examiner's requirements attached thereto, the requirements should be complied with as nearly as possible and the abstract then returned to the examiner for a final opinion.

(21) Abstracters should not attempt to give opinions upon the title of the property covered by the abstracts which they prepare.

5. The matter of insured titles has been discussed, but for the present it would seem to your committee that this is a matter primarily for the consideration of the abstracter and not for this committee.

Respectfully submitted,
GEORGE H. VAN DE STEEG
R. P. PARRY
R. D. MERRILL
LAWRENCE HUFF
CAREY H. NIXON
Committee on Titles

VICE PRES. SMITH: I might state that the first thirteen standards were submitted to the 1942 meeting and adopted tentatively, submitted to the local Associations for objection if any, and no objections having been made, automatically adopted after a period of six months, so we have reached agreement on those standards. Now we are starting with Standard No. 14.

CARL A. BURKE: Does the first paragraph of Standard 16 mean that you are getting around putting the proceedings in the Abstract if the judgment is over thirty years old?

MR. WARE: I suppose it's based on the Ancient Documents Rule providing that even an Administrator's deed over thirty years of age is presumed to have been executed under proper authority. But we also have a statute in this state that provides that three years after a Probate Court confirmation order the proceedings are conclusive, in any event.

MR. SMITH: My question is: Why thirty years?

MR. GRIFFIN: The standard indicates you are going to examine the original files. It says unless the proceedings show something to the contrary.

HOWARD DAVISON: I don't see any sense of thirty years. That's too long.

MR. SMITH: Why couldn't it be five years instead of thirty?

MR. DAVISON: Twenty-six years is a statute of limitations. In Boise we have had lawyers insist on probate proceedings fifty or sixty years old, and there is no sense in it. Where there is no will and it goes to the survivor I think five years is ample. We can always borrow the records and look them up. The trouble with most of us is we are too lazy to go to the court house and look them up. All these things mean extra expense to people. I think twenty-six years is ample time to question any title. The middle states are doing that and they are getting away with it.

MR. TOM MARTIN: Examinations can be so technical that the attorneys can practically stop the transfer of property and we should give very careful consideration before we make objections. We have tried to remedy that in Ada County by having a committee examine the base titles to a lot of additions. An examiner can find page after page of objections if he wants to, between the time the property was patented and the time it was platted. Our committee passed out the work among the attorneys and either approved or rejected the validity of titles down to the plat. That is a step in the right direction. The question is whether or not objections affect the validity of the title. Every attorney knows an affidavit neither aids nor hinders the title. At the very best an affidavit is only evidence that you can get somebody to testify to a certain fact to prove it unless he changes his mind or dies or moves away. There are other means.

Let me give you an actual illustration. A woman acquired a piece of property and her marital status was not given. She deeded the property as a widow and the marital status of the grantee was not given. Later the grantee in the second deed conveyed as grantor—she had been re-married, and then finally she acquired the title back. An examiner made an objection in regard to the marital status of these women and requested an affidavit showing what these facts were. I said: "I believe there is a better way than your suggested affidavits; suppose we put in the deed from the grantor, now a widow, this statement "that the grantor herein represents and warrants that her grantor who granted as a widow was a widow at the time she acquired the title to this property," giving the date and book and page of record, "and that she remained a widow to and including the date she conveyed to the present owners; and likewise the grantor here represents and warrants that she was a widow at the date it was conveyed to her" giving the book and page of that record. Now we have incorporated in that deed a clearing up of the objections by a warranty of the grantor, which has a binding effect and is of some validity. I suggest that where facts are known by the grantor those kind of objections be taken care of by representations and warranties in the deed.

Objections will be made, to a transaction that happened perhaps thirty-five years ago. John Smith, as grantee, received title. Thereafter John Smith deeds it as a widower. Now we will be asked to make a showing as to the marital status of John Smith at the time he received that property thirty-five years ago. I suggest that before that kind of objection is made, it would be a good idea to read Coe vs. Bennett in 11 Idaho, at page 39. Coe died leaving a widow and two sons. Under the statutes at that time the widow owned one-third and the two sons absolutely by statute owned two-thirds of it, one-third each. But a year or so after Coe died the widow gave a warranty deed to the property without any probate or anything else, and successive grantees remained in possession, paid the taxes and about 1907 the two sons sued for their interest in that property. The Statute of Limitations had run and our Supreme Court held that certainly she had no right to deed it but she did do it and her grantees and their successors had had possession of the property, and the people who bought entered into possession under colour and claim of title and the property was theirs notwithstanding the fact that that widow had no right to deed it. So before we go back into ancient history and make objections it might be a good idea to read that case and others from our own Supreme Court.

VICE PRES. SMITH: This morning we have a most important subject having to do with labor relations. So we will leave the real estate committee report for the time being and come back to it later. Our next paper will be "Fundamentals in the Understanding of Labor Relations." Dr. Fay Walter Clower, Department of Economics, Washington State College. Dr. Fay Clower.

DR. FAY W. CLOWER: The problems of labor relations are problems which are always in the process of being solved. New problems constantly appear, new ones reappear, and so labor problems are never really finished. Under Capitalism, or Socialism, or Cooperationism, or any other economic or social system, there will always be, for instance, problems involving the managers and the managed. There will also be questions centering around the distribution of the product.

Men's ideas of what constitutes a labor problem change. In the first third of the ninteenth century 12 to 15 hours usually constituted a day's labor. When the ship carpenters in Boston struck for a ten hour day in 1832 they were defeated and seriously criticized for striking for such a purpose. When the young women

of the New England textile mills were working from 13 to 15 hours a day they were told that a demand for a ten hour day was unreasonable since their fathers on the farm thought nothing of working for 15 to 16 hours a day. They were also told that it was an un-lady like thing for them to strike for a reduction of hours. Today a ten hour day would be considered a problem, and the desire for a six or seven hour day was often realized before the war.

When most Americans lived on farms and had big families the old age question was one which caused little worry for the community. The old grandfathers and grandmothers, the great grandfathers and great grandmothers were generally appreciated and cherished by all their offspring. But today families are small, the majority of them live in cities, and the children are more commonly scattered throughout the country. Under such circumstances it is more difficult for old people to be cared for by their children. As a consequence we have the old age pension problem, and the burden of the aged is increasingly assumed by the state. The provision of equal and adequate care for the sick is something which is now in the process of being worked out. Probably the family, the local community, the doctors, the states and the national government will all have a hand in it. Incidentally such problems as sickness, old age poverty, unemployment and many others are social problems quite as much as they are labor problems.

To some extent a labor problem or a labor grievance depends on circumstances and on our attitudes. Hunger and hardship were accepted by the pioneers as the inescapable lot of everyone under the circumstances and there was little bitterness because of it. The hunger and hardships suffered by the unemployed in the 1930's were commonly not accepted as either inevitable or necessary. Consequently their attitudes, as much as their actual conditions, constituted a problem.

All of us have observed that labor unrest is not entirely due to the actual conditions faced but to attitudes toward those conditions. In the file hewers lament of the early days of the Industrial Revolution the old file hewer says "Our masters make us work hard for six pence a day, though a shilling we should have if we got our just pay." He was unhappy working for a half shilling but he thought if he got a shilling or about two bits he would be content. In the modern world twenty-five cents a day would hardly satisfy the poorest Chinaman. It is the gap between what we have and what we think we deserve or ought to have which makes us unhappy. Psychological poverty is more prevalent among us than physiological poverty. A difference of four cents an hour may start a nation wide strike not so much because it

entails physical hardship, if decided one way or the other, but because it arouses the anger or resentment of union leaders and their followers. It affects their pride and their prestige if they have perhaps backed down from a kind of ultimatum. Defeat under such circumstances may be more satisfying than what is regarded as a cowardly acceptance of humiliating terms. Good labor negotiators on both sides always try to avoid the anger or the situations which provoke one side or the other to take positions on an issue from which they cannot "honorably" recede.

In the course of the history of our society there has been, despite setbacks, an improvement in the status and condition of the working masses of the people. After thousands of years of slavery, for the majority of men, the more individualistic workers died out, those that remained developed patience and habits of steady work. With the decline of the Roman Empire Western Europe lapsed into a state of feudalism, and serfdom tended to take the place of slavery.

Serfdom has certain advantages over slavery. A serf might be sold to another lord but he could not be sold away from his family or away from the land or the manor where he had been reared. He still had little legal protection against his lord except the customs of the manors.

With the decline of feudalism the workers were gradually freed from the land and lived according to a status known as the status of master and servant. Just as there have been remnants of slavery and serfdom until quite recent times, so there are remnants of this relationship of master and servant. In some of our law books to this day the question of labor relations is discussed under the heading of master and servant relationships. The liberal economist, Adam Smith, author of "The Wealth of Nations" often refers to the employers as the masters and the workmen as servants. As you gentlemen know, in the old days under our common law, damages against employers were sometimes avoided if it could be shown that a fellow servant rather than the master was responsible for an injury.

Sometimes today we speak of the servant problem in connection with employment around the household. The essence of the servant problem is to get people reared in a democratic society to accept the social status which goes with being a servant. As was pointed out by Thorstein Veblen a good servant should keep his place in a conspicuous manner. But Americans feel much like the Irishman who declared that in America "One man's as good as another and some of them a darned sight better."

Some of you may recall Kenneth McClaskey who was until recently a member of the staff of the National Labor Relations Board in this region. While a Rhodes scholar at Oxford he was assigned a valet, as was the custom at Oxford. Having been active in establishing student government at the Pullman High School and being by temperament a very democratic young man he lectured his valet on the undemocratic custom of providing servants for Oxford students. Said Kenneth, "When we are by ourselves and out of hearing of the dons don't bow and scrape and say "sir", just call me Ken." The poor fellow looked miserable and bowing respectfully replied, "Very well Sir, very well sir".

Related to this master and servant period in labor history is the feeling that still prevails to some extent that working with one's hands is not quite as honorable as non-manual labor. It is also felt that there should be a rather definite limit on wages. Workers should have enough to keep them in modest comfort but they should not wear silk shirts, drive a better car than the boss or permit their wives and daughters to dress up in fur coats. On the other hand it is expected that a business man should roll up as high a dollar score as he can. If he can make a million dollars a year so much the better. Recently there has been a tendency to put limits on the higher incomes by taxation. This appears to be a democratic equalitarian trend and may be more than just a war measure.

The next stage in labor history is the stage of individual bargaining. In this period employers and workers bargained as equal individuals even though in some cases the employer may have been a corporation. In general the bargaining was between flesh and blood individuals for there were few corporations.

Under the common law of England it was unlawful for workers to organize for the purpose of raising wages, shortening hours, or changing the working conditions. To combine for such purposes might lead to conviction for civil or criminal conspiracy or both. In 1799 the English common law on this point was embodied in the famous Combination Acts under which many workmen were found guilty, fined and imprisoned. The statutes also provided for a small fine of 20 pounds for employers who conspired to reduce wages or lengthen hours. Since the workers had no voice in the government of England at this time the part of the law applying to employers was never enforced. In the course of time the Combination Acts were repealed.

The common law of England with some modifications became the common law of the United States. After labor unions were organized, beginning in the 1790's, the unions soon found themselves prosecuted as civil and criminal conspiracies. Until about 1820 the juries in America generally found the workers guilty in these conspiracy cases. After about 1830 the juries almost invariably refused to convict. In 1842 in a famous Massachusetts case (Commonwealth vs. Hunt) Chief Justice Shaw declared that unions organized for the common benefit of the members were not unlawful and that even strikes for the closed shop were legal if conducted in a peaceful manner.

This brings us to the beginning of the most recent stage in labor relations—the stage of collective bargaining. Under collective bargaining organizations of workers bargain with individual employers or corporations or with employers associations. Collective bargaining is increasingly suggested by public bodies as a means of reducing strikes and industrial unrest. In the United States Report on Industrial Relations in 1902, the members of the Commission stated "There is a general consensus of opinion that systems of collective bargaining within the various trades themselves would prove highly advantageous, both to employers and working men, and to the general public."

In 1917 President Wilson's Mediation Commission stated "It is no longer possible to conduct industry by dealing with employees as individuals. Some form of collective relationship between management and men is indispensable. The recognition of this principle by the Government should form an accepted part of the labor policy of the nation."

During World War I the War Labor Board of that time issued a statement of principles which is historically significant. Among them we find the following: "The right of workers to organize in trade unions and to bargain collectively, through chosen representatives, is recognized and affirmed. This right shall not be denied, abridged, or interfered with by the employers in any manner whatever. Employers should not discharge men for membership in trade unions, nor for legitimate trade union activities."

In the Railway Labor Act of 1926 we first see Federal legislation definitely prescribed to promote collective bargaining in the railway industry. Again in the Norris-LaGuardia Act signed by Mr. Hoover in 1932 labor organization and collective bargaining are encouraged and protected. "The worker," it is stated, "shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." This law also discouraged the use of the individual or so-called yellow dog contract. Much the same policy was expressed in 1933

in 7A of the National Industrial Recovery Act as in the Norris-LaGuardia Act, but 7A goes somewhat farther. The second labor condition in 7A declared "that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.' When the N. I. R. A. was declared unconstitutional the National Labor Relations Act, with some additions, was substituted for 7A and passed in July 1935. We are now in 1944 well launched in a period of collective bargaining. There will be a good deal of backsliding but the trend is unmistakable.

The struggle for a good many years in the future will center about such issues as the closed shop vs. the open shop, union security, rights of the non-union men, and similar questions. The real issue however in all of these cases is whether there shall be collective bargaining or individual bargaining. The closed shop is generally demanded where collective bargaining is threatened. The Railroad Brotherhoods and other unions whose position is secure do not demand a closed shop. The union security clause is in part a face saving arrangement for employers and in part a temporary legal protection for the unions against an open shop drive.

Arguments in behalf of the non-union man and arguments against the check-off of dues are also inspired sometimes by those who fear collective bargaining or who would prefer individual bargaining. To repeat, the real issue in these and in many other instances is union shop vs. non-union shop—collective bargaining vs. individual bargaining.

With the development of modern capitalism especially since 1850, we have seen a steady increase in the concentration of ownership and control of the means of production. Fewer and fewer people own the property directly with which they make their livings. In the days of Andrew Jackson, aside from the negroes, it is estimated that about 80 per cent of the gainfully employed owned the property, mostly land, with which they mixed their labor. Today about 85 per cent of us work for the boss. As the workers lost the ownership and control of the means of production they came to claim a vested interest in their jobs. This is one of the most difficult things for persons outside of the labor group to understand. It is also a view which many outsiders strongly disapprove. But regardless of the ethics of the claim the fact of it is one of the realities one must recognize in dealing with labor. The courts in this matter have usually been ahead of general public opinion. The courts recognized the claim of the workers to a vested interest in their jobs by permitting peaceful

picketing. Workers on strike might walk up and down in the vicinity of the struck jobs to tell anyone trying to take those jobs that they belong to the strikers. Anyone who tried to muscle in would be looked upon by the strikers as thieves trying to steal something which really belonged to somebody else. The strike-breaker, especially if he were a professional, would be considered something of a traitor to workers in general. The strikers think of themselves as trying to improve wages and working conditions for all. The worker on a struck job has not quit according to his idea. The job is still his and he simply means to try to make it a better one.

Now when men regard other men as thieves or traitors there is nothing which they will not do to them if they can. Around the picket line fierce hatreds develop and equally fierce loyalties. Families, churches, and neighbors are divided. The women and the children sometimes become more bitter partisans than the men, and under the stress of their emotions do things which ordinarily they would never think of doing. There are communities in every section of the nation where these strike feuds have lasted for years.

As an example of how one group of citizens sometimes fails to understand another group let us briefly examine the so-called sit-down-strike. To middle class Americans the sit-down-strike was a revolutionary taking of other mens' property. It was soon declared unlawful. The automobile workers, however, couldn't understand why so many people were alarmed about their sit-down strike. To them it was just another form of picketing. Instead of picketing outside in the cold it was more comfortable and more effective to picket inside where they could better guard against possible strike-breakers and against the temptation of employers to take up the machines and transfer them to some other place. The automobile workers did not intend to take the factories or the machines for their own use. That anyone could have seriously entertained such an idea struck them as absurd. What they were interested in was the job. Their job property was being threatened. Consequently they kept an eye on "their jobs," hoping not only to keep them for themselves but to make better jobs of them as a result of the strike.

Some of the shrewder labor leaders knew this kind of picketing would be misunderstood and opposed it. Among those who thought that it might prove a boomerang was John Lewis of the United Mine Workers.

Recently the law has gone much further in recognizing the workers' claim to a vested interest in his job than merely to per-

mit peaceful picketing. Under the Wagner Act and in a number of the so-called Industrial Peace Acts passed by the states employees may be restored to their jobs and their lost pay returned if they are discharged for joining a union, for union activity, or for other reasons which might discourage collective bargaining.

And this brings us to the central thing in trade unionism. Unions are concerned with jobs rather than with reform philosophies. Union men are job conscious rather than class conscious. They believe in collective bargaining as to wages, hours, working conditions and fair industrial relationships. But they don't believe in collectivism, or socialism or totalitarianism. Generally they do not favor miscellaneous reforms such as the single tax, the Townsend Plan, or Technocracy. In fact real trade unionists are suspicious of utopian reforms and especially suspicious of reforming intellectuals.

Trade unions and employers Associations began with modern capitalism and flourished with the growth of democratic government and private enterprise. Contrary to general belief trade unionism tends to make workers indifferent toward communism and in the course of time even hostile toward it. There are two principal reasons for this. In the process of collective bargaining workers become increasingly job conscious and then come to appreciate more completely the technical difficulties and risks associated with modern industry. They may think the managers and owners a bit hard-boiled at times but they have more confidence in their ability to turn out goods than they have in the abilities of the kind of men who possess political talents primarily, and who would probably rule under socialism. Through collective bargaining with private employers the workers feel they can stimulate management to more efficient production and through collective bargaining they think the union members will be able to get their share of this increasing product or perhaps a little bit more. Unionists therefore believe in private ownership and private enterprise because they think it is more productive, and in the second place they believe that under Socialism there would probably be no collective bargaining and possibly no political democracy. Even a strike against a town, as in the case of the Boston police strike, smacks of revolution. A strike against the Federal government if it were sole or major employer, would not be tolerated. One reason why free trade unionists are so eager to win the war is that under Fascism, National Socialism or Communism, there are no free trade unions. Only under a system of private enterprise and political democracy can the trade unions survive. Over and over I have seen newly organized union members and union leaders desert a socialist or syndicalist or communist philosophy for the philosophy of trade

unionists. Many of the lumber workers in recent years have deserted the old Wobbly philosophy of syndicalism for collective bargaining. Many more workers are in the process of changing from class conscious communists to job conscious trade unionists.

When the Socialist Labor Party in England finally came into power in the 1920's under Ramsay McDonald, trade unionist members were so indifferent to socialism that they would not even support the nationalization of the mines and railroads. This helped to cause a split in the Labor party and the Conservatives have been in power in England ever since. The social democrats in Germany after the war, for all their talk about socialism, were at heart believers in private enterprise. They went along with the owners and managers of big business to acquiesce in Hitler's fight against Communism both at home and abroad.

In Russia in 1917 there were few capitalists and fewer trade unionists. The workers driven under ground and denied collective bargaining turned to revolutionary philosophies. This enabled Lenin, Trotsky and Stalin to put over a communist revolution. They did this with the workers support and by allowing the peasants for a time to keep possession of the land.

In America under private ownership and equal suffrage I expect the trade unions to continue to grow in membership and influence, as long as we can maintain relatively full production and employment. If we cannot provide full employment, collective bargaining will tend to break down and we may experience a difficult period of social turmoil and economic re-adjustment. In this connection much depends upon our tax policy following the war and upon our attitude toward monopoly. Our Federal taxes should be continued at the present high rates for several years or until we have reduced the national debt to the point where it does not seriously worry our citizens or threaten us with financial instability.

We should continue our historic policy of prosecuting anti-social monopoly whether on the side of Capital or Labor or both. Large corporations should be Federally incorporated, proxy voting abolished, and limited voting for each stock owner be made the rule somewhat as in the case of the cooperatives. The holding-company question and our patent policy also need re-examination. Probably we will need to continue a number of our price controls for some years if we are to avoid speculation followed by deflation and business depression.

One of the most complicated labor situations in America involves the relations between Labor and the Farmers. More than

three-fourths of our farmers do not employ an average of even one worker throughout the year. The farmer, being a worker himself, has a certain sympathy toward those who toil. The farmer as a "small man" also tends to identify himself politically with the laborer who is also a small or common man. Farmers and workers have often joined together in their opposition to what they have called at various times, "big business, Wall Street, or the monopolists." We have had farmer labor coalitions at times from Jefferson to Roosevelt. The working combination is for labor to support the farmers' measures and for the farmers to support measures favorable to labor. The social security legislation, the wages and hours law, and the laws relating to collective bargaining have applied chiefly to urban employers, especially the big ones, and not to the farmers. Thus most workers have benefitted by these laws and few farm operators have been bothered. Recently it is true there has been a rift and the workers have opposed certain price raising measures that were favored by some of the more powerful farm organizations. It is significant however that the Farmers Union, which includes more of the small farmers in their membership, have stayed with the workers in their efforts to keep down the cost of living. In the long run most of the farmers feel they will benefit by economic stabilization.

But whatever friendship the farmer may feel for labor politically, he does not extend his friendship to labor organizers on the farms. In fact many of our farmers are so hostile toward the idea of union labor on the farms that they are prepared to do whatever is necessary to prevent it.

Eventually, however, this attitude will change. Agricultural unions are accepted as a matter of course in England, Sweden, Australia and in certain other countries. Usually organization begins with the large operators such as the owners of the big sheep ranches in Australia. In our country farmers have accepted collective bargaining in certain cases where they have acquired ownership in creameries, ware-houses or other businesses located in or near a center of union organization. A few large operators—sometimes corporate—have made agreements with workers in the fields, and in near-by packing sheds. Nevertheless rural workers are still relatively unorganized and I would expect it to be at least a generation before much progress would be made in unionizing them. In the mean time urban labor will continue to work politically with the farmers to support anti-monopoly measures, extensions of social security, and other measures which are in the interests of both or which are not too much opposed to the interests of one or the other.

Many of the war-time methods of dealing with labor problems

will be handled differently when the war is over. At present we are operating under a system which might be called voluntary compulsory arbitration. The no-strike pledge means that, and it has been kept remarkably well by most of the unions. Since the war began the percentage of time lost by strikes has averaged less than a quarter of one percent of the total working time available, and our industrial output is more than double what it was at the outbreak of the war.

The little steel formula has been the most objectionable feature of our labor program. Wages should have been based on the cost of living index of the Bureau of Labor Statistics and not on the little steel formula which was rigid, not understood by the public, and not accurately related to the increase in the cost of living. Fortunately American workers showed a surprising amount of patience with this unscientific directive of the President and with the slow and sometimes bungling administration of the order by the War Labor Board. The directive was unilateral and was therefore a violation of the original no-strike agreement which called for the submission of all questions to arbitration.

When peace returns we shall probably return to conciliation, mediation, voluntary arbitration, and a certain amount of compulsory investigation. More state laws may be passed requiring up to 30 days notice before a strike can be called, although such provisions have not proven entirely successful and may be less frequent in legislation from now on than before the war. There will undoubtedly be more public regulation of the financial affairs of the unions than in the past. Damages to employers may be collected in the future from unions that lose elections and then persist in striking or picketing in order to keep the rival union from operating the plant and representing the majority.

The more recent state industrial relations laws are aimed at making the unions subject to public, and to rank and file control. Annual secret balloting for the election of union officers is required in Texas. Union fees are regulated in Texas and Colorado. Texas prohibits fees which will create a fund in excess of reasonable requirements of the unions. Colorado requires dues and membership fees to be fixed by the by-laws and declares such fees and dues shall at all times be reasonable and subject to the approval of the Industrial Commission. Several states now require annual audits and sworn financial reports. In some states the reports must be open to public inspection. Idaho, South Dakota and a few other states endeavor to regulate especially the unionization of agricultural employees, and to prohibit the picketing and boycotting of agricultural production.[6] The legality of prohibiting peaceful picketing will probably not stand in the courts and the

legality of prohibiting boycotting in connection with union organization is also subject to question.

We may eventually stress much more than now the idea that there are three parties at interest in labor disputes. The interests of the citizen and the consumer are no less important than the interests of Capital and Labor. When Labor and Captial get together alone the public and consumer interests are very likely to be neglected. I look for the public to participate more and more in the promotion of collective bargaining, in encouraging conciliation, and voluntary arbitration and in the investigation and publication of facts relative to labor conditions and legislation. Hard and fast compulsory arbitration, however, has proved pretty much a failure if extended to all labor-employer issues.

*See Monthly Labor Review, May 1943, pp. 942-944.

Compulsory arbitration really means the end of the right to strike and this is so near the right to quit that Labor always insists that it smacks of involuntary servitude. This is perhaps illogical in view of the workers' claim to a vested interest in his job during a strike but men are not always logical. Attempts to outlaw strikes and force compulsory arbitration in peace time would lead to the most vociferous opposition and in all probability would finally lead to the repeal of such legislation.

After more than forty years of experience with compulsory arbitration in Australia and New Zealand these countries, until the outbreak of the war, had largely abandoned it for collective bargaining and the settlement of grievances without government compulsion. Compulsory arbitration was tried in Kansas after World War I but even in the agricultural state of Kansas it was not successful. Both Labor and Capital refused in important instances to abide by the orders of the Court of Industrial Relations. Some of the labor leaders defied the act and went to jail. Some employers carried their cases to the Supreme Court which held that the Act could not apply to industries not affected with a public interest. Coal mining and food processing, where most of the disputes had arisen, were therefore ruled out. The law was later held to be an unreasonable interference with freedom of contract with respect to some of the conditions of employment affecting adults. In summary the effect of the law seems to have been to promote strikes, lock-outs, civil strife, and ultimately a change in the state administration. In 1925 the Court was abolished but some of its remaining duties were transferred to the Public Service Commission.+

+See Commons and Andrews, "Principles of Labor Legislation"

1936 Ed. pp. 437 to 447, Harper & Bros. Publishers.

In 1943 a new generation of Kansans passed a labor relations act which probably reflects the attitudes of Kansans toward war-time strikes and the abuse of union power in war-time rather than their attitudes in peace time. At any rate the Kansas law is relatively severe. The law does not prohibit discrimination against union members or non-members in hiring or firing. A strike cannot be called or a closed shop established without authorization of the majority of employees. Jurisdictional strikes, sympathetic strikes and secondary boycotts are forbidden. Other provisions of the Act provide for state supervision of union finances and for the licensing of business agents.

The part of the Kansas law permitting discrimination against union members in hiring and firing seems to conflict with the National Labor Relations Act in instances involving interstate commerce. There will also probably be court appeals as to the application of the section of the law outlawing jurisdictional strikes, sympathetic strikes, and secondary boycotts. Whatever the outcome, Kansas will probably weather the storm. From the days of the anti-slavery struggle through Populism, state prohibition, and compulsory arbitration Kansas has been a state given to experimentation. In this labor relations act of 1943 I suspect that Kansas has once more submitted herself as a legislative guinea pig for the edification of her sister states.

If collective bargaining continues to grow in the next generation, American employers will probably come to feel more like those in Britain. They will not fight collective bargaining as such but will save their energy and their ammunition to concentrate on what goes into the bargain. Because of their superior ability and knowledge employers have a special responsibility for seeing that government in industry is conducted in such a way that steady and efficient production is maintained and the best interests of employers, workers, and the community are promoted.

Selected References

Public Control of Labor Relations, by D. O. Bowman, published by McMillan & Co. 1942.

Organized Labour in Four Continents, by Marquand and others, see especially pp. 321 to 404, on Labour and Capitalism in America by Selig Perlman, published by Longmans Green & Co. 1939.

How Collective Bargaining Works—study directed by H. A. Millis for the Twentieth Century Fund, 1942.

Labor Cases and Materials, by Raushenbush & Stein, published by Crofts, 1941.

Monthly Labor Review—U. S. Department of Labor.

American Federationist, A. F. of L. Washington, D. C.

C. I. O. News, published by the C. I. O. Washington, D. C.

VICE PRES. SMITH: The paper which Dr. Clower just presented dealt with fundamentals; the so-called cause. We have hoped also to present the effect of the cause by a paper having to do with the lawyer and his problems in this most intricate field. The next paper will be "The Lawyer in the Field of Labor Relations" by Eli Weston, who has had considerable experience in the procedural field. Eli Weston.

MR. WESTON: Mr. Chairman, members of the bar:

We are to assume that President Hyatt and the committee in charge had a two-fold purpose in mind in suggesting a discussion of the above subject; First, to present for your consideration a brief resume of some of the modern social laws, and regulations as administered through boards, bureaus or inspectors; Second, to give you a few actual experiences in the field of labor relations showing the practice, if it may be so designated, before the various boards and bureaus.

It will be impossible to traverse even casually the field of labor relations without drawing numerous conclusions and interjecting many controversial and debatable subjects without explanation.

The present trend towards the expansion of bureaucratic government resulting in the vanishing of States rights so vitally affects all in general and the lawyer in particular, that we must consider its ramifications calmly and in an orderly manner; we need to be definite and forthright in our presentation of the situation as we see it.

Before the danger can be arrested or corrected, the rank and file of American people must know and understand just what has been happening to the legislative and judicial angles of the isosceles triangle upon which our government is founded.

Today, in a very real sense, the American people are no longer governed by law. They are governed by regulations, orders and directives issued by one or the other of our multiple federal bureaus. I am not now referring to war regulations and the like, but to conditions existing before the war, and which, unless the trend is checked, are likely to continue and to intensify after the war is over.

To get a proper perspective we must go back to the period just preceeding the war, 1930 to 1941, and include in our discussion a reference to the laws passed and regulations promulgated during that period.

I refer to the National Industrial Recovery Act, Securities and Exchange Commission, Fair Labor Standards Act, the Walsh Healey Act, the Davis Bacon Act, and the National Labor Relations Act. In addition to these, there are numerous other acts and regulations pertaining to wages in general. All of these laws place varying amounts of judicial authority in the hands of either a board, a bureau, or an administrator, giving in each case authority to set up rules and regulations, employ inspectors and investigators, who in turn have authority to determine the guilt or innocence of employers and to assess or recommend either civil liability or criminal prosecution.

National Industrial Recovery Act

We consider first the National Industrial Recovery Act, sometimes referred to as the NIRA.

This act, passed in 1933, and based on the commerce clause of the Constitution, was designed to hand over to the executive department and its bureaus, the powers of government.

The act was pronounced unconstitutional, in its main features, in two decisions of the Supreme Court (Panama Refining Company v. Ryan, 293 U. S. 388, 79 L. ed. 446, decided January 8, 1935; Schechter Poultry Corporation v. U. S., 295 U. S. 495, 79 L. ed. 1570, decided May 27, 1935) upon two grounds: First, that there was an unconstitutional delegation of legislative power to the President, and Second, that there was an attempt to regulate, to an unconstitutional degree, under color of authority of the commerce clause, intrastate commerce and the local and internal affairs of the States.

You need not take my opinion as to the scope and the purpose of the act. What was said by the Supreme Court in the Panama Refining Company and the Schechter cases will bear me out. In *the Panama case, section 9 (c) of the act was directly involved, which vested in the President and his assignees uncontrolled discretion to regulate, indeed to prohibit, the movement in commerce of petroleum, and the products thereof. Violation of any order made by the President, or any one to whom he assigned his powers, was* punishable by fine or imprisonment, or both.

Describing the grant of legislative power to the President the court said:

"If Par. 9 (c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its lawmaking function. . . . . Instead of performing its law-making function the Congress could at will, and as to such subjects as it chooses, transfer that function to the President or other officer or to an administrative body."

The Supreme Court of that period, and I believe we should remember the dates, having declared the first attempt unconstitutional, the proponents of the act, undaunted, undertook to create a strong executive department exercising all powers of government through a federal bureaucracy and a submissive congress, and what has been described in high places as a cooperative and sympathetic court.

Concerning the submissive Congress, we are all familiar with what has transpired. With reference to the cooperative and sympathetic Supreme Court, I leave that to your own conclusions. But with reference to the glorification of the commerce clause of the Constitution, this clause was pressed into service as the basis for asserting the power to unlimited control and regulation of all local and State affairs.

It can be safely stated that there is no longer a dividing line between interstate and foreign commerce on one hand and intrastate commerce on the other.

It can be stated in the following language of modern judicial interstate commerce logic.

Any disturbance, however slight or unimportant, of any part of the total structure of our intricate, complex and delicately balanced system, may, by the centrifugal forces, be propelled outwards to the peripheral boundaries and the repercussions of centripetal forces thus react upon all integrated parts.

This may sound to you like a nursery rhyme, but it aptly describes the extent to which the decisions have obliterated any distinction between inter- and intrastate commerce.

According to this test the shepherd following his flock on the slopes of Boise foothills, the housewife gathering eggs for the breakfast table, the farmer planting his family patch of potatoes in the dark of the moon, or milking his lone cow to serve the family table—they may not dream that they are in the flow or current of interstate commerce, but within the modern doctrine they are important instrumentalities of interstate commerce.

Securities Exchange Commission

We pass the Securities and Exchange Commission, a board set up with power and authority to pry into the activities of all concerns, selling or offering for sale, stock, bonds and securities, with this rather significant remark recently made by one of the members of the Commission: "We **do** make the law. This **order supersedes any laws opposed to it."**

Fair Labor Standards Act

We should not spend much time on the Fair Labor Standards Act of 1938. This law was designed to guarantee a minimum wage plus overtime at time and a half after forty hours in any work week, to all employees handling or producing materials moving in interstate commerce. This law was also intended to exempt retail establishments, outside salesmen, agricultural labor, executives, professional and administrative employees, first processing of farm products and the handling of certain farm products within the "area of production."

The Administrator of this act is given authority to make rules and regulations for the enforcement of the act, to define certain terms such as the "area of production," etc. It is interesting to note what the courts have stated with reference to the attempt on the part of the administrator to go far beyond the authority granted to him in his attempted definitions.

In the case of Caliup v. Terrell Cotton Company, decided May 29th, 1941, U. S. District Court, the Court states; referring to definitions of "area of Production":

"That definition does not define "area of production." What the Congress had in mind, I think, if it is permissible to attempt to fathom a Congressional mind, is that those far away from where the farmer raised his cotton, might not be exempted. Clearly they never intended any such authority to the Administrator as this. So, this court merely ignores that definition by the Administrator as illegal, unconstitutional, capricious, and arbitrary, and holds that this defendant operated within the 'area of Production,' of the cotton, which it stored."

And again in the case of Fleming v. Farmers Peanut Company, U. S. Circuit Court of Appeals, of the Fifth Circuit, decided May 25th, 1942, the Court stated:

"The power to define the area does not include the power to limit the exemption by denying it operation when more than seven or ten work together on one establishment. That part of the definition is void; the other part may stand."

After the decision in the Fleming case, the Administrator of the Wage and Hour law issued an instruction, which is in part as follows:

"The Division will refrain for the present from making inspections which involve 'area of production,' in the States comprising the Fifth Circuit."

In other words, the law of the land, as determined by the Administrator of the Fair Labor Standards Act, was different in the Fifth Circuit than it was in any other part of the United States.

Walsh Healey Act

Time does not permit us to discuss the lengthy provisions of the Walsh Healey Act, a law enacted at the request of the Department of Labor to require all businesses having contracts with the government of $10,000 or over to, among things:

1. Adopt the prevailing wage scale for the area (set by the Department of Labor).
2. Pay overtime for all hours worked over forty in any one week.
3. Pay overtime for all hours over eight worked in any one day, and to comply with other regulations set up by the Department of Labor.

The Walsh Healey Act, not as drastic as others, caused very little hardship in the large industrial areas, areas having union contracts, and companies already operating under the Fair Labor Standards Act. The law does however, cause considerable difficulty to employers and businesses in the agricultural States, and States such as Idaho, where most employers do not pay overtime after eight hours, and some, rather than comply with the act, have refused government contracts.

Davis Bacon Act

This act relates to the rate of wages for laborers and mechanics employed on public buildings under contracts in excess of $2,000, requires payment at least once a week of the rate determined by the Secretary of Labor; requires posting of wage rates by the contractor; and permits the government to withhold all payments if the law is not strictly complied with.

The Davis Bacon Act is similar in a great many respects to the Walsh Healey Act except that the amount in the Davis Bacon Act is $2,000, and in the Walsh Healey Act, it is $10,000, one referring to contracts with the government and the other to contracts for the government.

National Labor Relations Act

The National Labor Relations Act has been described by organized labor as labor's Magna Carta. This description is not entirely accurate, however, as I think we are all agreed that the Magna Carta of the Thirteenth Century assured complete freedom to all people, not just favored few.

The National Labor Relations Act, commonly referred to as the Wagner Act, has in my opinion just two purposes: First, to give to all employees the uninterferred with right to join a labor organization of their own choosing. Second, to require the employer to bargain collectively with the organization selected by a majority of his employees.

I do not propose to discuss in this paper the events that led up to, or made, the passage of the Wagner Act necessary. I believe all reasonable persons agree that there must have been a need for the Act and that the employers, through their own shortsightedness and exploitation of labor, made the passage of this, or similar legislation, inevitable.

Assuming, therefore, that the law itself is sound and passed for a laudable purpose, some of you may wonder why the law has come in for such violent and adverse criticism, and why during the course of its trial period hundreds of amendments have been offered, and why it is at the present time under fire through House and Senate investigating committees.

You might press the point further and inquire as to why we have the costly jurisdictional disputes, why we have more strikes since the Wagner Act than we had before the law was passed, and why this law, if drawn for a laudible purpose, could create so much dissension, dissatisfaction, and division within the ranks of labor, both organized and unorganized.

The answer is clear if we examine the history of all so-called social legislation dating back to the NIRA. Once again a Board composed of appointees designated by and from the membership of organized labor was permitted to make its own rules and regulations, set forth its own interpretations, and become, through investigators and trial examiners, detectives, committing magistrates, and judges all in one.

To illustrate: Practically all of the officials of the National Labor Relations Board with its total personnel running into thousands are either former members of organized labor, or appointed and recommended by it.

Under this law an investigator from the Board is sent into the community upon any written complaint by organized labor (this may be merely a letter from the Union). An investigation is then made of all the angles of the complaint, including all private or public features of the employer's business relations, and so forth in great detail. The investigator then makes a recommendation to the employer, and if not followed, a hearing is conducted with the investigator sitting as the hearing officer.

If the employer wishes to go further, the case is then referred to the Regional Board where the original report by the investigator has already been received and acted upon, inasmuch as the Board directed the hearing in the first place, and once again the result is predetermined against the employer.

The most common type of violation comes under Section B of the National Labor Relations Act are as follows:

1. Any general program or policy by the employer designed to interfere with the Union's organizational campaign.

2. Specific instances of interference, such as discharge of Union employees, public statements against the Union, talking to the employees about the Union, andsoforth.

3. Interfering with the Union by refusing to recognize it as the bargaining agent.

4. Refusing to bargain with the Union after they have been designated by the Board as the bargaining agent.

5. Refusing to sign a contract with the Union after same has been agreed upon.

It has been quite frequently stated that an employer has at least two strikes against him before he ever appears in a matter before the Board. This statement is not exactly true. My experience has shown that the employer has three strikes against him, but to be fair we should examine some of the reasons why this statement may be true.

Most employers resent being organized. Most employers will do anything they can to prevent the Union from organizing their employees, and once again I do not propose to go into the reasons back of this resentment or antipathy. Perhaps the employer has good reason for a feeling of fear of organization. Perhaps he fears the arrogant and brutal use of the economic sanction, but the fact

remains that he has a fear.

If we consider this feeling on the part of the employer on the one hand and examine the theory of the National Labor Relations Act on the other hand, it becomes convincingly clear that an employer cannot help but violate the Act, because anything or everything that he does, retaining in his mind his adverse feeling towards the Union or organized labor, will be construed by the Board as a violation of the Act.

I believe one of the most glaring examples of this is the case of Wambec Mills, Inc., a New Jersey lumber mill, a case where the employer who was under an organizational campaign by the Union refused to hire two employees when he learned that they belonged to the Union. While it was not admitted by the employer that that was the reason for refusing to hire the employees, the Board found that it was.

Eleven months after the acts referred to occurred, the Board found the employer guilty of violating the Act, assessed him the full amount of pay that could have been earned by the two employees even though they had never worked for the company one minute. This case is, of course, extreme, but it illustrates the extent to which the decisions may go under this law.

If an employer is dissatisfied with the decision of a trial examiner, the procedure requires him to appeal to the National Board at Washington, and after the unfavorable decision is rendered in Washington, there are two courses open to him.

If the employer refuses to obey the order issued by the National Board, the Board may, on its own motion, petition the Circuit Court of Appeals for a review and confirmation of its order, or the employer may petition for a review asking for a dismissal of the case, or whatever other relief he desires, giving the Board, of course, the opportunity of having its order approved in the event the employer does not prevail on his petition for review.

Immediately after the decision by the National Board, the employer will receive a letter suggesting that if he does not intend to obey the order, to notify the Board as to whether he intends to petition for review.

We find here a rather unusual situation. If the employer states that he intends to petition for review, there seems to be no time limit placed upon him as to when he must file his petition, at least I haven't been able to find any time limit, and I presume he would have such time as it would take to exhaust the patience of the Board, and if he took too much time, the Board would un-

doubtedly require compliance with the order, or they will petition on their own motion.

Of course, if the order of the Board is approved, the employer is then under the jurisdiction of the court and subject to contempt proceedings if he refuses to obey the order.

The decisions under the National Labor Relations Act have gone the whole way in obliterating the line of demarcation between inter- and intrastate commerce.

Any employer who receives his goods from outside the state is considered in interstate commerce by these decisions.

Any business that "affects" interstate commerce, even though the business be purely local, is now considered in interstate commerce. A recent case illustrating the question of affecting interstate commerce involves the sale of coal mined within the state, sold within the state, but to a concern that operates interstate. This was considered interstate by the original seller. A second illustration; if a purely local concern is in competition in a community with concerns that are engaged in interstate commerce, the Board would consider the local firm in interstate commerce, because his business affected and was inter-twined with those in interstate commerce.

We could spend considerable time on the National Labor Relations Act and its numerous ramifications, but I wish to close this subject with the statement that we are not to be critical of the court decisions under this law. The fault lies in the provisions of the law itself. The findings of fact of the trial examiner as approved by the National Labor Relations Board are final and a mere scintilla of evidence, whether hearsay, direct, or circumstantial, is sufficient to support any finding.

The record as made before the trial examiner, is, in most instances, examined by some young attorney with the Board, not connected with the case, and his recommendations are, as a rule, followed, and the Circuit Court of Appeals cannot under the law go back of these findings no matter how flimsy the proof.

There have been two United States Supreme Court cases recently clarifying the employer's right to talk to his employees.

Under these decisions and under the constitutional privilege of free speech, the employer may talk to his employees and explain his position in great detail, providing he says nothing of a disparaging nature about the Union.

The privilege and license either permitted to or appropriated by organized labor under the National Labor Relations Act mushroomed organized labor from an organization representing five to six per cent of the working men in 1934 to approximately 22% at the present time, paying into the coffers of the Union several million dollars each month.

Naturally this gives organized labor not only enormous economic powers which they haven't always used with either discretion or finesse, but also controlling political power. An organized minority, particularly where it has the balance of power politically is, of course, a much stronger force than an unorganized majority.

We could spend several hours discussing the power and influence of organized labor and particularly the Teamsters Union, but I wish to refer to only one instance before we pass on to the last, and perhaps most important subject of our discussion.

I want to refer to a recent Teamsters unauthorized strike in Boise, a strike called in violation of the no-strike pledge, a strike called in violation of the conditions of the contract requiring arbitration, a strike called in violation of the rules of the Interstate Commerce Commission requiring all longhaulers to pick up and transport freight in interstate commerce, and a strike called without ignoring the procedure prescribed by both the National Labor Relations Act and the War Labor Disputes Act of 1943.

In our local case the Teamsters Union exerted its economic power by depriving the local hauler of his principal national account involving seven to eight hundred dollars per month revenue simply because the Teamsters Union could sit down with the president of the company in the East and ask for his "cooperation," and in cooperating with the Union the account was taken away from the local company and given to a union concern. Will you keep in mind that this employer had no employees in the union.

When the matter was up for arbitration, the Union again exerted its political influence by keeping the National War Labor Board out of the dispute entirely and by requiring the War Man Power Commission to change its usual procedure by granting striking employees "certificates of availability," even though these employees voluntarily quit.

In discussing the case with two of the International vice presidents of the Teamsters Union, when I suggested that they might be violating the restraint of trade laws either nationally or locally, or that they might be violating the War Disputes Act of 1943, I

was glibly told that the Teamsters Union was not concerned with either the anti-trust laws, the Interstate Commerce Commission rules, nor the National War Labor Board's orders or directives, and that I was slightly backwoodsy for even making the suggestion.

At a later conference I was quite frankly told that the Teamsters Union had influence in the right places and that if they decided to use their economic or political power, there was no one could interfere with them.

I merely cite these instances to show the arrogance and power of this well-organized minority and at the same time the serious condition confronting the American people when such uncontrolled political and economic power can be cornered by so small a group.

National War Labor Board

We come now to the part of our discussion which introduces us to the National War Labor Board created shortly after Pearl Harbor as a result of conferences called by the President and representatives of industry and labor. At this conference, labor agreed to no strikes and industry to no lockouts for the duration. To my knowledge I know of no lockouts by industry, but strikes have increased alarmingly each month with the month of June—one of the worst in our entire history.

An interesting commentary on this situation is the attempt on the part of Congress to legislate against unauthorized strikes. The legislation passed is futile, impotent, and has done absolutely nothing whatsoever to correct the situation.

The Board has two major functions: First, to finally settle all labor disputes **that might interrupt work which contributes to the effective prosecution of the war.** Second, to stabilize prices, wages, and salaries.

The order creating the Board is Executive Order 9017, and the order permitting the President to stabilize prices, wages, and salaries is Executive Order 9250.

On June 25, 1943 Congress passed the War Labor Disputes Act which gave the Board power (1) to hold public hearings in labor dispute cases; (2) to subpoena parties, witnesses, and documents relative to settlements; (3) to decide the dispute and provide by order the wages and hours **and all other terms of the contract.**

On August 16, 1943, the President by Executive Order 9370 provided that the War Labor Board could report cases of non-compliance with its orders to the Economic Stabilization Director, the Director being authorized to require all other agencies of the government to cooperate in the execution of the directives of the War Labor Board; imposing such economic sanctions as (1) cancellation of government contracts and priorities; (2) taking over operation of the employer's business; (3) modification or cancellation of draft deferments; and (4) against the Union withdrawal of privileges such as check-off, and soforth.

With reference to the first function of the Board, I quote from the select committee appointed to investigate the activities of the National War Labor Board under House Resolution 102:

"1. The Board has adopted the policy that in the determination of a wage dispute the question of the financial status or ability to pay of the employer is irrelevant and immaterial and that any employer whose business does not justify the payment of what the Board in its judgment or generosity regards as a decent standard of wages is economically inefficient and ought not to be permited to remain in business.

"2. The Board takes the position that it has the right not only to fix future wages but to render a money award for back wages for services already rendered and paid for without affording the employer an effective right of judicial review.. The Board has placed no limitation upon itself in the exercise of this assumed power and, as pointed out in this report, has rendered judgments running into large sums of money. It is entirely probable that in some instances the Board may drive employers into bankruptcy, on the theory above mentioned that the Board regards employers' inability to comply with its judgments as immaterial.

"3. The Board has promulgated and enforced a new legal doctrine to the effect that it has the power and authority to compel the parties to execute a contract to do anything that the parties might voluntarily do, irrespective of whether there is any legal or contractual obligation on the parties so to do.

"4. The War Labor Disputes Act prohibits the Board from any action in conflict with the National Labor Relations Act. The National Labor Relations Act prohibits the employer from any action that encourages or discourages membership in a labor union, except by voluntary agreement between the employer and the union. To order an employer against his will to encourage membership in a union by requiring continuance of membership as a condition of employment, or requiring the check-off of union dues as a condition of employment is so clearly in violation of the specific terms of the law that it is difficult to follow the devious reasoning by which the Board seeks to justify its conclusions.

"5. The National War Labor Board has not confined itself to labor disputes in war industries but has assumed jurisdiction over all types of business, no matter how remotely they may be removed from any connection with the war effort.

"6. The War Labor Board has compelled employers and employees to agree to submit disputes to arbitration. Compulsory arbitration which requires the parties to abide by the arbitrator's decision is in violation of the constitutional rights of the parties and was so decided by the Supreme Court of the United States in the case of Charles Wolff Packing Company v. The Court of Industrial Relations of the State of Kansas, 267 U. S. 552 (1925)."

A great many people have been duped into thinking that during the time of war or national emergency the Chief Executive has added powers or that he may disregard the constitution or the citizens rights and privileges under civil law. On this I refer to the case of United States v. L. Cohen Grocery Company, 255 U. S. 81, 88 (1921), the Court said:

> "We are of the opinion that the court below was clearly right in ruling that the decisions of this Court indisputably establish that the mere existence of a state of war did not suspend or change the operation upon the power of Congress of the guaranties and limitations of the fifth and sixth amendments as to questions such as we are here passing upon."

It follows, therefore, that the President of the United States and those acting for him under Executive orders cannot suspend or change the Constitution merely because a state of war exists.

In the issuance of the National War Labor Board's orders and directives prior to June 25, 1943, no act of Congress was being administered. Since the declaration of war against Japan on December 8, 1941, the Congress of the United States has been in session practically all of the time and by its actions has shown itself to be most willing and anxious to do everything possible to assist the President and the executive branch of the Government in the war effort.

Out of all of this authority exercised by the War Labor Board in its efforts to settle labor disputes, we draw the following conclusions:

1. All disputes of any kind or description whether the work involved contributes to the effective prosecution of the war or not are taken under the jurisdiction of the Board.

2. Employers are compelled to accept the highly controversial Maintenance of Membership Clause. Practically the same thing demanded by the Union before the war but refused to them by either the National Labor Relations Board or the courts.

3. Employers are compelled to pay on a retroactive basis increased wages regardless of financial ability.

4. Employers are compelled to arbitrate and accept the decision of the arbiter.

I believe the Maintenance of Membership, or sometimes referred to as Union Security, Clause should have a brief explanation.

Under the National Labor Relations Act an employer is permitted to raise as a defense an objection to the closed shop provision in a contract, and he will not be considered in violation of the bargaining clause of the Act by insisting upon the strict open shop, providing he does it in good faith.

The employer is, however, prohibited under the National Labor Relations Act from bargaining with a minority representation of his employees.

The National War Labor Board by compelling the employer to accept the Maintenance of Membership Clause violates both of these provisions of the National Labor Relations Act in spite of the fact that the National War Labor Board order of creation provides that it will in all instances act consistently with the provisions of the National Labor Relations Act.

The Maintenance of Membership Clause is briefly as follows: If a contract is signed on July 1, fifteen days from that date the union must submit to the employer a certified list of all of the names of the employees in the Union on that date. The employer must then agree to maintain those members in the Union for the duration of the contract, and if the employees refuse to remain in the Union, the employer is obliged to discharge them.

During the fifteen-day period from July 1 to July 15 referred to as the "escape period," the employee may withdraw from membership in the Union.

After the fifteen-day period any new employee hired by the employer may or may not join the Union, but if they join the Union they must be maintained in membership by the employer.

To show the extent to which this clause can go, one of my clients has a contract with the Union with no employee working

for him in the Union. In other words he has a contract with the Union but none of his employees belong to the organization that is the second party to the contract.

The second function of the National War Labor Board is more serious. Serious because it vests in the Board complete life and death authority over all businesses employing eight or more employees.

In the establishment of the War Labor Board and its authority, we find again the influence of organized labor. The National War Labor Board has jurisdiction over all employees working for wages or employees on salaries who are represented by a Union. Other employees such as executive, administrative, or professional come under the jurisdiction of the salary stabilization unit of the Department of Internal Revenue unless they are represented by the Union.

Any employer who has increased his wages or salaries above the top rate paid for the particular job classification as of October 2, 1942, in the case of wages, and October 27, 1942, in the case of salaries, is in violation of the wage stabilization program unless he has obtained approval from the National War Labor Board or Salary Stabilization Unit.

It is my considered opinion that 90 per cent of all employers have either innocently or of necessity, violated the technical and highly complicated rules as promulgated by the National War Labor Board with reference to wages and salaries.

It is well to keep in mind that in determining the liability the Board requires the employer to deduct from his expense of operation, from his income tax return, the **total wage or salary** earned by the employee during the period employer is in violaton.

Perhaps the best way to illustrate the types of violations of this law would be to give actual cases.

In a case I shall designate as Case "A" in the eastern part of the State of Idaho, seven employers engaged in a seasonal operation and selling their product to the army petitioned the National War Labor Board beginning March, 1943, for permission to pay 85c and 90c per hour for the fall season starting in September of that year.

The petition was not acted upon during the summer season, and when the operations were about to start the employers were faced with the problem of either paying the rate requested or not opening their business. The army was insisting on having

the product and the employees were demanding the rates, and the employers feeling that it was their duty to get the product out for shipment paid the rates asked for.

The War Labor Board subsequently approved the rate demanded, but in prosecuting the case found the employers guilty of unlawful increases to the extent of $106,000, but because of what they termed extenuating circumstances the amount was reduced to $26,000. The Board recommended that this amount be deducted by filing an amended return of the income tax reports of the individual employers.

The Board also recommended criminal prosecutions in the case of two of the employers found guilty of wilful violations.

One of the employers payng 70c an hour, upon receiving permission to pay 85c, paid 75c instead, and was along with the rest considered in violation.

The second case, I shall designate as Case "B," involves an employer in the central part of Idaho who applied for permission to increase his skilled craftsmen to 85c per hour, and after several months delay the Board approved the 85c rate but required the employer to pay the rate in accordance with General Order No. 31. General Order No. 31 provides, among other things: (1) that not more than 50% of the employees may be increased during any one year; (2) no increase shall amount to more than one-third of the difference between the top and bottom rates of the approved schedule; (3) no employee may be increased more than two thirds of the approved rate during the first year; and (4) not more than 10c per hour may be given to any group of employees or 5c per hour for all of them, depending upon which is the greater amount.

I have just given you some of the provisions of General Order No. 31, and I surmise that you, like this employer, couldn't understand the provisions of the Order, and if he understood them, he couldn't live under them, so he did the most natural thing, he paid 85c per hour to fifteen out of forty employees.

The Board then conducted a hearing and imposed economic sanctions against the employer to the extent of $15,000.

Case "C" is in the western part of southern Idaho and involves an employer who started operations in March, 1943. At that time the War Labor Board regulations did not require the employer to obtain approval for the payment rates in new job classifications. The law was later amended in May, 1943, requiring the employer to file an application for approval for all new job classifications.

The employer did not discover the amendment until February, 1944, and upon discovering the same, filed an application asking for the approval of the rates he was then paying.

The War Labor Board sent two investigators in and in examining the payroll records, they found the employer in violation to the extent of $76,000. They graciously consented, however, to reduce the amount substantially, providing the employer would agree to pay it and not contest the case.

I make an aside comment here for what it is worth. In my experience before the boards and bureaus, I have been told any number of times by my clients that the investigators, and even the attorneys, of the boards, suggest that the employer is much better off if he will appear before the Board without counsel.

In Case "C" the employer was constructing a camp for the navy under a cost-plus or negotiated contract arrangement and was practically ordered by the navy to pay the prevailing wage rates in the area and the job was started at the rates ordered by the navy.

After the job had been operating several months, it was changed to a contract job and not under government supervision, and the employer immediately applied for approval of the rates then in effect.

The War Labor Board ruled that the employer was in violation, even though the rates being paid were suggested by the navy and are the prevailing rates for the area.

In closing I want to call your attention to the fact that there is no appeal from the orders of the National War Labor Board. The Board quite candidly admits that it does not intend to go into court to enforce its orders (Why should it? It has much more authority through its economic sanctions.) On the other hand the employer cannot bring the Board before the court. This is evidenced by the history in the Montgomery-Ward case.

I quote from the regulation of the Economic Stabilization Director on this point:

> "Any determination of the Commissioner made pursuant to the authority conferred on him shall be final and shall not be subject to review by the tax court of the United States or by any court in any civil proceedings."

I wish I could say that the powers being exercised by the National War Labor Board were sincerely in the effort of the prosecution of war, but in my limited experience of organized labor, I am forced to the conclusion that what we are now going through is merely a continuation of the program started long before the war.

None of us are unaware of the many labor disputes which the National War Labor Board has settled by mediation and conciliation, nor are we unmindful of the many problems confronting the National War Labor Board. However, if the Board's autocratic challenge to constitutional authority remains unanswered and unremedied it will imperil our present economic system and will mark the transition of our Government from one of laws to one of men.

Democracies can fight wars effectively without abandoning democratic processes. If the successful prosecution of the war and the country's general welfare requires special regulation of relations between employer and employee, Congress has authority to provide for such regulation and to establish constitutional standards for its administration.

History teaches that even the temporary exercise of arbitrary power often leaves permanent scars.

Congress and the courts have been vested by the Constitution with the authority to preserve the constitutional rights and privileges of the people from destruction by illegal and unauthorized acts of officials in Federal agencies. Congress should proceed immediately toward the enactment of legislation which will with certainty define and limit the authority of the National War Labor Board and provide specific policies and standards by which it shall operate.

AFTERNOON SESSION

Friday, July 7, 1944

VICE PRES. SMITH: Our first report this afternoon is "Federal Taxation of Community Property" by Mr. J. L. Eberle.

J. L. EBERLE: The Federal Government, by the Revenue Act of 1942, has assumed to create a federal system of property ownership and the power to substitute a type of federal title for the property laws of the State of Idaho and other community property states.

By the Revenue Act of 1942, which took effect October 21, 1942, a number of changes were made in the federal estate tax law in derogation of recognition formerly given to the community property laws of the states where that system prevails. By Secton 402 (b) (2) of the 1942 act, Section 811 of the Internal Revenue Code

was amended by inserting at the end thereof a new paragraph, now Section 811 (e) (2), requiring the valuation of the gross estate of the decedent to include in certain cases the value of property never owned by the decedent as follows:

> "(2) Community interests—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any state, territory, or possession of the United States, or any foreign country, except such part thereof as may be 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. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition."

The foregoing paragraph has effect chiefly with reference to the valuation of the taxed estate. The matter of the imposition of a personal liability for the tax is covered by Section 411 (a) of the same act, whereby Section 827 (b) of the Internal Revenue Code is amended to read as follows (omitting the words relating to powers of appointment, which are not germane to this discussion):

> "(a) Imposition of liability. Section 827 (b) is amended to read as follows:
>
> "' (b) Liability of transferee, etc. If the tax herein imposed is not paid when due, then the spouse, transferee, trustee, surviving tenant, * * * * or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under section 811 (b), (c), (d), (e), (f), or (g), to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. Any part of such property sold by such spouse, transferee, trustee, surviving tenant, * * * or beneficiary, to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien provided in Section 827 (a) and a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth'."

Another section of the Revenue Act of 1942 in derogation of community property rights is Section 453, whereby all gifts of community property are declared to be gifts of the husband, except where traceable to compensation for personal services actually rendered by the wife or made from the separate property of the wife. Still another section of the new act having a similar purpose is Section 404 (g) (4), whereby it is decreed that premiums on life insurance paid with property held as community property by the insured and surviving spouse shall be considered to have been paid by the insured.

At my suggestion the Idaho State Bar Commission joined with the representatives of other community property states in a brief filed in the Supreme Court of the United States, in the case of Flournay v. Wiener (Feb. 28, 1944) 88 L. Ed. 478. It was hoped it might determine the question of the validity of the provisions above mentioned. Unfortunately the Attorney General of the United States strenuously opposed the jurisdiction of the Court, devoting his principal argument to a dismissal of the case, presumably to avoid a decision until a case more favorable to the Government might arise. The Supreme Court by a vote of four to three held that it had no jurisdiction because although appellant had assigned as error that Sec. 402 (b) (2) of the 1942 Revenue Act violated the Fifth Amendment of the Constitution of the United States, he did not assign as error the violation of the Fourteenth Amendment. Three justices joined in a vigorous dissent to the effect that the point as to the constitutionality of the provisions above mentioned had been properly raised and that the Court should pass upon it. I understand from counsel that test cases will be commenced shortly both in Texas and Louisiana, questioning the validity of these provisions. In the meantime the practice of attorneys in community property states had depended upon individual judgment of counsel in each case. Some have paid the tax upon the entire community estate under protest; others have paid the tax on one-half of the community property with the statement that the balance would be paid in the event the provisions involved were upheld by the Court. Federal Revenue authorities are taking the position that these provisions are valid, particularly as to the estate of decedent husbands and expect to take action accordingly until there are authoritative court decisions to the contrary.

If these provisions are held valid we are confronted with a situation where the entire amount paid can not be claimed as an exemption or deduction in computing State Inheritance Taxes. Subsection e of Section 14-402 I. C. A. provides for an exemption or deduction of the amount paid as Federal Estate or Inheritance Taxes only to the extent of and limited to a computation made on valuations fixed by the Probate Court and only on that portion of the property the transfer of which is taxable, under the State Act. In other words, the State Inheritance Tax being applicable only

to one-half of the community property, the Federal Estate Tax paid on the other half and within the higher brackets would not be deductible.

It has been our conception that the Federal Estate Tax was a tax imposed upon the transfer of the net estate of the decedent which estate would include all of the property and to the extent of the interest therein of the decedent at the time of his death. In view of our community property law and the decisions of our Supreme Court holding that the wife has a vested interest in the community, upon what theory does the Government contend that upon the death of either spouse the share of the other in the community property is taxable as the property of the decedent?

The Attorney General of the United States contends that the Federal Estate Tax is not levied on "transfer" of property as in the case of State Inheritance Tax laws but its application depends on whether death has brought into being or ripened for the survivor property rights as to making appropriate the imposition of a tax upon that result. He depends in the main upon the case of Tyler v. U. S., 281 U. S. 497 and also upon U. S. v. Jacobs, 306 U. S. 363. In other words the Attorney General's contention is that the provisions of the 1942 Revenue Act above mentioned can be sustained on the basis that death shifts substantial rights and powers in the property to the survivor with respect to his or her previously "vested" one-half interest, and that such provisions do no more than select as a basis for Federal Taxation the alteration affected by the death of one of the spouses of the community property interests of both. He argues for example that death frees the one-half interest of the wife in the community property from the legal dominion and management of the husband and that the husband's legal right and power as manager of the community property ceases. In other words the burden of management of the community property is shifted by death.

In the first place our Commission in its brief, argued that the Tyler and Jacobs cases above mentioned, do not support this contention. In the former case an estate by entirety was involved; in the latter, joint tenancy was involved. These cases dealt only with property which had originally belonged to the decedent who in his lifetime had made a transfer by gift or without consideration, retaining the right of survivorship. Manifestly the situation in these cases is quite different from the character of community which attaches to property at the moment of acquisition and not because of a gift or the voluntary choice of either or both husband and wife.

Moreover it is difficult to appreciate how the husband's death,

as a matter of law, can be said to be an economic benefit to the wife to attempt to justify the taxation on the basis of the shifting of the management to the wife and such contention does not savor of good faith. Upon his death she loses the business manager that she voluntarily selected by the marriage contract. Abandoning the spongy mire of theory in favor of the practical, her husband's death is a distinct disaster and not a benefit.

If the argument of the Attorney General is sound why would not these provisions also undertake to tax the estate of a trustee upon his death on the value of his beneficiary property or the estate of an agent or a managing partner where the same contention might well be made?

Manifestly in the time alloted, I can only briefly touch upon the many questions raised in attacking the validity of these provisions. I shall refer briefly to some contentions made by our Bar Commission, in the brief filed as above mentioned.

For nearly a quarter of a century the Federal Income Tax law has been administered with full recognition of the community property status in the States where that system of law has been in effect. The ownership of community property equally by husband and wife, each with a separate and distinct vested interest, has been directly adjudicated and determined by the Supreme Court of the United States in community property income tax and other cases.

It has always been our conception that the whole subject of domestic relations of husband and wife belongs to the laws of the several states and not to the laws of the United States. In the past, it has been the settled policy of the Supreme Court of the United States that it would follow state decisions interpreting state laws governing property and property rights.

We have never had such a thing as a national system of the law of husband and wife or of the property rights of husband and wife. In the past, the laws of each state have always been looked to for the determination of any question of such character. Heretofore there has been no law of the United States, in the sense of a national customary law distinct from the common law, as attached by the several states, each for itself applied as its local law and subject to such alteration as may be provided by its own statutes.

If the tax imposed by the 1942 Revenue Act as above mentioned, upon the entire community property on the death of either spouse is to be justified upon the shifting of power of management, how would such a contention be applicable in the case of

death of the wife? Moreover the Supreme Court of the United States in the past has held that where a state has enacted a community property system and given the husband power of management and control, a subsequent statute taking away such power does not deprive him of a property right. The same Court in the past held that a state statute conferring upon the husband the management and control of community property does not deprive the wife of her one-half interest in the same but that she remains the actual legal owner thereof and protected by the Fourteenth Amendment.

Warburton v. White 176 U. S. 484
Arnett v. Reade 220 U. S., 311

In view of these decisions the Government in effect by the provisions above mentioned endeavors to treat as property, that which the Supreme Court has in the past held not to be property.

Under the provisions above mentioned, the estate tax on the community estate varies with the total variations of the combined separate estate of the deceased spouse and the community estate. As a result the community interest of the surviving spouse is not taxed on a return depending on the value of that one-half interest but the value of such one-half interest is added to the value of the other half and to the value of the separate estate of the deceased spouse and the return accordingly rises repeatedly reaching into the higher brackets.

Until the Revenue Act of 1942, the community interest of the surviving spouse paid no tax whatever on the death of the spouse first dying because that death effected no transfer of the survivor's half interest. Under the Estate tax laws, Federal and State, the 1942 Revenue Act abolishes the tax of ownership as to community property and it has substituted the conception of dual, but complete, ownership by both spouses taxed as a part of the gross estate of the first to die, depending (with the aid of a new federal statutory presumption difficult to overcome) not on actual ownership but on the sheer accident of which spouse has predeceased the other.

Perhaps the most flagrant example of the arrogant ignoring of the laws of our State is contained in the language of Section 402 (b) (2) providing that the entire community property shall be included in the estate of the spouse first dying "except such part thereof as may be 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." In other words the surviving spouse is given the opportunity to show if possible that some part of the

community estate was "received" as compensation for personal services actually rendered by the surviving spouse. It will be noted that the word "received" is used for an acquisition earned or owned, and seems to be an idea of creating a new kind of acquisition. Manifestly personal services giving rise to acquisition of community property are services rendered by either or both spouses in behalf of the community and the compensation for those services is not received by either spouse in his separate capacity but only as and for the community. In other words, wherever the husband or wife may work, whatever services they may render, such services are actually rendered by the community and the compensation therefore is that of the community and belongs to it. Moreover apparently the bride and groom will have to commence keeping books from the date of their marriage to the date of their death to derive any benefit of these provisions in the event they are sustained.

It will also be noted that under the Revenue Act of 1942 the power of testamentary disposition limits the minimum, but not the maximum, amount to be included in the gross estate, so that it can not be ever less than the amount over which the decedent had power of testamentary disposition. In other words the law of the state is recognized for determining the minimum taxable estate by reference to the power of testamentary disposition but the State law is entirely ignored and disregarded in determining the maximum taxable estate. An interesting regulation under the Act is contained in regulation 108 Sec. 86.2 (c) as follows: "No gift tax results from a transfer on or after January 1, 1943, of separate property of either spouse into community property." In other words it would seem that at the present time a husband or wife can transfer his or her separate property into community property without the payment of any gift tax. However in view of the fact that this would seem to be an administrative interpretation there is no assurance as to how long this regulation will continue in effect; and in case the effect would result in any substantial loss of Revenue the Treasury will interpret the provisions of the law differently. The discrimination against community property states is apparent when it is pointed out that under the 1942 Revenue Act it is only in community states where the ownership of the property is disregarded. It is only in community property states that significance is given to the origin of the property. It is only in the community property states that a presumption is adopted most difficult to rebut, to the effect that a man and wife shall both be deemed, at one and at the same time, to be the owner of all of the same property and that each shall be taxed on the others property and the amount of the tax is made dependent on the sheer accident of which spouse should predecease the other and it is

only in the community property states that a bare cessation of management is professedly made the occasion of the tax.

I have referred to certain precedents long established by the Supreme Court of the United States. Of these, all were prior to the current approach of the Supreme Court as presently constituted. In its present attitude towards its great heritage and the precedents supporting the same, when the validity of these provisions come before it, will it also strike down that great principle so well phrased by the Supreme Court in the case of Smith v. Alabama, 121 U. S. 465, "it was in contemplation of the continued existence of this separate system of law in each state that the Constitution of the United States was framed and adopted"?

VICE PRES. SMITH: The next paper on the program will be "Legal Procedure—Psychologically Speaking," by Dr. J. W. Barton, Department of Psychology, University of Idaho, Moscow.

PSYCHOLOGY APPLIED TO LEGAL PROCEDURES

By J. W. Barton, Univ. of Idaho

DR. J. W. BARTON: Those outside the field of psychology do not have even a good working or practical understanding of what is included in the term, "psychology," as used today. Too many still think of it as "mind stuff", consciousness, or even soul. This is not surprising since the term "psychology," in its derivation, means "about the soul". This view is with us yet in even some psychology departments of private educational institutions, the purposes of which, in such institutions, are to justify some philosophical or religious conceptions. This notion was the earliest of all and it was so thoroughly taught that the common sense view of its meaning is pretty well that of the study of the soul, mind, or consciousness or some combination of them. William James wrote mainly in terms of mind, and James R. Angell, the late president of Yale and who was previously head of the department of psychology at Chicago university, defined psychology as the science of consciousness.

James did do much to break psychology away from the haze of epistomology, for he became more and more interested in the work of explaining human behavior. One cannot read his psychological productions without abandoning the transcendent philosophical views in which he came up. So intense was this struggle in his own mind that he did much in the way of trying to write two books in one, in that he was constantly under the necessity of putting footnotes intended to square what he was presenting as psychology, with what he had held in philosophy.

Musterberg, who followed James at Harvard, and whom most of you know as the author of "On the Witness Stand," was more objective and consequently, more scientific. He had no conflict in trying to harmonize the scientific approach in explaining human behavior with matters of spirit, mind, soul, and consciousness, for he just gave us such nebulous considerations.

Yet, a clear cut break between these two approaches did not come until J. B. Watson wrote his book: "Psychology from the Standpoint of a Behaviorist". Herein he proposed that even the old ambiguous terminology be thrown out. Words like mind, consciousness, soul, mental, conception, sensation, introspection, images, attention, etc., were to be defined more precisely or to be discarded. Permit me to give this notion to you in his own words: "One reason why psychology made this false start under Wundt, is because it would not bury its past. It tried to hang on to tradition (the transcendent), with one hand and to push forward as a science with the other. Before progress could be made in astronomy, it had to bury astrology; neurology had to bury phrenology; and chemistry had to bury alchemy. But the social sciences—psychology, sociology, political science and economics, will not bury their "medicine men". According to the opinion of many scientific men today, psychology, even to exist longer, not to speak of becoming a true natural science, must bury subjective subject matter, introspective method and present terminology. Consciousness, with its structural units, the irreducible sensations (and their ghosts, the images), and their affective tones and its processes, attention, perception, conception, is but an indefinable phrase. Whatever scientific value there is in the colossal number of volumes written in terms of consciousness can be better defined and expressed when the psychological problems which give rise to them are solved by genuine and objective scientific methods."

Whatever criticisms might be brought against the behaviorism of Watson, the least that can be said for it, is that it was a bold and unqualified attempt to explain human behavior. To explain means to state in causal terms—these are the terms of science. If what people do cannot be stated in cause and effect terms, then there is no possibility of controlling them in any way. Watson's main thesis was to discover the underlying principles of changes in behavior. He stated these main principles as (1) Observing what the individual is doing or has done and then determine why he so acts or acted; (2) Knowing the situations in which one is produced to determine or predict what he will do.

These considerations for psychology conform to the demands to which procedures must conform to be properly designated as scientific. For such considerations the subject matter must be

objective, possible of evaluation, and the findings subject to verification. These are the requirements of any subject matter in order for it to be possible of scientific treatment. Yes, this is determinism, and is often designated as materialistic. We should also remember that is the only way of control or anticipation. We can anticipate only in terms of cause and effect relations. Every case of human behavior has a history, a story of heredity and training.

Does all this mean that whether or not one is a criminal or a civil offender, an attorney trying to win cases rather than to do justice, a judge steering a case to conform to public clamor in order to get votes at the next election, a juror that is so dumb that he scarcely comprehends either the nature of the case or the law made to apply, a bogie bondsman who stands to make a financial haul in the deal, a congressman in attendance at a gangster's funeral, a wholesale "fence" whose function it is to dispose of stolen goods, a surgeon that lifts the face of the criminal for hiding identity, a higher up that is the brains of the killing racket, or a substitute for prison service **is simply acting out his nature and the situations that move to action?** Do we all, in any and all cases just behave out of the nature of the histories that made us? Are all offenders, as well as those mistakenly or consciously trying to force claims, just doing the best that they can under the inescapable circumstances of their natures and the situations working on them at the time? Given John Dillenger as he was, could he have behaved differently? **With you as you are right now and the present circumstances as they are, could you believe differently on this point?** Would a change in your nature, a change in the circumstances, or both, have to be had before you could believe differently? Is it possible that all civil and criminal offenders as well as all the obstructors of justice are without freedom of choice?

What is the meaning of the phrase: "He did with his own free will and choice", if he always answers the call of causal necessity in what he does? What are the implications inherent in the statement: "He did with malice aforethought"? Freedom of choice could mean without duress—a kind of freedom from undue influence or force by others. Such a view would be sound scientific psychology and adequate grounds of legal proceedure; but this is a far cry from the "free will" view held to by even a few psychologists as well as some physicists wherein one was thought to be capable, at the time of his offense, to have done the right thing without him or his environment being changed. He knew right from wrong and could have done **either** at any moment, is a fallacy that we should correct in our treatment of offenders.

If one, because of his heredity and his training, is malicious,

he is not a safe risk for society. But what can the poor fellow do about it? You know that he cannot in some way crawl outside of himself and be something else. He did with malice, is sound pleading for he is dangerous to persons or property and not because he freely chose to just be perverse. Hitler has no binding contracts or other obligations of a civil kind; he manifests malicious and wanton destruction of property and persons. These ways of behaving are the necessary expressions of a human nature adequately stimulated, just as much so as Churchill's nature expresses an imperialism that might prove to be pernicious at the peace table.

Yes, we are going to continue to plead he did with his own free will and with malice, for it just happens that by freedom should be meant "free of" for he behaves on his own, and again he behaves with malicious intent. In these two we have symptoms that go a long way in properly diagnosing him as dangerous to be at large; and it is a pretty safe bet that he will do something that will find him in the meshes of the law.

It is likely, that some, in following me thus far will feel like interposing; "If one does only what his nature and the circumstances define, wherein does responsibility lie"? Certainly one cannot have had anything to say as to what his inheritance is, biologically speaking; and the assumption is that what he has learned is forced on him by the environment in which he finds himself. The youths of the land of Hitler could not escape their devotion to him. You cannot help it that you came up to be a Democrat, agriculturist, saint, or sinner.

Then if one has been determined by his innate nature and the circumstance, by what justification is he apprehended, held, tried, disposed of by punishment, assignment of damage, or refused what he feels to be a just claim? To accept this view of human nature is to make many feel that there is no justification for punishment or deprivation for any performances, however mistaken or malicious. But this conclusion need not follow from what this deterministic view offers.

What are the objectives in legal procedures anyhow? If we can get these clearly in mind we would likely escape many of the ills and shortcomings, attached to the applications of the law in making adjudications. In practice, it would seem that for the contending counsel, the main objective is that of winning a case. There is much to make some of us conclude that even judges, juries, clerks, police—the whole court system exists for the purposes of **finding in given directions** regardless of facts to the contrary. Even the highest tribunal in our land has reversed itself a time or two within the last ten years. What the personnel of that body

is politically, seems to be of great moment, and it makes no difference what party has the appointive power. As legalists, it would seem that we too, frequently have as our objectives, some private, or individual, or group interests to serve in our show of applying the law in all procedures. Hear what Tannenbaum, a recognized authority on criminal practices, has to say in his book, "Crime and the Community": "We have here sufficient evidence to indicate that crime is an organized social phenomenon, that it embraces many persons, that it operates on a wide scale, that it depends upon cooperation and connivance by both the police and politicians, and that it lives by defeating the law at whatever cost." The collusion of police, courts, prosecutors, politicians, etc. for making the world safe for crime as well as for civil offenders are exceedingly prevalent if the reports of crime surveys by individuals, state and federal commissions can be relied upon.

These corrupt practices are not confined to the large centers. Who is not familiar with practices in Idaho of courts attempting to influence witnesses, discredit one or the other side of a case before a jury, take a too active hand in jury selection, intimidating counsel by threat of contempt charges, of manifesting bias in testimony evaluations in open court? Not only the judge sometimes behaves contrary to law in the conducting of a case; but the prosecuting attorney occupies a peculiar position of advantage in getting his way. He has the sole right in most jurisdictions to determine whether or not indictment is brought. He can drop, discontinue, or postpone a case at his discretion. This is not true for Idaho since the attorney general has the power to force the prosecuting attorney or take the case out of his hands; but in how many cases has this power of the attorney general been applied?) So much power vested in any official connected with a case loads the dice pretty well in a given direction. But to win the case or to have it decided in a given direction, which means the same thing, seems to be the objective in most legal procedures. That is what is meant by Wood and Wait in their notion that a case of law is conducted by means of the "sporting method"—two sides battling each other for every advantage regardless of the law or facts, sometimes even to obstruct or to cover them up, respectively.

The objectives in all legal procedures should be the protection of each and every individual in his property and life. This, of course, implies the maintainence of a social culture—the welfare or safety of society. This statement might be sufficiently inclusive to satisfy all demands ;but for the sake of not leaving anything out we should probably include the notion of the reform of the offender or even of his prevention, or the prevention of others by deterrng them by the disposition that the court makes of those

found guilty. Stated briefly, the objectives are: the public safety, prevention by deterrence, and reform of the offender. This is all a far cry from the notion that procedures are for having our political biases, personal interests, attending intimidations, etc., determine the court findings.

We must proceed more scientifically—more in conformity with cause and effect relations. We must come to appreciate that in the application of law we are attempting to determine the behavior of individuals or trying to explain why such and such behavior took place. If this is examined just a little, it will be seen that we have stated the subject-matter of psychology as quoted from Watson above. Every case at law is a matter pertaining to human behavior—offenses, claims, infringements, neglects, etc.; and the testimony tending to describe or explain. Remember that to explain is to state in cause and effect terms. After the behavior has been explained, or after the "case is all in," then the law is applied and the adjudication is made. This is all just a matter of proceeding scientifically.

The contending attorneys and the judge are often even too far off in the application of the law to the case; but the case, as shown by the testimony, is too frequently far wide of the truth. The two main causes for this deficiency in defining the case to the court are; first, conscious effort to obstruct, defeat and withhold the facts that really define the case; second, lack of knowledge as to the causes of human behavior. Even the laity are familiar with framing of witnesses, unnecessary delays in hearing the case; undue influence in open court of judges, ignorance of jurors in understanding facts and the application of the law; intimidations of witnesses, jurors, judges, attorneys, police; political and special interest biases of court officials; that whole web of political corruption that is all too prevalent in many cases at the bar. All of this and more tend to make impossible the application of a true cause and effect relation in court procedures. What is done, even though erroneous as indicated, are matters within cause and effect relations; but most of them are false causes and of course could never arrive at the correct conclusions.

The second cause of miscarriage of justice is that human nature is not known sufficiently well by judges, contending attorneys, jurors, and the police. Very many of such court officials do not know that any person before the court got there properly or otherwise because of his nature and the circumstances—that each case has a history that completely defines his offense, claims, etc. Nor do they know that he should be treated (not punished) in the light of his history, rather than in terms of his offense, claims, etc., if the objectives at adequate adjudications are to be had. One

judge was heard to say that if he had his way, no history taking of an offender would ever be permitted in a criminal hearing. (It is difficult to appreciate how such a judge would get at the matters of "his own free will and with malice aforethought" without some history taking.) With such a view a criminal act must be looked upon as a "free will" act enacted because of an innate perverseness born of the Devil on the spot, and of course should be punitively, or painfully treated in order to bring about the retribution, or the return for evil that he has done. Too many of such officials have never gotten on far enough to have appreciated that there is such an issue as the nature of the offender or the claiment in a case at law.

Why should it be expected that judges, lawyers, etc., know much about the nature of human behavior? If the preparation for the law is looked into, it will be readily discovered that very little training of this nature if offered in the curricula of law schools. At the University of Idaho there is no assurance that a graduate of the Law School will have had even a single course in psychology. The requirements for the L. L. B. at this institution are: "Any canddate for the Bachelor of Arts degree, who at the end of the junior year has completed 98 semester hours and who has satisfied all other requirements of the College of Letters and Science for this degree, may in his senior year take the full first year of the law course, and upon completion of the same be entitled to receive the dgree of Bachelor of Arts. Upon satisfactory completion thereafter of two years of advanced law study, the degree of Bachelor of Laws will be conferred". Then if we turn to the curriculum of this College of Law we find the further regulation: "The course of study covers three academic years. The prescribed first-year work is required of all students. Students in the second and third years normally take 14 hours each semester and may not, during any semester, receive credit for more than 15 hours.

This all adds up to the fact that law graduates may escape taking a single course in psychology and the general practice is to take history, government, etc. in preference to psychology. There is nothing of the pre-legal preparation to encourage a special study of human nature as such. And then during the three years of legal study the course provides for 14 semester hours in law and a limit load of 15 hours. There are no one hour courses in psychology so there is no chance for recognized study during those years. All of this practically precludes the study of psychology as an academic experience for law students at Idaho.

At Northwestern, psychology is required in pre-legal preparation, and the emphasis is general, applied and abnormal study.

Duke University requires at least two courses and designates them. At Minnesota, six credits in psychology are required. At Washington University, St. Louis, advanced courses are open to election with prerequisite courses. Most of the institutions make no provision for psychological study in law preparation, which of course, make Idaho's course rather regular. I think that if Harvard had such a requirement that our chances at Idaho would be much encouraged.

The law schools are not the only institutions that have neglected the study of human nature as presented by psychology. Medicine held out till it was overwhelmingly shown that most of human ills are functional (mental) and are adequately relieved by psychiatric means. Most medical schools are now offering psychology courses and are going so far as to offer doctorate degrees in psychiatry. Psychiatric clinics are becoming numerous all over the world. The military has made rather extended provision for training in and use of psychological knowledge. Business and industrial organizations have their departments of personnel, the functions of which are to select, train, assign, and manage workers. New York University was the first such institution in the United States to offer the doctorate in these fields that include much of psychology training. Most all human enterprises are coming to recognize that wherever what the human does is of moment, it helps to know his nature. What man does legally speaking, is causally determined and thus gives promise of anticipated controls. To affect such controls for the protection of property rights and personal safety through the application of law is an attempt at psychological procedures. Legal procedures are psychological procedures, more or less adequately gotten at. If we do not get our psychology by means of academic study we will by the emperical one of fumbling about in practice till we learn how. By the same token, one could become a good physician if they would turn us loose on the public long enough; but we shudder at the mess of waste in the wake of such effort.

The law on one side and the disputant (the human) on the other. These must be tied together. This tying brings in some more people to deal with—judges, lawyers, juries, police, witnesses, attendants, hangers on, if not the underworld, political machines, parties in interest. All these and more are counted or encountered along the way of legal procedure. These should all be known by those directing and managing in legal procedures; but particularly, should the psychological principals in litigation be known by judges and counsel.

How much psychological study should serve as a minimum for a working knowledge in the field of law? As we are set up

at Idaho, four courses should be required—general psychology, applied psychology, abnormal psychology, and psychology of criminality. These courses represent a total of fourteen credit units. This is equivalent to the required fourteen units designated for one semester in law. Should we feel that to know the other half of legal procedure (those in litigation)—one sixth of the time of academic preparation for law practice is relatively too much? The time given to such study could be reduced if a course or two were shaped specially for lawyers. Other departments, such as chemistry or botany, are shaped to meet special demands like agriculture, manufacture, medicine, etc. There is little doubt that such courses could be provided in psychology for students of law if they were required for this kind of preparation. General principles of human behavior are essential to all handling of human control; mental abnormalities are encountered in civil and criminal practice more than are found in the military; and in order to apprehend, try, and dispose of a criminal, should be almost entirely a psychological matter. The principles are provided by the general and applied courses, mental abnormalities come to be understood by a study of abnormal psychology, and the courses in the psychology of criminality, give a good view of the best procedures in handling the criminal.

Let us take just one civil case (and I do not mean to take the position that all civil cases are like this one or that it is even typical): Mr. X defended himself in a suit brought by the United States Government for recovery. The defendant had borrowed from the Federal Land Bank large sums used in buying and selling livestock. Mr. X had in some way misappropriated or lost the money, but which, if either, was never shown. It was shown that he escaped or was in the act of leaving the country, but was not too consistent about it. He bought too many sheep to be paid for by his available funds, many of the sheep could not be accounted for. He was known, as shown by the testimony, to have resorted to irregularities in business practice on other occasions. He was held not liable on the grounds of intermittent lack of mental responsibility. His apparent attempts at escape were shown to be due to periodic seizures of amnesia. It is easily understood by students in the abnormal psychology fields that when one goes bad in memory, his perceptions, imaginings, thinkings and judgments also go bad.

I admit that most civil cases are matters of fraud, collusion, ignorance, etc., but that does not render them less likely of psychological concern. If people were entirely honest and free of ignorance, I suppose there would be little to do of the legal procedure kind in civil practice. We too often make claims that are not sustained by the law and there are causes behind these performances

which can be gotten at and should be, if property and life are to be properly safe-guarded by the law. We can know the civil claimants as well as the criminal offenders by knowing the general principles of human behavior as well as the specific maladies (ignorance and criminality) with which each is afflicted.

What benefits have we a right to expect from a better psychological understanding of human nature? We have a right to know rather specifically what help would accrue from such effort of preparation in legal procedure.

In the first place there would be developed the view that whatever one does, has been causally produced, i. e., that each response has a history and that each history is knowable. This, of course, is the scientific approach, and it offers the hope that something can be done about it all—that there is the chance to make the public more safe by making those who offend more nearly whole. (Less ignorant, pernicious, or mentally sound.)

Next there would be emphasized the fact that one's misconduct is not the sole result of heredity and as a consequence cannot be eliminated. Too many judges and counsel really believe that the offender is different, in toto—that he represents that other class as opposed to those approved. It must be found that people, all people, differ in degree, legally speaking, and not in kind. No one is wholly bad and none are a hundred percent good. It should be remembered that none responded when asked to "cast the first stone". The criminal psychopath is likely another fallacy. People are not born bad, they are made so after they get here.

Again "by his own free will and choice" to be allowed in the pleadings should be so only to indicate one's nature; in that he was free of duress, or other external forces over which he had no control—that he really is what his conduct implies. This pleading should never take on the form of the "free will and choice," wherein it is held that he could have done otherwise without any changes in his nature, the circumstances of his environment, or both. From this point of view, the offender should not be punished, but rather should he be treated either educatonally or medically. It is likely that much of what we use now and designate as punishment will be kept as good means of treatment. He must be treated for ignorance or for criminality, (just habits), or for both. This is the only way to make society safe.

Psychology would insist on a higher qualification of personnel as shown by a civil service procedure all the way from top to bottom. Even the governor, in order for election should give evidence of adequate knowledge of human nature if he is to have power to pass on the dispositions made of those tried in court.

No elective officer should be eligible for judicial functions without knowledge for such service. Scientific procedures proceed in no other way in the matter of selecting personnel for service. One is not qualified just because he is the choice of the people. We limit the people's choice in the placement of physicians, school people and lawyers. Why not others who have so much power of control?

What of the police? This is an exceedingly wasteful system, it seems. Listen to a portion of a report of the New York Crime Commission on this point: "If we start with 100 per cent of arrests (in felony cases), 98.03% are left after the police custody has been terminated, 41.12% after the preliminary hearing, 28.88% after the Grand Jury has acted, 20.57% after trial, and 15.42% are actually imprisoned or fined. Our machinery for the apprehension and trial of persons accused of crime in beginning action against five persons whom it does not punish, for every one whom it does punish. Either we are arresting many innocent people, perhaps altogether too many, or we are permitting altogether too many guilty people to escape through the meshes of our criminal procedures". It is likely that both of these possibilities apply.

Why do the police do such a poor job? In the first place they are part of the "spoils system" and hold their jobs because of the helps they can render to the political machines which are in too close collusion with the underworld and the politicians who are in turn go betweens, with the public on one side and the underworld on the other. They are ignorant, especially in matters of mental ill health symptoms. Too frequently they are paid a pittance with the tacit understanding that policing as a business should pay as it goes. The writer knows of a case of one plain clothes man who got his job on pull. He was struggling in those days to pay the rent on a very shabby house. Within five years he was collecting rent from five houses held in his own name. This is not an exceptional and isolated case, except in the excessive amounts collected; and these would be small as compared to police commissioners in large centers. The poor fellows know little concerning the law as it applies in protecting the public, the rights of the offender or even his own prerogatives. Council committees, police commissioners, mayors, state commissioners all serving as directing heads for the police, are usually less well trained than the police, since they do not stay on the job anywhere near as long. Add to all this the fact that the general public generally often goes out of its way to obstruct the police and the wonder is that they do as well as they do.

The crudeness with which suspected offenders are hauled into custody, and the cruel, if not archaic, methods used, known as first degree, can have no other effect than that of infuriating those detained; particularly is this true of those five of the six who probably should never have been required to suffer such indignities. The only way to make one angry, even to the point of war, is to interfere with his biological drives, one of which is to be capable of free locomotion. Then follow this curtailment of motion with the torture of physical or mental hurt and we have the most effective system that could be concocted to hardening people into not only obstructing the police, but the whole judicial system, if not forcing them to seek safety, favorable recognition, adventure, and love with those equally imposed upon. He connects himself with those of his kind even though it is a minority group, or even a group that makes war on the dominant group.

The prosecuting officers simply add fuel to this flame of rebellion in their attempts to make the supposed culprit look as bad as possible. The case must be won at any costs. Science, bosh! It is not common decency. It is worse, it hurts. Fixing, delaying, jockeying, are all intended to avoid a true picture of the nature of the supposed offender. At the very best there is slight effort to go beyond the nature of the offense. The offense is at best symptomatic of whether or not the one at bar is dangerous to the public, to himself, or possible of being retrieved. Public safety by means of banishment, reform, or example to others, should be the obejctives. The defense is no less a menace to public safety for they, too, do all they can to win cases; but **they** are not driving these poor unfortunates into opposing camps as completely as is true for the prosecution.

Alright, judge, jury and counsel, he is found to be guilty. Let us say that this has been properly found to be the case by means of all the most approved objectives, or scientific methods. Finger printing, ballistics, chemical examinations, blood tests, nature of materials, etc., the modus operandi of every kind along with lie detectors, truth drugs, hypnosis—everything. These have all been used and indicate conclusively that he is guilty; anyhow that he committed the act defined in the information. Let us assume that he has been found to be competent to offend. His mentality is found scientifically to be of such nature as to know right from wrong. (No court, counsel or jury that I have ever known is competent to determine anyone's mental sufficiency for such function.) After all this is shown, what disposition shall be made of him?

Keep in mind the functions of the law: To safeguard the public. In the light of this objective, what shall we do with him? Now you interpose that we must take into account the degree of the offense as shown by the act. I impose that rather should we

take into account the nature of the offender as shown by his act and all the circumstances that have produced him. The best means of protecting the public is likely best provided by making him safe for the public. He might be too old, too incurably mentally deranged, or otherwise incompetent to be safe or contributive to the public safety. In such case it is likely that he should be safely disposed of by death. But many are not so unfortunate and should be salvaged.

What shall we do with these that show promise? If they are of tender years, of course we will send them to reform schools, if they have reached their majority, they most likely are to be shut up away from mingling with the approved group—the general public. It might be a work house, a chain gang, a conscientious objectors camp. The general condition is the same—a chance to learn more of what he knows too much already,—the way to make effective inroads on property rights and personal safety. Where could you send a child, a youth, anyone better provided to teach them more of what we object to in them? If there are any more tricks of throwing the police off, getting into collusion with the politicians, using the most modern means of perfecting their special pursuits of entirely solidifying their philosophy and means of life, it would be difficult in these United States to beat the prisons and even as humble dwellings as jails and state industrial schools.

Most all of the inmates of such institutions are in for a term. (Even life termers are found to serve fewer years than those sent up for from twelve to twenty years.) They are all coming back to us. This is scientific education deluxe! But what of the safety of the public? Yes, to properly treat the offender,—sometimes for feeblemindedness, at other times for insanity, and at still other times for bad habits is likely the best means of making this world safe for people to live in.

We need the best trained people in human nature to determine the detention, examination, and treatment of those who are just off the track because of habits, mental capacity, ignorance and mental illness. It is likely that all cases of law, are so, because of deficiencies in some combination of two or more of these designations.

But what shall we do with these unfortunates that are already dangerous to the public interest and yet will eventually come back? The recidivistic figures as given by Wood and Wait are as follows: "For particular offenses the percentages were 64.3% among those convicted for burglarly; 60.1% for drug violations; 56.1% for the robbery group; and 55.3% for those convicted of passing stolen property." They go on to state: "A far larger proportion of jail prisoners have had previous commitments than is the case with those who are sentenced to prisons or reformitories." It seems that they do not just come back, but that they resort to their old practices and are likely just more apt because of opportunities to learn more tricks of their trade.

The safest law of learning is this: Do in your training what you are going to be required to do when the training is over and do it as nearly like it is going to be used as possible. What are these people going to do when they come back? If they do what they have been doing during the time of incarceration, should we be surprised at so many repeaters? We must forget the idea of retribution, or the return of evil done, for it only hardens the victim into open war on the civil systems. While we hold them, they must learn to live with the approved group when out—or else. Yes, I would dispose of incurables that are really dangerous and this would likely include some of the criminally insane; but those that show promise, treatment medically or educationally speaking, should be followed, for we must make them safe for the public good. Tannenbaum is probably not wrong when he states that it is the social group that determines the behavior of men for better, or for worse. The punitive motive in penal treatment has long since outlived its usefulness, from the points of view of either social protection or the reform of the criminal. Such of the prisons or jails that are kept for the future must be turned into laboratories and clinics for the study of those to be disposed of. It will likely be found that for most of them, probation and parole should be used much more frequently and much more effectively so that the offenders can have a chance to practice what they are going to be asked to live—find a place in society that will make them a living and an approved life.

Judges, counsel, etc., either learn human nature enough to apply the best known scientific means to your legal procedures or else confine yourselves to the application of the law to only those cases whose natures have been already thus determined.

These are some of the things we should know about human nature as applied to legal procedures.

1. That the offender is not simply an individual, but rather, he is a product of social relations and should continue so.
2. That the pattern of one's life is not safely shaped by isolating him from the approved group.
3. That public condemnation is not the most effective means of shaping his life acceptably.

4. That offending tendencies are not evidence of an evil nature from which one can in no way be extricated.
5. That freedom and choice, as we use them, are matters that do not conform to the laws of causation.
6. That punishment neither reforms nor deters.
7. That one should never be asked to train in that which he will not be expected to perform in.
8. The evil doer is always the one set off and apart from the approved group and struggles to make good against it.

PRES. HYATT: Thank you, Dr. Barton. Now as a result of that observation I hope we will be able to have the University of Idaho Law School do something about a psychology course. Mr. Wyman, we will take you next. Mr. Wyman's topic is "Is Your Local Bar Functioning?"

MR. THORNTON D. WYMAN: The question can be readily divided into two responses, "Yes" and "No". It is like Irvin S. Cobb, who was elected to a Bank Directorate, advocated a system of simplified banking. Instead of "Paying" and "Receiving" marked over the bank tellers cages, he suggested that they be replaced by simply "No" and "Yes".

There are a number of the Districts reporting "No" to the question "Is your local Bar functioning?".

The excuses offered are:

1. War Time.
2. Too busy.
3. Hard to get interest.
4. Lack of attendance.

As to the excuse of War Time—it is used by the retailer of poor quality merchandise, to the husband who plays poker—and loses.

There are many activities that Lawyers should be giving their effort and time to. An example is the sort of work that Mr. Galloway has pointed out in his remarks. Are you in your District informed on these matters?

Too Busy—the busy man is the man to go to if you want to get something done.

Let us consider the last two excuses for inactivity on the part of Local Bar Districts, "Can't get them out, and lack of attendance".

There are often times that the fault lies in the officers and not in membership.

A few suggestions might be offered:

1. Make a better choice of officers—try younger men.
2. Hold meetings—monthly.
   a. Call membership personally.
   b. Send out cards.
3. Get something to discuss.
   a. What do you know about the returned soldier who has been medically discharged? What about his hospitalization? What benefits is he entitled to receive? Can he get vocational education? How can he obtain these things?
   b. Do you still believe in the theory of low appraisals in estates to avoid inheritance tax? What is the answer to your client who was an heir who later sells his inheritance at twice the appraisal and has to pay an income tax on the profit of the sale? Do you have someone like Mr. Huff or someone from Internal Revenue Department discuss these matters before the members of your district?
   c. What about Abstracts—is the public satisfied in your community with paying large abstract bills for Irrigation and Drainage District procedure in the abstracts when a single entry in some instances might be sufficient?
   d. Do clients bear cheerfully the costs of lengthy trials? Have you discussed Pre-trial?
4. Hold an Annual Meeting.
   We hold a short business session first, a speaker and election of officers, with constant interruptions of motions of adjournment—to refreshments and a banquet and social friendly discussions.
   While Goodfellowship has prevailed and we have had an excellent attendance of from fifty to sixty members out. I make this suggestion—that you have a ladies night with an interesting speaker, to take the place of the usual banquet. Properly done you can sustain interest and give the meeting a definite object or purpose.
5. Get publicity on your activities. Let the public know that lawyers are interested in their affairs. Create good will through favorable publicity. Mr. Smith, Mr. Grif-

fin and Mr. Hyatt certainly have demonstrated what can be done with news of our convention activities.

I have heard this said about Lawyers in general that they can attend a noon luncheon at a round table or some other gathering and you will usually find them starting some argument and have something to say about everything, but when you get them together in a group they are meek as lambs and you can't get an argument or a response out of them. Oh yes, they will resolve about something but do nothing about it.

You will complain that the Lawyers do not have a sense of professional responsibility and there is a lack of loyalty. Others spend time finding fault about the Bar Association in general, the programs or some other pet gripe.

If you are not satisfied then discuss the matters and take some action in your Local Bar meetings. The stronger the Local Bar the stronger the State Bar. No individual lawyer can change things but as a group much can be accomplished, in fact that is the only way things can be done.

I can report that there has been a very fine interest in Third District Bar Association as shown by the large attendance at monthly meetings and Annual Meetings. We have discussed Inheritance Taxation, Federal Income Taxes, Abstracts, Office Management and Efficiency, War Service, Rent Control, and had several interesting talks from men in the Armed Forces of the United States.

I know the Seventh District Bar is functioning but I regret I do not have reports from the other Districts.

As I have said, if you want a strong State Bar Association then build your Local Bar Association into a strong Association for under our present system it is the only way you can do so.

PRES. HYATT: We will next hear from Mr. A. L. Merrill on "The Lawyer and the Public".

MR. A. L. MERRILL: It takes three things to make a great nation—Land, Law and Literature. If any one of these be missing, no race can fully develop. Let me call them the three "L's". Land, the source of economic wealth; the basic bid for human activity; the reservoir which supplies the needs and desires of an active progressive people. Literature, the free expression of the people; speech, writings, paintings, music, thinking and inventions; the stimulus which energizes productivity upon the land

and makes life desirable. Law, the stabilizer, the control of human activities, the fundamental source of security which makes possible the development of the other two "L's". This second "L" is the pivot around which the other two revolve. It is the source of life which energizes expression and productivity. It gives the feeling of security in action which electrifies creative forces and gives man undreamed of possessions.

There are great spaces of land upon the earth today capable of producing enough to support millions in comfort and luxury but which are waste and desolate because of the breakdown of the second "L". There are great masses of people whose mental and emotional possibilities are curtailed and subverted because of the inadequate protection of law. I have observed the tremendous natural resources of our sister republic on the south and the delightful possibilities of her people, but have realized that the lack of development of these resources is largely due to the failure in the past of this second "L" to function as it should. I have stood on the rock-rimmed shores of New England and looked across the moss covered lands and wondered why a great commonwealth could develop in such a place and then I am reminded that it is because of the great strength of this second "L".

When law is strong and sure and safe, peoples' minds are alert and their desires for the acquisition of material comforts and advantages are increased. They feel a security in their endeavors. Fear of loss of the production of their minds and hands departs and an enthusiasm takes its place. Great sums of money and labor are thrown into new ventures which produce new and enlarged possibilities. Great irrigation works, railroads, mines and factories are constructed and developed without a moment's hesitation. But, absent or weakened, this second "L' and this enthusiasm subsides and the economic structure crumbles. Protection of the fruits of one's labor is as essential as the labor itself. Whenever this fundamental is restricted, the economic thermometer falls. There is something very deep in animal nature which demands the right to possess that which by effort has been acquired. Even a dog will fight for the bone he has found. But some argue law should be changed or at least weakened to take away or restrict the "profit motive" and attempt to distinguish between "property rights" and "personal rights." But such argument is unsound. It does nothing but weaken this second "L". Protection of the right to profits is the incentive to produce. There is no such thing as "property rights". This watch has no rights, but the owner thereof has a personal right to possess it. All such rights are personal and their protection is one of the prime functions of law.

But what is law and how can it be developed and maintained? I shall not attempt a comprehensive definition nor presume that I can enlighten you, my brothers, in your broad concept of it. Suffice it to say that in America it is organized self-control which has produced by crystallized reason a group or set of governing principles by which and through which the conduct and activities of men may be measured and determined. Confidence in these principles and an abiding faith that created agencies, called courts, will enforce them, are essential in the power of this second "L".

Abstract principles or rules of law are in themselves impotent. They must be vitalized. This requires their acceptance by the masses and their enforcement by the courts. "Thou Shalt Not Steal" is helpless unless the force of public opinion is behind it. This second "L", therefore, is no stronger than the people who cover the land or give expression in the realm of literature. It becomes apparent, therefore, that this great force must come from the hearts and heads of the people.

We are accustomed, of course, in thinking of "law" as an arm of government. In reality it **is** government. It has its beginning in organization and thereafter in reducing in measured terms these rules and regulations. The permanence of such rules is what gives faith in accomplishments and a feeling of security in adventure. This necessarily argues that good government must be one of laws and not of men. What ever may be the thoughts of some people today, the story of the past tells in unmistakable terms the historic concept of this doctrine. I like the language of Justice Matthews, who, in speaking for the Supreme Court of the United States in Yick Wo vs. Hopkins, 118 U. S. 346, 30 L Ed. 220, said:

> "When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power * * *. The fundamental right to life, liberty, and pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men'. For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Gentlemen of the Bar, what is our responsibility in developing a true concept of law and its essential value in human affairs? We are supposed to be specialists in this field. While it is our duty and right to fight the battles of our clients, it is also a greater duty to be a teacher of the purpose and value of law. This task should be performed every day of our lives. In our talks with clients, in our attitudes toward juries and courts, in our contacts with our fellow men, in the numerous touches of life. I do not mean to be boresome. Much of this teaching can be done by opinions rendered, advice given and comments made. Sometimes I fear we are much at fault in this matter. We observe a feeling in many people that a lawyer should be avoided when the truth is he should be the "standby" friend from whom safe counsel might be obtained. He should be more often in legislative assemblies. He should be an advisor in the field of legal action. We should remember, and it should be taught to the populace, that our great principles of government of law and order by which the American people have attained greatness, have been in a large measure the result of the work of lawyers. Remember that of the 55 members of the Constitutional Convention which produced that great document, 38 were lawyers. In the early days of our history, the activity in our Congress and in our State Legislatures was predominantly the work of lawyers. In late years we have seen a change in this and also a great change in some other things—yet who will forecast an American future with a glory surpassing that of the past?

It is axiomatic that men will either govern or they will be governed. If this second "L" breaks down, we'll be governed. It is not only our duty to advise what the law is, but, in times of change, what it ought to be. It is a fundamental responsibility of the legal profession to assist in creating just and equal laws.

We cannot be merely commercial. This trait, I believe, is one of the reasons for the attitude of some people toward lawyers. Of course, professional service rendered on call is the basis of our livelihood, but if fidelity be given unto the law and its purposes be first served "these other things will be added unto you."

There are some things people take for granted. You arise in the morning and turn the faucet and receive a refreshing drink of water without even a thought of its original cost. But if in the night the water main should break, we would then realize what we have lost. So is it with this second "L". It has been

developed with blood and work and sacrifice. Its value is never realized by the average individual. The mere fact that courts are open and a lawyer is available settles many a dispute and the average individual gives it no thought. The lawyer is a great "standby" for times of need. What would be the situation if, in the morning, people should awaken and find no courts and no lawyers? How would property be saved and debts collected? What is the result when a calamity in the form of a fire or earthquake comes to any city? We read of it frequently. There seems to immediately arise an utter disregard for the rights of others. Many people seem to feel restraint is off and one may do as he pleases and that conduct is not of the highest order.

I often think of a municipal power system or a large industrial plant with its own electric generation machinery. Always, if possible, the service of some utility is engaged to have a "standby" ready. In case of an emergency, the service will go on just the same. This "standby" service is justly paid for whether used or not. So is the lawyer to the merchant, the banker, the farmer and the laborer. He is the "standby". The only difference is that he is not paid for it unless and until he is called upon to render the service. But do people generally understand this and if not whose fault is it? Have we performed our service in the teaching of the law and its purpose as we should have done?

Again, we have all observed dissatisfied and disappointed litigants. They do a lawyer no good. But there is a reason for their attitude. Perhaps they have not understood nor have had their problem clearly explained to them. I like the doctors' theory of "bedside manners". Can't we develop such? It is all embodied in one word—"confidence". It means the development of personality, integrity, honesty in speech and in finances. It means the paving of the way between the lawyer and the client that he may understand more fully his problem and where it fits into the scheme of things.

I am not unmindful of the numerous personal problems which present themselves to the lawyer and the client. I have spoken perhaps theoretically, but I believe I have not lost sight of the practical touches of everyday practice. The problems with which we deal touch every phase of human existence and at every point there is opportunity for genuine service. The great problems of the future will be more exacting than those of the past. There has never been a time when the need for real lawyers has been greater and never a time when it is more essential that the true position of the lawyer in the community be more clearly understood by the people. This cannot be accomplished if we come out in the sunlight only when it will serve a selfish interest or if we create fear in the minds of the people rather than love and confidence.

Gentlemen of the Bar, we are the ambassadors of the second "L". There are few others who can or will perform our service. This requires our study of court decision and legislative enactments, of business trends, and of thought and expression, of the hopes and aspirations of our clients. Clear, studious thinking, honorable decisive judgment, patriotic, helpful service are the essentials of a lawyer and must be freely given. On the whole, no group of people give more unselfishly of their time and talents or receive a more modest remuneration for services performed than those of the legal profession. I, like you, am immensely proud to look my people in the face and say "I am a lawyer".

PRES. HYATT: Mr. Leguineche, have you a paper on the discussion?

MR. PETE LEGUINECHE: I have no paper. As a young lawyer you can't have any ideas until you have been practicing for thirty years and then you are too old to put them into effect. I have only been practicing for three years.

When I started practicing, public relations was forceably brought to my attention with the admonition that a lawyer cannot advertise. At that time I was quite certain that the sole purpose of that admonition was to keep a young lawyer from taking any business of the older lawyers. I am not quite so certain now.

When the committee on public relations was appointed we received a letter, each member, advising us it was a broad field. Public relations is a broad field. It is the entire field of the practice of law. It would be impossible for any committee to cover public relations, so one recommendation that ought to be made is that this field should be narrowed. If by public relations is meant advertising, the committee on advertising, and we could use a committee on advertising, then we ought to have a committee on advertising and we ought to call it a committee on advertising.

The question of advertising or the question of public relations if it is to be discussed falls into two groups. First, the individual problem. That problem must be met and handled by the individual. Secondly, the problem as it pertains to the legal profession as a group. So the committee has asked for and has received suggestions in connection with group advertising.

In other states the bar association has adopted resolutions. Bar Associations always adopt resolutions, but this one is to the

effect that the bar association encourage banks and trust companies and abstractors to do the advertising for the lawyers; that an ad is put into the papers by a bank or by the abstract company or by the trust company, with its primary purpose to advertise the banking business, but at the bottom of the ad there will be words to this effect: "Have you drafted your will? See a lawyer today." Or if it's an abstract company they add: "Have your abstract examined by a competent lawyer."

The other method of group advertising is the one we have used so successfully during this association meeting, and that is to send adequate and complete write-ups of our actions carried on by the lawyers. Mr. Wyman has been able when we have had our local bar association meetings to get good write-ups. From a narrow and strict sense of advertising that is all we can do. We are still prohibited from running an ad. Of course I can run for Prosecuting Attorney, as I did two years ago, and get a little advertising. Otherwise there is nothing but the group advertising. That leaves the individual lawyer in this position, he has got to advertise himself by letting his clients acquire confidence in him, if he can, by fooling them into thinking he is good. But then from day to day he has got to educate his clients. Ninety percent of the clients don't know what it's all about and if they don't understand the proceedings when the case is all over they are severely disappointed. As a young lawyer that has been my most difficult problem; the misunderstanding which comes between me and client because I fail to explain the case thoroughly to the client. I fail to take him into my confidence. That is the first method of individual advertising.

There occur to me two other methods. These methods are not so much individual as they are a combination of the individual and the group, and that is the manner in which the lawyers treat each other. Every now and then someone asks me to get them a divorce for $50.00, and I say I understand the bar schedule is $75.00. "That's the minimum and that's as cheap as I can possibly go." They say: "Well there are a lot of lawyers will get divorces for less than $50.00". I had one person tell me he could get a divorce in this town for $35.00. I don't know who has the bargain counter. I lost that client. I didn't want him in the first place. But those little misunderstandings because someone is cutting fees create a bad impression on the public.

The second method which I shall call individual-group public relations is the more speedy handling of cases. I have been accused with this one particular fault for three months. We get a small piece of business which isn't too important to us because of the small fee. But to the client it's very very important. We go to the lawyer for the insurance company and he says "That's a small matter; we will get that settled now. I will write a letter one of these days and call you up." Two or three weeks pass and your client comes in and wants to know why he hasn't received his money. You suddenly remember you have that case in your file and you refresh your memory and you run in and see the other lawyer for the insurance company and he says: "Well they want a little more information," which is nothing but a damn lie; he has forgotten to write them. Now you report that back to your client. After about six such trips that client is not only tired of you, he is tired of the legal profession, and I don't blame him. Sometime in a year or maybe it will only take six months, you get that lawyer to a place where you can get that case settled. Now if you can't handle a case you shouldn't handle it. It is damaging to the profession.

An example that occurs to me is that of a lady who had valuable property rights. She had asked for a settlement, which was not good. She was entitled to much more and I told her she was. But she said "It will take six months to a year until you lawyers get that done; I am going to go ahead and settle." That's an attitude we are creating among the laymen.

This committee, I trust, will be continued. Its duties ought to be a little more specific. Suggestions should be received from the Bar Association and from the members of the bar as to how we can improve public relations, if we want to improve public relations. Sometimes I think we make a tempest in a tea cup. That's what I am doing.

PRES. HYATT: Mr. Frederick of the Rent Control Office has something to tell us about the eviction law of Idaho that we probably hadn't thought about before.

MR. A. T. FREDERICK: It is my intention only to point out a hiatus in the Idaho eviction law when considered in the light of the Rent Regulation for Housing promulgated under authority of the Emergency Price Control Act of 1942, as amended (Public Law 421, 50 U. S. C. Appendix). The following points should be considered:

1. Under the Idaho statutes, if not specifically, then by implication, all the estates of less than a freehold are either tenancies for a term or tenancies at will. In the former class of cases no notice to vacate is necessary; in the latter class of cases a one month's notice is required to terminate the tenancy (Sec. 9-303, I. C. A.). Under the provisions of Section 6 of the Rent Regulation for Housing, a tenant may not be evicted so long as he continues

to pay rent to which the landlord is entitled, "notwithstanding that such tenant has no lease or that his lease or other rental agreement has expired or otherwise terminated". Application of this provision converts all Idaho tenancies for a term into tenancies at will, at the expiration of the term.

Under the provisions of Chap. 54-208, I. C. A., all tenancies at will must be terminated by the landlord's giving notice in writing to the tenant to remove from the premises within a period of not less than one month. So far as I can determine, there has never been a judicial decision interpreting this statute and there seems to be a divided opinion among the members of the Bar as to whether or not the said month may begin running immediately upon service of a notice, or not until the first day of the rent payment period following the one during which notice is given. The latter interpretation is the one most usually applied in other jurisdictions. Heretofore, a tenant in this State has usually removed himself upon notice by the landlord; few court actions have been necessary where a tenant-landlord relationship existed, uncomplicated by questions of mortgage foreclosure, lease forfeiture, etc. Now, however, because of the extreme difficulty in finding alternative housing accommodations, tenants are prone to ignore notices to vacate. The real havoc of the indefiniteness of the statutory provision relating to the date from which the one-month time element of the notice to vacate begins to run has in many cases made it necessary for landlords to wait almost double the prescribed one-month period, because their notice to vacate had, by its terms, begun running from the date of such notice, and they were later advised by counsel that the notice was invalid, thus necessitating reservice of the notice to vacate and a consequent delay in securing possession of their premises.

2. Section 6(e) of the Rent Regulation for Housing provides "No provision of this Section shall be construed to authorize the removal of a tenant unless such removal is authorized by the local law." Section 6(a) denies the right of eviction without cause and proceeds to enumerate six grounds upon which eviction is authorized. Only one of these grounds; i. e., violation of an obligation of the tenancy, is expressly set forth in the Idaho statutes as a basis for eviction. While it might be logically argued that because, under the Idaho law, a landlord has the right to evict a tenant on thirty days' notice without cause, such right may be invoked when any one of the conditions set forth in Section 6(a) of the Federal Rent Regulation exist, it may be equally well urged that such construction would be in violation of Section 6(e) of the Regulation that prohibits removal of a tenant unless such removal is authorized under the local law. Thus we have what might be called a

"no-man's land" of the eviction law and a court deciding an actual eviction case could logically reach either conclusion. Therefore, it would seem advisable to guarantee by express legislative enactment the right of eviction under the Idaho law when any of the conditions contemplated by Section 6(a) (1-6 incl.) of the Federal Rent Regulation exist.

This deficiency is brought more clearly into focus when we consider the fact that in dealing with tenancies at will we have no written memorandum setting forth the rights of the parties; their duties and liabilities are usually determined by operation of the law. A typical situation arises in tenancies at will where, by operation of law, a landlord does not enjoy the right of access to rented premises. Under the provisions of Section 6(a) (2) the Federal Rent Regulation authorizes such eviction—provided that refusal of access by the tenant "shall not be grounds for removal or eviction if such inspection or showing of the accommodations is contrary to the provisions of the tenant's lease or other rental agreement." When we realize that most all existing tenancies for a term will ultimately be converted into tenancies at will, we find ourselves face to face with the fact that regardless of how grossly negligent and indifferent a tenant may be, the landlord is forced to retain such undesirable tenant because by operation of the Idaho law on a month-to-month tenancy, the landlord is without the right of access and, therefore, may not evict his tenant. This particular defect could not be cured, even by assuming that a landlord is authorized to terminate by a one-month notice to vacate any tenancy coming within the provisions of Section 6(a) (1-6 incl.) of the Federal Rent Regulations without cause.

In summary, a re-statement of this problem in a concise nutshell would be something like this: First of all, only one of the conditions enumerated in Section 6(a) (1-6 incl.) is expressly provided for as a basis for eviction under the Idaho law. However, since under the Idaho law a tenant at will may be evicted upon a one-month notice without cause, it does not necessarily follow that such an eviction would be authorized under the Rent Regulation in the absence of express provision in the State law making a particular circumstance a ground for eviction. Although it has been the policy of the local Area Rent Office to interpret the Rent Regulations to allow of such procedure, it may be challenged by a tenant-defendant. Even this most favorable interpretation fails to grant to the landlord all rights contemplated by Section 6 of the Regulation when the question involved is one of eviction because of the tenant's refusal of access to the landlord.

While, under normal circumstances, a tenant usually vacates property upon service of a notice to vacate, and therefore a proceedings to evict is seldom challenged, in view of the special pro-

tection guaranteed tenants under the Federal Rent Regulation and the increased obstinancy of tenants to respect notices to vacate, I believe it would be well for the legislature of this State to incorporate into its law express provisions guaranteeing to a landlord at least as much latitude as is contemplated by the Federal Rent Regulations. This is particularly true because the wider latitude already in force under the Idaho law is circumscribed in many respects by such Federal Rent Regulations.

It should not be argued that the probable temporary nature of the Federal Rent Control program would make futile such legislation, because, with a single minor exception, the type of enactment which would be necessary to cure the defects would not be contrary to the general policy of the Idaho eviction law in the absence of the Rent Regulation.

At the risk of being considered presumptuous, I should like to take this opportunity to suggest that the major portion of the Idaho law relating to eviction is nebulous or, at best, is not logically written. If it is felt that the temporary nature of Federal Rent Control does not justify legislation to cure deficiencies hereinabove pointed out, I still urge that the Idaho law relating to eviction be rewritten to achieve conciseness, logical sequence, and clarity. As a simple illustration of what I mean, witness the fact that the Idaho Code in its definition of unlawful detainer draws a distinction between tenancies for a term and tenancies at will. The presumption in such a case is that we resort to common law for a definition of terms. Common law tenancies, however, contain interlopers—periodic tenancies, tenancies by sufferance—into which category falls month-to-month tenancies. Under our statutes, however, we are forced to the conclusion that a month-to-month tenancy must be considered as a tenancy at will.

PRES. HYATT: In connection with Standards for Examination of Title I am going to ask that they be referred to the local bar associations for study and then sent back to the secretary.

We will proceed with the report of the Resolutions Committee. I will recognize Mr. Elam as Chairman. We will pass on each resolution at the time it is read.

MR. LAUREL E. ELAM: We have had much discussion on administrative law. The American Bar Association has had a legislative committee working on this proposition of federal administrative procedure and briefly it is a bill providing a method of procedure in connection with the enforcement of these laws, and makes proper provision for referring these controversies after they have been passed on by the administrative boards, to the courts. The resolution of the committee is as follows:

"Be it resolved that the Idaho State Bar go on record as favoring and supporting the proposed federal administrative procedure act, which is a bill for the improving the administration of justice, procuring fair administrative procedure, such act being referred to and commonly known as "Administrative Procedure Act".

(A Motion to adopt the resolution was carried, after discussion.)

MR. ELAM: No. 2 is "Believing that the current Idaho Codes are encumbered with many obsolete statutes and provisions that add to printing expense and bulk of current editions and that such statutes should be repealed as rapidly as possible after discovery,

NOW, THEREFORE, Be it Resolved by the Idaho State Bar that the Commissioners appoint a permanent committee to be known as Committee on Statutory Revision to consist of not more than three members to which may be referred proposed statutory repeals and which committee shall have authority to recommend to the regular Legislative Committee repeal bills to be presented to the state Legislature.

MR. E. B. SMITH: I favor this resolution, but I don't think it will work unless it is put up to the legislature for legislative appropriation. It is a tremendous task. Based upon experience which the Bar Commission has had it is extremely hard to get lawyers to do this work.

(Upon Motion the resolution was unanimously adopted.)

MR. ELAM: The next one is:

"Resolved that the Idaho State Bar approve a statute to be passed by the State Legislature similar to the Statute No. 10073 of Iowa Code of 1935, which reads as follows: **'Affidavits, Explanations of Title — Presumption.'** Affidavits explaining any defect in the chain of title to any real estate may be recorded as instruments affecting the same, but no one except the owner in possession of such real estate shall have the right to file such affidavit. Such affidavit or the record thereof, including all such affidavits now of record, shall raise a presumption from the date of recording that the purported facts stated therein are true; after the lapse of three years from the date of such recording such presumption shall be conclusive."

MR. GRIFFIN: I move that the proposed resolution be submitted to the legislative committee of the Bar for such action as it deems wise and proper.

((The Motion was unanimously adopted.)

MR. ELAM: The next one is:

"WHEREAS, At the 1942 Annual Meeting of the Idaho State Bar there were submitted thirteen "General Standards of Title Examination" for guidance in making title examinations of real property situated in the State of Idaho, and after submission to the Local Associations, no objections were made thereto and they were therefor approved as Standards of the Idaho State Bar, and it is advisable that other Standards presented at the meeting be submitted to the Local Bar Associations for adoption, rejection or amendment, and that to expedite action thereon each Local Bar Association appoint a "Title Committee" to make recommendations concerning Standards for Title Examinations,

NOW, THEREFORE IT HEREBY IS RESOLVED:

1. That the Standards of Title Examination as submitted to the Idaho State Bar, and reported at pages 152-161, inclusive, Proceedings of the Idaho State Bar of 1942, are declared to be approved Standards of the Idaho State Bar; that the Standards submitted at the 1944 Annual Meeting, be mimeographed in suitable form and sent to the Local Bar Associations with the request that the same be submitted, considered and acted upon at a stated meeting and the results of such action be reported in writing to the Secretary of the Idaho State Bar before June 30, 1945, and

2. That whenever three-fourths of the Local Bar Associations have agreed on the adoption of any Standard or Standards of Title Examination, and notice of the adoption of such Standards shall have been given by the Secretary of the Idaho State Bar to all of the Local Bar Associations and the members thereof, such Standards shall be deemed adopted by the Idaho State Bar and from the date of such notice members of the Idaho State Bar shall be bound by such Standards in the examination of abstracts of title affecting real property in the State of Idaho.

3. That each Local Bar Association appoint three of its members as a "Title Committee" to aid and assist in the recommendation, compilation and correlation of Standards of Title Examination of such Local Bar Association and that such Title Committee of the Local Bar Association furnish to the Secretary of the Idaho State Bar copies of all Standards of Title Examination adopted by the Committee's Local Bar Association.

(After discussion the resolution was adopted.)

(NOTE: Mr. Elam read each of the resolutions numbered in Roman numerals from "I to VI" inclusive, and each was separately adopted without discussion.)

I.

Resolved that this convention hereby extends its unanimous vote of appreciation to the Bar of the Third Judicial District of the State of Idaho for acting as host to the 1944 State Bar Convention and for the entertainment of its members and the wives of its members.

II.

That this convention give a unanimous vote of appreciation to each person who has contributed to the success of the convention by presenting papers or otherwise and particularly to those who have come from other states; that a copy of the printed proceedings autographed by the officers of the Idaho State Bar Association be forwarded to each person appearing at the convention from outside the State of Idaho, including the officers of the Army and Navy who came for the specific purpose of presenting the "E" award to the Idaho State Bar.

III.

That the salary of the Judges of our Court should be increased to be in line with the compensation which is paid Judges in the surrounding states; that the salary of District Judges be increased to Six Thousand ($6,000.00) Dollars per year and the salaries for the Supreme Court Judges should be increased to Seventy-five Hundred ($7,500.00) Dollars per year; that the legislative committee of the Bar Association sponsor a bill before the 28th session of the legislature of the State of Idaho to put into effect this recommendation.

IV.

That the Act entitled "An Act establishing and relating to a Judicial Council and appropriating money therefor" which has been presented to this convention by "The Committee on Reexamination of Reorganization of Courts, Judicial Salary and Judicial Retirements," be, and the same is hereby approved; that

the legislative committee of the State Bar Association be and the same is hereby instructed to present said Act to the 28th session of the Legislature of the State of Idaho and to sponsor the same.

V.

That the license fee for lawyers be increased from $7.50 per year to $10.00 per year.

VI.

That the Idaho State Bar and each member thereof pledges its support to the members of the Bar who are now in the Armed forces, to do everything possible in assisting them in re-establishing their practice upon their return to the State of Idaho.

(Mr. Elam read the following resolution.)

Appreciating the fact that the State of Idaho has already too long delayed a renovation and modernization of its archaic penal system in keeping with the progress made by all the surrounding states; that present constitutional prohibitions to the replacement of our present political control with competent, non-partisan, trained personnel must be removed in order to provide the proper rehabilitation of prison inmates, both for their own welfare as well as for the protection of our communities to which they will return.

NOW, THEREFORE, be it RESOLVED by the Idaho State Bar Association that we urge the adoption at the coming general election, November 7, 1944, of the two remaining constitutional amendments necessary to carry out the prison reforms, namely: H. J. R. No. 3, providing for the abolition of the present Board of State Prison Commissioners, and H. J. R. No. 4, taking the pardoning power out of the hands of the present state elective officers and investing same in the Governor of the state, subject, however, to such regulations as may be provided by law, that is, subject to such regulations as the Legislature may from time to time prescribe.

(After discussion the resolution was unanimously carried.)

MR. MARCUS WARE: (After discussion of the subject) I would like to move the adoption of the following:

"That the matter of including studies in psychology for pre-legal or law students be referred to the Bar Commission for its consideration and action."

PRES. HYATT: The law school isn't doing anything in insisting on some psychology in connection with the law education. I think it's up to the Bar to offer some suggestions to the faculty of the law school.

MR. JAMES BUTLER: The medical profession has done a great deal for that profession, because through its association it has taken hold of medical schools, and the standards which must be maintained and the type of studies they should have to graduate. I'd like to see this thing go through if only for the reason that it shows the lawyers of this state might some day continue with this sort of thing. Maybe in a year we will be able to do something with the law school and do something comparable to the medical schools.

(The Motion was adopted.)

MR. ELAM: The Committee has one further recommendation; that the Bar Commissioners appoint the resolutions committee about one week before the meeting of the Bar. Then let the committee have the advantage of as many of the papers as possible ahead of time. It would give them time to work on these subjects.

PRES. HYATT: When the local bar associations get to working again I think that can be. Thank you, Mr. Elam. The Prosecuting Attorney's Association has a report.

MR. MARCUS J. WARE: The new officers are:

President, Marcus J. Ware, Lewiston, Nez Perce County;
Vice-President, T. E. McDonald, Idaho City, Boise County;
Secretary, V. K. Jeppesen, Caldwell, Canyon County.

The Association will undertake a study of prison reforms legislation (1) to provide for the segregation of first offenders; (2) that district judges be authorized to commit first offenders to work camps or other rehabilitation centers to be provided for first offenders who have committed less serious crimes.

PRES. HYATT: It was announced yesterday evening that Emery T. Knudson was elected commissioner from the Northern District. Unfortunately he wasn't able to be here. Your new officers are E. B. Smith, Boise, President, Paul T. Peterson, Idaho Falls, Vice President and Sam S. Griffin, Boise, Secretary. I will stand the new President on his feet. He is a work horse. These programs you owe to him. I am glad you have somebody like him to carry on.

MR. E. B. SMITH: Mr. Hyatt, the retiring president, and members of the Idaho State Bar, I humbly accept this position.

May I say a word now about our programs. The present program which was sponsored by your retiring President, your distinguished Secretary and by your Commission, has pointed out the concrete practical things with which we must deal; and a proper mixture of ideology for the profession and the membership; and a bit of sociability and humor. Those are the three things upon which our programs rest. Without these your programs are a failure and they will be a failure. This year and the few years past hundreds and hundreds of man hours have gone into the preparation of these programs; I would say thousands, by your Commission, by your committees, by the able men in preparing the papers presented for these meetings; papers which could go into any law journal in the world and we would be proud of them. For the past few years, these programs have been your programs, not what some one or two thought they ought to be after sitting down in an office, because nobody can do it that way. The pattern has been one of trying to find out what is in the minds of the members, by finding out what the lawyers in each community were thinking about. We try to find out the trends and bring them to you in these programs. We have contacted members all over the State to find out what you want to know about, and not what we think you ought to know about.

We don't care very much about the ethics of the Chinese; that isn't a practical subject in Idaho, but we do endeavor to select subjects showing trends and practical, workable suggestions.

PRES. HYATT: The meeting is adjourned.

Note: At a special noon luncheon representatives of the Secretary of War and of the Secretary of the Navy presented to the Idaho State Bar separate Certificates of Appreciation in recognition of the participation by the Bar and its individual members in rendering legal assistance to military and naval personnel and their dependents. The Certificates will be framed and hung in the Law Library in the State Capitol Building at Boise.

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