IDAHO STATE BAR COMMISSION

By_____, Secretary

# PROCEEDINGS

OF THE

# IDAHO STATE BAR

VOLUME XVII, 1941
SEVENTEENTH ANNUAL MEETING

SUN VALLEY, IDAHO

July 11, 12, 1941

## OFFICERS OF THE IDAHO STATE BAR

PAST AND PRESENT COMMISSIONERS

JOHN C. RICE, Caldwell, Western Division.....1923-25
N. D. JACKSON, St. Anthony, Eastern Division.....1923-25
ROBT. D. LEEPER, Lewiston, Northern Division.....1923-26
FRANK MARTIN, Boise, Western Division.....1925-27
A. L. MERRILL, Pocatello, Eastern Division.....1925-28
C. H. POTTS, Coeur d'Alene, Northern Division.....1926-29
JESS HAWLEY, Boise, Western Division.....1927-30
E. A. OWEN, Idaho Falls, Eastern Division.....1928-34
WARREN TRUITT, Moscow, Northern Division.....1929-32
Wm. HEALY, Boise, Western Division.....1930-33
JAMES F. AILSHIE, Coeur d'Alene, Northern Division.....1932-35
JOHN W. GRAHAM, Twin Falls, Western Division.....1933-36
WALTER H. ANDERSON, Pocatello, Eastern Division.....1934-40
A. L. MORGAN, Moscow, Northern Division.....1935-38
J. L. EBERLE, Boise, Western Division.....1936-39
ABE GOFF, Moscow, Northern Division.....1938-41
C. W. THOMAS, Burley, Western Division.....1939...
L. E. GLENNON, Pocatello, Eastern Division.....1940...
PAUL HYATT, Lewiston, Northern Division.....1941...

OFFICERS, 1941-42

C. W. THOMAS, President
L. E. GLENNON, Vice-President
SAM S. GRIFFIN, Secretary
309 Idaho Bldg., Boise, Idaho

## LOCAL BAR ASSOCIATIONS

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

Clearwater Bar Association (Second and Tenth Districts), Weldon Schimke, Moscow, President; Lawrence Huff, Moscow, Secretary.

Third Judicial District Bar Association, Frank Martin, Jr., Boise, President; Dale Clemmons, Boise, Secretary.

Fifth District Bar Association, Ben Johnson, Preston, President; Phil Evans, Preston, Secretary.

Seventh District Association, Frank F. Kibler, Nampa, President; V. K. Jeppesen, Nampa, Secretary.

Eighth Judicial District Bar Association, O. W. Wilson, Bonners Ferry, President; George W. Beardmore, Sandpoint, Secretary.

Ninth District Bar Association, O. O. Johanneson, Idaho Falls, President; Louise Keefer, Idaho Falls, Secretary.

Eleventh Judicial District Bar Association, F. C. Scheneberger, Twin Falls, President; Tom Alworth, Filer, Secretary.

# PROCEEDINGS

Vol. XVII

SEVENTEENTH ANNUAL MEETING

of the

IDAHO STATE BAR

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ABE GOFF, President, Moscow
SAM S. GRIFFIN, Secretary, Boise
COMMISSIONERS
C. W. THOMAS, Burley; L. E. GLENNON, Pocatello

## FRIDAY, JULY 11, 1941

### (Morning Session)

PRESIDENT GOFF: Gentlemen of the Bar, the Annual Meeting of the Idaho State Bar will now come to order. The first business is to appoint the canvassing committee for the Northern Division. I appoint Frank E. Kimble of Orofino, E. V. Boughton of Coeur d'Alene and L. E. Huff of Moscow.

The first regular business is the annual report of the Secretary, Mr. Sam S. Griffin.

SAM S. GRIFFIN: Abe Goff, whose term as Commissioner expires with this meeting, became President of the Bar in July, 1940, following reorganization of the Board after election of L. E. Glennon of Pocatello, as Commissioner of the Eastern Division. C. W. Thomas was selected as Vice President.

ADMISSIONS:

Grading of an examination followed immediately the last annual meeting. At that and the following December, 1940, examination, 19 applicants (three of whom had previously failed examinations) appeared, of whom 14 passed and 5 failed. For the June, 1941, examination 15 applicants qualified and 2 were rejected. Grading will follow this meeting.

For the June examination the briefing problem theretofore given was eliminated, and the number of questions reduced to fifty, given in six half day sessions over a three day period. This materially added time within which to answer each question.

Following approval of the Bar the Board proposed a rule to the

Supreme Court providing for a committee of Bar Examiners to assist the Board in preparing and giving examinations in order to permit more time for the Board to consider other interests of the Bar. The Court disapproved the proposed rule and the Board itself has therefore continued to pass upon applications, character, prepare questions, give and grade examinations and recommend admission or rejection.

Upon request for opinion thereon the Board ruled that one admitted as an attorney in another state who took up residence in Idaho could not practice in Idaho, pending his admission in Idaho, by associating a resident attorney under Rule 116 which, under certain conditions permits a non-resident attorney to practice. The Board held that being no longer a non-resident he could not thus take advantage of such rule to practice without admission.

The Board further was of opinion although the Federal District Court Rules might allow admission to such Court without admission to practice in the State of Idaho that nevertheless practice in such Court was practice within the State in violation of the State statute. The Board proposes to urge the Federal Court to adopt a rule similar to Rule 1 of the U. S. District Court for the Northern District of Illinois relating to appearance by resident attorneys.

COMMITTEES:

Pursuant to direction of the last annual meeting the Board appointed Committees on Examinations of Titles, on Economic Status of the Bar and on Schools for Practicing Lawyers.

LOCAL BAR ASSOCIATIONS:

The local bar associations were requested by the Board to hold meetings, and especially to do so for consideration of the Federal Soldiers and Sailors Civil Relief Act, the advisability of a new Idaho Code, and of matters to be placed upon the program of this meeting.

NATIONAL DEFENSE:

At the request of the American Bar Association an Idaho member of that Association's Committee on National Defense was designated in the person of Frank Stephan, Twin Falls, who was also designated chairman of a like committee of the Idaho State Bar, consisting of J. L. Downing and E. E. Hunt.

The Bar purchased and distributed to every member of the Bar a copy of the Soldiers and Sailors Civil Relief Act.

SUPREME COURT RULES OF PROCEDURE COMMITTEE:

Pursuant to legislative act the Supreme Court appointed a Committee of twelve lawyers and judges to assist in formulating Rules



of Procedure. Since the Act carried no appropriation, the Board appointed the same persons as a Bar Committee and has paid the expenses of two meetings of the Committee, and of mimeographing and distributing to the members of the Bar, copies of the first preliminary draft of Rules of Civil Procedure. The great labor of preparing stencils and mimeographing and assembling the draft was largely performed by the Justices' Clerks and the Court Clerk's office.

The Supreme Court of the United States being now engaged in preparing Rules of Criminal Procedure, a task which also confronts the Idaho Court and Committee, two members of the Idaho Committee, at the expense of the Bar, attended a conference of attorneys and Judges on that subject held at San Francisco, California.

DISCIPLINE:

Seven complaints were investigated and thereafter dismissed. One attorney was charged, tried, and disbarment recommended, and by the Court, adjudged. Findings were made upon trial had last year, and suspension of another attorney recommended. The matter is pending in the Supreme Court for its determination. An attorney previously suspended applied for reinstatement, which was denied.

MEETINGS:

The Board met eight times, consuming 19 days not including office and travelling time. It visited the College of Law classes, conferred with the Program and Legislative Committees, and the Supreme Court; one member attending a conference of Northwest Bar officers at Portland, expense claims were examined and approved and many matters of routine attended to.

LOCAL BAR VOTES:

Under the voting rule for the annual meeting adopted last year and approved by the Supreme Court, the local associations are entitled to votes at this meeting as follows:

| | |
|---|---|
| Shoshone County Bar Association | 26 |
| Clearwater Bar Association | 55 |
| Third District Bar Association | 130 |
| Fifth (6th) District Bar Association | 73 |
| Seventh District Bar Association | 52 |
| Eighth District Bar Association | 40 |
| Ninth District Bar Association | 53 |
| Eleventh (4th) District Bar Association | 83 |
| Total | 512 |

PROGRAM:

The program for this meeting was prepared, and arrangements made by the Program Committee consisting of E. B. Smith, Boise, and Paul Hyatt, Lewiston, based largely upon suggestions therefor received through correspondence and personal interview, with individual lawyers and local association officers.

FINANCES AND MEMBERSHIP:

Statement of receipts and expenditures follows:

**Appropriation**

| | | |
|---|---|---|
| RECEIPTS (as of June 30, 1941) | | |
| Balance June 15, 1940 | $5,245.34 | |
| License Fees | 3,793.00 | |
| Costs | 5.00 | |
| Examination Fees | 340.00 | |
| Total | $9,383.34 | $9,383.34 |
| EXPENDITURES (as of June 30, 1941) | | |
| Office expense | 1,576.94 | |
| Travel | 959.83 | |
| Meetings | 325.78 | |
| Publication 1940 Proceedings | 628.19 | |
| Discipline | 92.77 | |
| Rules Committee | 233.34 | |
| Total | $3,928.35 | |
| Balance in Fund June 30, 1941 | $5,454.99 | |

LICENSED ATTORNEYS:

| | |
|---|---|
| Northern Division | 118 |
| Western Division | 237 |
| Eastern Division | 110 |
| Non-Resident | 23 |
| | 488 |
| Judges | 22 |
| Total membership Idaho State Bar | 510 |

DEATHS:

The following deaths have been reported since the last meeting:



Ausfrid L. Anderson, Nampa.
Otto D. Burns, Lewiston.
Fredrick J. Cowen, Blackfoot.
D. M. Cox, Emmett.
Dean Driscoll, Boise.
J. A. Elston, Caldwell.
Lot Feltham, Salmon.
A. L. Freehafer, Council.
J. R. Good, Boise.
John W. Graham, Twin Falls.
James V. Hawkins, Coeur d'Alene.
Wesley Holden, Idaho Falls.
W. H. Holden, Morgan Hill, California.
William Jensen, Lewiston.
L. D. Moore, Moscow.
McKeen Morrow, Boise.
J. L. Niday, Boise.
B. F. Tweedy, Lewiston.
Roy Van Winkle, Hailey.
Fremont Wood, Boise.
E. W. Whitcomb, Salmon.
E. V. Larson, Twin Falls.
Ralph Hubbard, Lewiston.

PRES. GOFF: At this time, gentlemen, comes my pleasure to make what is called the President's Annual address.

Gentlemen of the Bench and Bar of Idaho: It is a distinct pleasure to find so many of you here present at this, the 17th annual meeting of the integrated Bar of the State of Idaho. Each year these annual meetings become more truly representative of the lawyers of the state, and I trust that in the future attendance will continue to grow until, in spite of the great distances most of you will continue to have to travel, we may see the majority of the Bar present at its annual deliberations. We tried holding the meeting here as an experiment, and the result seems to have justified our expectation.

It was my privilege this year to sit as a member of the State Legislature. The candidate of my party in the county to succeed himself in the State Senate was called away to army duty just prior to the election last fall and I was asked by the County Central Committee to take his place on the ticket. One of the reasons that I consented was that I hoped to be able to render at least some small service in the legislative program of the Bar, with which I was to a degree familiar. Contrary to the view I had before entertained, I was agreeably surprised at the general high caliber of the men with whom I had the good fortune to serve and the sincerity and earnest purpose with which they undertook and carried through their respective duties.

Some had little formal education, but in each instance the apparent deficiency was remedied by solid experience from which good judgment was the rule almost without exception. The education and training of most of the members was certainly above that of our citizens generally, and I am glad of this public opportunity to express my respect for the members of both houses.

I was particularly pleased to find a number of brother lawyers: Speaker Bistline, Budge and Sullivan in the House, and Mitchell, Owens and Ambrose in the Senate. The friendliest of feeling prevailed and we stood solidly together where the interests of the Bar were concerned. E. A. Owens, a former Bar President was chairman of the Senate Judiciary Committee. With the help of a very active and energetic legislative committee we had no difficulty whatever with the single exception of the Judge's Retirement Bill, in pushing through the legislation which had been approved by you. This bill was defeated because there was considerable division of feeling concerning it among the lawyers of the state, which was, of course reflected in the legislature and because of the flood of retirement measures to which it was thought this might leave open the gate. This was the second session in which a bill of this nature has been defeated, and I doubt the wisdom of presenting it again. There seems to be too much opposition to it even among the lawyers and it takes only a word to whip up opposition with the ordinary citizen. Be this what it may, in an effort to make judicial posts attractive, we must, as an organization, and as individuals, continue some constructive effort at the next session, and, in my opinion, this should bo directed at an increase in salary. Such a bill would have passed at this session. Financial security will be a step, at least, in making and keeping the Court in the high position it should occupy. In passing, it is worth mentioning that there is considerable question as to whether our present so-called non-political selection of judges is any great advance over the former method. Where vacancies arise we must be quick to insist that candidates for appointment be suggested and approved by the organized Bar.

As far as lawyers are concerned, the principal lesson I learned is that there is no foundation for the oft repeated statement that we can't get what we want through the legislaure. If we agree and present a united front as to the necessity and wisdom of any measure, the majority of the legislature will accept our judgment and act accordingly. It is only when the lawyers who are members disagree that we run into difficulties. You would be surprised to find how willing the other members are to accept and act upon what meets the approval of the lawyers present. On the other hand, we cannot blame them for opposition when they can say, "Why, the lawyers themselves can't agree on this." Laymen are not suspicious of lawyers. No professional group enjoys greater trust and confidence in spite of all the bad jokes to the contrary.



I urge more of you to become members of the House and Senate of our state. A lawyer's training and experience particularly qualifies him for such position. It is a thankless job in many ways that will cost you time and money, but the whole broad pattern of government would be improved if you were but willing to undertake it. I don't recommend an entire legislature of lawyers, but we do need more of you and the state would reap the benefit.

The most important single piece of legislation was the Act recognizing the power of the Supreme Court to make rules governing procedure in all the courts of Idaho. This bill was sponsored by the organized Bar and in spite of a defeat two years ago, went through the Senate this time without a dissenting vote, did almost as well in the House, and then was signed by a lawyer Governor. I don't want to encroach on the time of the Chairman who is to report on the progress made to date by the committee appointed to draw those rules, but I should not pass over the subject without commenting on the fact that here in Idaho we intend to preserve the judiciary as an equal and not a subservient branch of the government. That, to me, is the real point behind the recognition by the legislature of the fundamental right of the Court to regulate its own practice and procedure. This power is recognized and not granted. It has always existed and many of us felt that the power could have been exercised even without this legislative recognition. Now, there can be no question about it. Section 1 of the Act reads:

> "That the inherent power of the Supreme Court to make rules governing procedure in all the Courts of Idaho is hereby recognized and confirmed."

Whether the committee appointed by the Court sees fit to recommend a set of rules following our code of procedure as it now stands, or to adopt an entirely different set of rules, the principle still remains. The Court has appointed a representative committee and it is the lawyers who must work with them each day who will formulate the rules. When procedure needs to be changed it will no longer be necessary to go crawling along the slow and devious path of legislative repeal. We must approach the formulation of those rules in the unselfish spirit of the furtherance of justice. By so doing we will have obeyed the highest precepts of our profession, will bring benefit to the citizens of the state generally and likewise to ourselves. I want to compliment the Court for the attitude it has already shown and the answer, by the aggressive progress already made, to those who said it would sit in sleepy inertia with hands folded. The surest way to put an end to the silly, unjustified craving for the creation

of semi-judicial boards is to let the public see that justice can be best administered by the agency created for that purpose by the Constitution.

In formulating rules of procedure, eventually to cover criminal and probate, as well as civil procedure, the Idaho Bar again takes a pioneer step. Only a few states have preceeded us, but the movement is spreading throughout the country. It is with pardonable pride we can say that ours is a progressive Bar. Our Bar Integration Act was one of the first adopted by any state and I was surprised recently in talking to a member of the Board of Governors of the Washington Bar to find that their Integration Act had been copied largely from ours. Furthermore, they are still struggling with problems of organization and discipline, many of which have long been settled in Idaho. There is a long path ahead, but compared with many other states, we show real progress.

The truckers, the bartenders, the undertakers and even the farmers are organized and make their collective influence felt. The Bar Commission feels that most of you want something to be done for the lawyers in a practical way. That desire was kept in mind in outlining the program you are to have at this meeting. We might have had a Senator Soaper here to guess with us on what the future holds for America among nations, but we thought you were entitled to something we hope will be of help to your practice and pocketbook. Without in the slightest linpairing the high tradition of the profession, we can't go on as an organization without continuing to try to do more for lawyers. My term will end with this meeting, but I know the others are open to suggestions from you. Where fee schedules have been adopted these must be enforced if they are not to turn and work in reverse of what they were intended. A reasonable fee schedule is a protection to the public, a just payment for a service rendered. Disciplinary action should be taken when admonition gets us nowhere.

The profession of Jefferson, of Lincoln, of Holmes, of Webster, and of Hughes has produced more highminded leaders than any other calling. The retirement from public life of Charles Evans Hughes will make every lawyer pause to reflect with justifiable pride at this lifetime of distinguished service, standing out in clear relief against a background of presidential "Yes-men." The leaders of the Bar still are among the leaders of the nation, state and county. We, as individuals, by human frailty may not measure up, but we can still strive to emulate these great names in our profession. Wherever I find a lawyer who keeps before him the lofty heritage of the profession, I find him honored and respected by his community. Fortunately there are few indeed of the lawyers of Idaho who have not earned the right to be so classified.



We are now to begin our annual deliberations. Let each of us resolve that every subject discussed will receive our most thoughtful consideration, so that when we finally adjourn we will do so with a feeling of real accomplishment.

PRES. GOFF: We are fortunate at this meeting to have with us a member of the Nampa Bar, Mr. George van de Steeg, whose address is entitled "It Works When We Agree on Title Examinations".

I am going to appoint a special committee on this particular subject to report tomorrow, O. A. Johannesen of Idaho Falls, Carey Nixon of Boise, Dana E. Brinck of Spokane.

GEORGE H. VAN DE STEEG: Mr. President, Members of the Bar:

Last year, at Pocatello, as those of you who were there present at our annual meeting may remember, I was delegated by the 7th Judicial District Bar Association to present certain efforts that had been made, particularly by the members of the Nampa bar to reduce, if possible, the mounting costs of our abstracts of title to our local properties, and to establish a uniformity of opinion among ourselves as to numerous local matters appearing frequently upon our abstracts so as to constitute it "the law of the case"; and having gone that far among ourselves, to obtain the adoption of our said uniform local opinion by our own District Bar Association, and thereafter by this State Association.

The Nampa committee made a study of our local situation and then, in order to get the ball rolling, made a report to our District Bar Association. That report I read at our Pocatello meeting last year and it will be found in the printed proceedings of that 1940 meeting. It was intended only as a basis for consideration and discussion. There was no idea that it be adopted as made. The District Bar Association did not adopt that report, but after a full discussion of it, the Nampa committee was directed to continue its work with a view specifically to recommending to the District Association certain matters upon which we Nampa lawyers could uniformly agree and then to further report the same.

Pursuant to that mandate from the District Association, the Nampa committee met and with the assistance of other members of the Nampa bar, worked out certain specific matters of local import, upon which we were all agreed, and decided amongst ourselves that, in our own examination of titles, we would put those specific recommendations into effect to see how the matter would work out, and then offer the same in the form of a resolution to be adopted by our District Association. We have done that during the past year and we are now ready to offer the following resolution to our District Association for its adoption:

**RESOLUTION**

"We, the undersigned, committee on Abstracts of Title of the Nampa Bar, recommend to the Seventh Judicial District Bar Association, the following resolution:

BE IT RESOLVED by the Seventh Judicial District Bar Association that the following recommendations be observed by all attorneys within this district in connection with Abstracts of Title and the examination thereof:

(1) That all affidavits be eliminated from Abstracts except affidavits as to marital status during period 1907 to 1911 and wherever discrepancies appear in the names of grantor and grantee in the chain of title.

(2) That abstractors omit the instruments relating to the action of Eldredge against the Payette-Boise Water Users' Association.

(3) That abstractors merely make reference to the fact that irrigation districts, highway districts and cemetery districts have been formed in the territory where the property covered by the abstract is situated.

(4) That the abstractor insert only a brief memorandum of the substance of contracts executed with light and power companies.

(5) That Court proceedings in the following actions be omitted from Abstracts: (here are named seven judicial proceedings).

(6) That the following matters be disregarded wherever they appear upon Abstracts, for the reason that the same have become established by lapse of time and the operation of the statute of limitations: (here are named five transactions relating to judgments or estates).

(7) That where the owner of property has redeemed the same from foreclosure sale, an abstract of the Court proceedings in such action be omitted from the Abstract.

(8) That abstracts of Court proceedings be omitted in all matters and actions after the expiration of a period of twenty-six years from date of final decree.

(9) Short form community probate. If decrees be prepared so as to have Court find specifically the facts required by the statute and that no transfer tax is due, then omit all proceedings except the decree from Abstracts.

That copies of this resolution be furnished all members of the Seventh Judicial District Bar Association and all abstractors of titles within the district, such copies to be certified by the President and Secretary of the Bar Association.

F. A. HAGELIN
GEO. H. VAN DE STEEG
FRANK ESTABROOK." ..



This resolution will be presented to our District Association at its next regular meeting. While I cannot say that it will be adopted, I have every reason to believe that it will be.

The specific matters referred to are all of them common to many of our abstracts. They are for the most part old and even ancient. Every Nampa lawyer is familiar with these proceedings, having run through them and checked them many times. He knows they are regular and sufficient to pass the chain of title. Then why insist that they, nevertheless, must be set out verbatim in the abstract? Why not waive them and save our clients this extra expense? There was a time when we did, all of us, waive them and pass them up. Then along came outside examiners who objected and forced them to be set out, and we local lawyers, in self defense, soon followed that precedent forced upon us by outside examiners. Today we are all of us overtechnical. We treat a minor irregularity as a substantial defect rendering a title unmarketable. We have become chronic dissenters in our examinations of titles. We cost our clients a very considerable unnecessary expense, which we can avoid if we have the courage of our convictions.

I come now to my subject: "It works when we agree on title examinations". As I said a moment ago, in Nampa we have been putting the matter to a test during the past year. Even though we have as yet no official adoption by our District Bar Association, we Nampa lawyers have actually been following the procedure recommended in the report read to you today. We no longer call for the proceedings therein set forth. We simply pass those matters without any comment at all.

We also have a committee of three members of our local Nampa bar who are designated as an advisory committee. This committee has no real power of any kind, of course. Nevertheless, when an attorney comes across a question in an abstract about which he isn't sure, he simply consults one or more of the members of this advisory committee, and the matter is discussed and threshed out and invariably to the satisfaction of everyone concerned. We are no longer afraid or suspicious of each other in title examinations. What we are doing is trying to agree upon and adopt uniform standards of procedure in these matters. And having agreed upon them, we no longer have any fear that our brother lawyer is going to show us up. We know in advance that, if we pass these specific matters, he also will pass them.

The net result of this has been that we are cooperating together to the end that we are no longer construing every abstract against the title.

But you say that may work very well among the Nampa lawyers, but what good is such local agreement when a title is examined by an outside lawyer? We have found this: it depends thus far pretty much on who the outside attorney is. Certain attorneys in Boise who examine many abstracts on properties in Nampa and vicinity are already cooperating with us. If they know that we locally are passing certain proceedings, or waiving them, they also pass or waive them. Either they make no mention of them at all in their opinion of title, or if they mention them they state that the matter is being passed by the Nampa Bar as not being a substantial defect and, therefore, advise passing it.

Whether we shall be able to get that kind of cooperation from examiners who reside farther away, outside our state, is something that remains to be seen. It seems reasonable, however, that an outside examiner, once he can be assured that an entire local bar is content to overlook and pass certain definite matters in abstracts to local properties, such outside examiners would be willing to do likewise. There ought to be such a thing as "full faith and credit" among lawyers, in these matters.

If we can go farther than the local bar, and assure such outside examiners that the District Bar Association and also the State Bar Association has approved the action taken by the local bar in respect of these matters, would not most, if not all, outside examiners fall into line? Would they be so arbitrary and unreasonable as to say: I don't care what all you Idaho lawyers do or say about it; I insist, all of you to the contrary notwithstanding. I doubt if there would be many who would want to take that attitude.

While we haven't to date accomplished a great deal, I think I may safely say that we have started something that will result in a considerable saving of expense to our clients. I know that the lawyers of Nampa like what has been done to date. Now, locally, instead of examining an abstract to see how many irregularities and little defects we can point out, we strive to keep from picking out anything that isn't a substantial defect. And we work together and consult each other to accomplish this end.

In conclusion, may I say that the place to start is with the local bar. In Caldwell, a committee like the Nampa committee was appointed, and it has made a very thorough study along the same lines the Nampa committee and it now has a very fine report ready for the next meeting of the District Association.



This program, this method of procedure, has the sponsorship of the American Bar Association. In Connecticut, Iowa, Kansas, Arkansas, Florida, New Jersey, New Mexico, Texas and Minnesota it is being worked out along the lines above suggested. What it amounts to is that we agree upon and adopt certain standards, which once they are carefully examined and adopted by the Bar Association, become a rule of practice in the examination of titles, to be recognized and accepted by all examiners of titles.

PRES. GOFF: I am sure it was of great interest to know what you have done in Nampa. This is something we can call to the attention of the public, a service we actually render to them, and it is of great importance.

I feel that we should have some discussion on this matter.

PHIL EVANS: I listened with much interest to the address of Mr. van de Steeg. There is one matter I would like to have taken up by this committee, because it is a matter upon which there is some considerable controversy down in our district. What should be the action of the examining attorney where the husband has executed a deed to his wife without setting forth that the conveyance is for the use and benefit of the separate estate of the wife—simply a straight warranty deed to the wife? The statute provides that all the property acquired by a husband and wife after marriage is community property, and in case of a deed like that there is nothing to show the transfer is intended to constitute the property the separate property of the wife. What is the examining attorney to do, assuming there are no probate proceedings and after the husband has died the wife conveys to a third party? There are no probate proceedings determining that the husband as a member of the community has died without leaving a will and that she is entitled to succeed under the 1911 law to the property. Some of our attorneys in the Sixth District hold that the deed from the husband makes it separate property of the wife and upon death of the husband no probate proceedings are necessary. Others hold that the property is still community property and heirship proceedings will be necessary to determine whether she is entitled to take because of the intestacy of the husband.

There is a need that some definite action be taken on this.

PRES. GOFF: The last legislature had before it a bill that any deed by one spouse to the other made the property separate property. That is the only bill the bar sponsored that was turned down, that I know of.

E. B. SMITH: That question will be fully answered by the legislative committee report this morning.

PRES. GOFF: We now come to one of the most important parts of our meeting today, the report of the progress made by the Committee on Procedural Rules for Idaho. Mr. Eberle, as you all know, is a former Commissioner of the Bar, and also a former President, and is Chairman of this Committee which has had two meetings, one yesterday and one at Boise.

J. L. EBERLE: As many of you know, the Idaho State Bar has at its annual meetings for the past four or five years gone on record as favoring the making of rules of procedure by our Supreme Court, and recently a legislative enactment was passed and signed by our Governor recognizing that power.

Each year this matter has come up for discussion, and the legislative committee was instructed to prepare a bill and submit it to the legislature. This was done in 1939, but as many of us know, due to the opposition of a few members of the bar in disregard to the views of the majority, the bill failed. In the last session of the legislature the legislative committee again prepared a bill and presented it to the legislature. By reason of the fine and splendid work of the members of our organization who were sitting in the House and Senate this measure was passed. I want to take this opportunity of thanking those men in the House, Frank Bistline, Willis Sullivan and Hamar Budge and in the Senate, Goff, Mitchell, Owens and Ambrose. They went to the trouble of explaining to each member of the legislature the reason for this bill, and with the explanation the opposition was removed. This bill recognized the inherent power of the Courts to govern matters concerning procedure, and is now Chapter 90, page 164 of the '41 Session Laws. The bill provided for appointment by the Court of an advisory committee and that the rules should become effective six months after promulgation, and thereafter all laws in conflict therewith would be of no effect.

The Supreme Court acted with due diligence in appointing that committee under the statute. On May 18th, the Committee met and organized. Of course the first thing was where to begin. The statute contemplates not only rules of procedure for district courts in civil cases, but also criminal rules and probate and justice courts. It was decided, in beginning this tremendous task, to confine our efforts only to rules of civil procedure at this time. It was suggested in view of the fact that we needed so much assistance by way of discussion that some draft be made available for this meeting so that this matter could be discussed on the floor and in private conversation when we get together. This job was so large sub-committees were appointed, and given certain sections of the Federal Rules to consider. Then the sub-committees went to work, and in view of the fact we had so many inquiries concerning the Federal Rules by the lawyers of this state, and in view of the suggestion of the Supreme Court that



we give serious consideration to the Federal Rules, we thought the present draft should be made to correspond with the Federal Rules as much as practicable for use in this state. With some suggestions and changes in accordance with our statutes and local conditions the present draft was made, with the idea of getting it into the Bar's hands before this meeting, of course without the complete discussion of the whole committee. They were simply gotten up in this form to give you a basis of discussion and suggestions that you might have, and they can be used for that purpose.

The Committee had another meeting yesterday afternoon, and in line with the action which has been taken by this body upon several occasions, the committee adopted a plan of approach to the work from now on in organizing this work. The Secretary will send to each member a statement with respect to this, but to those of you who are here, I would like to read this plan which was adopted by the Committee:

> "That the Committee adopt rules which shall correspond with the Federal Rules except where the Committee determines that there is a particularly good reason for elimination or change."

The Committee also adopted a resolution requesting each member of the Bar to take these rules and give them serious and deliberate consideration so that both the Committee and the Court might have the benefit of suggestions and objections from every member of the Bar. In order not to delay the matter too long the Committee requests that each of these suggestions or objections be in the hands of the Secretary by September 15th. It was also requested that each suggestion be on a separate sheet and numbered according to the subject matter contained in the Federal rule and that there be an original and five copies, so that they can be immediately routed to the subcommittee that has that particular rule in mind. Then each subcommittee is to revamp this preliminary draft in accordance with their own suggestions and thoughts and the suggestions submitted, and then with enough copies for all members of the Committee, on the 15th day of September they will meet to prepare a second draft of these rules.

May I express the attitude with which we face our job; we are endeavoring for a clearer recognition of the purpose of the legal profession. There must be a willingness on the part of each one of us here to honestly attempt to improve the administration of justice. Otherwise there is no good to be gained.

Since my appointment on this committee a good many lawyers have spoken to me about the rules, and a number have said to me, "What we have is good enough. Why change?" This same statement

was made to me in the hotel lobby here. A younger lawyer said to me something along the same line. If any lawyer thinks that the present system functions perfectly I want him to make inquiry of the public. A leading lawyer said to me, "I can see where some changes could be made in our present system, but I am going to see our present statutes are adopted, perhaps with some changes, but at least not have the complete change to the Federal Rules." I couldn't understand that, because he had told me not over three weeks ago that the Federal Rules are working very satisfactorily. I reminded him of that. He said it was still true, and then said, "If we are to have our State rules of procedure similar to the Federal Rules, every Idaho attorney will be as much at home in the Federal Court as in the State Court, and where would that get me?"

Now, of course, if we lawyers are to retain our rightful standing in the community, we must drop that attitude of continuing in the future as we have in the past.

Mr. Casterlin and I listened for two or three hours to discussions by the members of the various Federal Courts assembled in San Francisco, wrangling and arguing over minor points, concerning the law business being taken over by administrative offices, and Circuit Judge and District Judge, one after the other pointed out the various troubles and the causes. Justice Douglas arose to speak—a young man of about forty years, with a youthful figure and sandy hair. He arose above all the bickering we had been listening to and discussed his interest in the administration of justice. He told them that he was the man appointed by the Supreme Court to supervise the Ninth Circuit, that it was not going to be a perfunctory job with him and that he was going to do a real job and would be attending each of their meetings. Then in his naive way he said, "I don't know how you men are going to like that, because I am a Justice of the Supreme Court, and I have never been a District Judge or Circuit Judge."

I must repeat the statement you all have heard so often. "It is the younger members of the bar upon whom we are going to have to rely". They will be the ones who will have to see progress made. These rules give fuller discretion to the Courts, and after these rules have been discussed among the members of the Bar, it is the younger members who will have the burden. Of course some step is going to have to be taken now that the legislature has recognized this power of the Courts. Whether we like it or not, the public is not satisfied as things stand today. No longer will we be subject to the whims of the legislature when bills on procedure are suggested. No longer will we be subject to the pressure groups, for this bill has taken this technical field out of the inexperienced hands of the laymen in the legislature and placed in the hands of the Bar as a whole.



That they merely transferred this power to the Courts is not sufficient. We have now had thirty years experience with this rule making power in the states, and rarely has any Court taken the initiative of making any improvement in procedure. In every instance where changes have been made it has been through an active and closely working Bar.

I have made brief mention of the reasons for adoption of new rules. I have told you that one of the main reasons for our loss of business is the semi-judicial agencies. And it is interesting to note that every time a new agency has been set up, they have given the rule-making power to such agency, and those in charge of administering those agencies have almost without exception followed the Federal Rules of Procedure. Each time we have new lay agencies, and each time you put an arbitration clause in a business deal, it is an implied affirmation of the belief that lay agencies have been more expeditious and more effective than the Courts. If we are to stop losing our business, it behooves us to proceed in this purpose in an effective and business-like way. I have the knowledge that that word "business-like" is not liked by members of the Bar. It is said we are not a business but a profession. We all know that, but in the eyes of the people we are a part of their business-like work and that cannot be forgotten, and we will be treated that way by the people and the government. And you can consider this, as the law is now interpreted, under the Wage and Hour Division we are not even considered a service organization, and from now on, even when the farmers and clerks all come under the Wage and Hour law, even they are considered on a higher plane than the lawyers. This attitude of the public is a lawyer's problem, not a Court's problem.

Of course we are making our recommendations to the Court for the approval of these rules.

In line with the thought of Justice Douglas, Judge Paine has said that there is nowhere in time a government more interested in maintaining the forces of peace and truth than ours, and the faith of the people must be protected and maintained by the administration of justice. What we do therein depends entirely upon the spirit and attitude with which we approach one of the fundamentals of that administration of justice, because the more perfect a rule and the procedure, then the further they can be kept in the background and the less they become controlling in litigation. The Committee, and I know the Court, all keep that as the aim. In this letter which was recently sent out to every member, it was stressed that thoughtful consideration be given and each member should consider these changes with a studious attitude.

One attorney said to me, "Why does this committee wish to use

the rules you have drawn up in place of our present statutes?" And I said, "You certainly flatter this Committee, because those rules came out as a result of two or three years of hard work by the greatest minds of the legal profession working with the Supreme Court of the United States. Each of them has a committee behind it which has had very broad experience, and there isn't one of them that hasn't had some opposition to it, and if you will read them you will find the long history of where that particular rule was used. These men studied the laws of the whole country, taking what seemed best from all jurisdictions, and in some cases improving upon them." It was indeed flattering of that attorney to assume that this Committee had anything to do with the original formulation of those rules.

There is one more thing I hope you have in mind. The Supreme Court of the United States and leading lawyers are now working on simplified rules for criminal procedure, and that will have to be done here in Idaho also.

Our object is to devise rules that will get to the merits of the case and eliminate the shadow-boxing, the dilatory tactics and technicalities. If we are to improve our system we must eliminate the shadow-boxing and get the controversies down immediately to their merits, to regain the spirit of fair play which has always been applied to the administration of justice.

So it is the request of us, the Committee and the Court, that you give earnest consideration to these rules and that you thoroughly study them, and then if you find any changes should be adopted, put them down in writing and send them to the Secretary with sufficient copies that they will be available for all.

PRES. GOFF. We have ample time to have a full discussion. I hope you won't hesitate to make suggestions. This is most important.

And don't forget if you have any suggestions outside of this meeting for improvement or alteration of these rules, after you have studied them, reduce them to writing, an original and five copies and send them to the office of the Secretary. I might state that the Supreme Court has furnished some funds for this work, and the Idaho State Bar is also contributing some funds.

A. L. MERRILL: When I first studied this material I was strongly against any change, but after considering this further and having discussed it with members of the committee I have completely changed my mind.

PRES. GOFF: Mr. Merrill is a member of the Rules Committee.

ROBERT KERR: I have heard a comment or two among the members of the Bar directed to this point: Do the proposed rules



eliminate entirely the procedural steps of the civil code of procedure, or will some of those statutes be retained. Are we going to have to have two sets of books to check each time we go into court?

A. L. MERRILL: I might say I had varying views upon the rules, and I hope I have not yet come to a place where I can not offer my views as the conditions seem to warrant.

Here, gentlemen, we are met with this situation: The Federal Courts have adopted rules that are uniform throughout. We go into the Federal Courts and we are met with one method of procedure. They are simple, and they can be mastered with a little study. I am rather attracted to them now; I was not in the beginning. They are with us to stay, apparently; we have them. All lawyers who have worked in the Federal Courts, and I assume all of you do, must familiarize yourself with them. They are predicated upon the fundamental theory of the rule-making power of the Courts. The theory seems to be right, that the state courts should prescribe the rules of procedure. I can not say whether or not we should have similar rules, but in approaching that problem we should keep in mind what Mr. Kerr has asked as to two sets of rules, so we would have to familiarize ourselves with two sets, one set in one Court and the other set in the other Court. Why nôt have the same rules for both?

If you gentlemen will take the Colorado Rules, or the Florida rules and compare them with others you will see exactly what I mean. The Colorado rules made considerable departure from the Federal Rules, they are so changed in many respects from the Federal Rules it is essential and necessary for a lawyer to familiarize himself with two separate sets. The Florida Rules, on the other hand, follow the Federal Rules almost in all respects, except when certain Constitutional provisions of Florida require it to be otherwise. The result now is, apparently, a lawyer making himself acquainted with the Florida Rules can practice under the Federal Rules just as easily.

I can not see the advantage of adoption of some Rules of the Federal practice unless they are patterned after the Federal Rules as a whole and there is a uniformity of practice in the two Courts. I see no reason why that should not be done, and if you will notice these rules, gentlemen, you will see the Federal Rules are based very largely on the Code Practice. I felt quite flattered when I found that the Idaho Code was adopted in many instances in the Federal Rules, and the practice, I find is quite similar, except in three or four particulars, to the practice we have here. Frankly, there are some of those Federal Rules which are inapplicable to our State Courts, and, of course, we don't want to adopt them.

It seems if we take the rules, one by one, size them up with the Code, and adopt all but those clearly inapplicable we will have a

simple, complete code of procedure. Statutes that are in conflict will of course be supplanted by the rules adopted. The practice will be rendered simpler and we will be able to get the direct result of a full decision in litigation much more quickly.

Some lawyers suggest that it is altogether too simple to have a complaint as in the Federal Court, particularly with respect to negligence cases. If we went no further than to adopt the Federal Rule in that respect, I think it would be an improvement, but if we go still farther, and as in the Federal Court, accept the practice of discovery, we will have a great improvement. The Complaint in the Federal Court is simply the commencement of the litigation, and we can develop the theory of the suit, by calling the opposite parties in and under oath inquire of them what their case is about. That will supplement the complaint and eliminate the jockeying for position.

Those, gentlemen, are my general views of this matter, and I think we can take a very good step forward if we give to those rules the careful, earnest study that the Committee requests.

JESS HAWLEY, SR.: I have a question I would like answered by some member of the Committee. What is the purpose of subparagraph "C" of Rule 7, which reads as follows: "Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used."

A. L. MERRILL: It was merely the suggestion of the sub-committee to follow the Federal Rules on that point.

E. H. CASTERLIN: The rule which Mr. Hawley now refers to can not be considered alone standing as an isolated statement, but it must be read together with the other rules. If you will read this rule which provides for the abolishing of demurrers, together with the rule which provides for Motions, Rule 12-b, you will have a picture of the two which is easily understood. In other words, instead of filing the old demurrer, either general or special, you file a motion which can come within any one of six distinct heads. The first is jurisdiction of the subject matter, then jurisdiction of the person, improper venue, insufficiency of process, insufficiency of service of process, and the sixth is a failure to state a claim upon which relief can be granted. If you are speaking of a general demurrer being abolished, you immediately run into the motion to dismiss on the ground that there is no claim upon which relief can be granted. That is the ground of the old general demurrer, and the purpose of the old general demurrer is served by that type of motion. If you are referring to a special demurrer, that the complaint is uncertain in that you can not ascertain this or that, you read this rule in connection with the rule on discovery or in connection with the rule on depositions or in connection with the rule on examination of parties. Then you immediately take into your own hands under those provisions of those rules what you



demand of the other party, and you find out for yourself, and it places you in a much more exact position than it would by having the complaint made more definite.

For instance, take this type of complaint, an automobile negligence action. You sue me. You file a short complaint. I immediately want to find out what it is all about, so I come in and answer and deny that, putting me in a position where I don't have to get consent of Court or anyone to notice you for examination, and then I ask you all the questions I want, and I get your story and I get your side of the case right down in simple language. I say to you, "Do you contend that the brakes on my car were defective?" And you must answer me "Yes" or "No". I ask, "Do you contend I was violating any city ordinance?" And you must answer "Yes" or "No." If you answer "Yes", I can ask you what one. Thus I can get your complaint right down in my own language so I know just exactly what you mean. Thus the special demurrer is taken care of.

Now, Gentlemen, whether I have answered his question in full, I don't know, but let us always remember this, that the rules of procedure depend for their operation upon the man who sits back of the bench. They will conform to the new rules in passing upon them; where the umpire uses his discretion in calling balls and strikes. Under the new rules we find they work this way: If you come in by the old type general demurrer, the Judge can say one of two things. He can say you are now under the Federal Rules and the general demurrer was abolished and you are out of court, or he can say we will consider this a Motion for not stating a claim and we will go ahead.

Rules of procedure are not like a "pin ball" game where if the ball doesn't get in the right slot you lose, because the Judge has control over the course of litigation. He can say you made this mistake, but I can still grant you relief. That applies even to extensions of time, but as I recall, there is in the Federal Practice only one place where time cannot be extended, and that is time for appeal. If you let that time go past there is no judge in the world that can extend that, but if you are given twenty days to plead, the court can grant you an extension.

KARL PAINE: If Mr. Hawley didn't practice in the Federal Court I think that answer would be sufficient, and he should know that this is a copy of the Federal Rule. Is that not true?

MR. CASTERLIN: Yes, sir.

MR. PAINE: I thought that would answer the question for Mr. Hawley.

JESS HAWLEY, SR.: I don't know. I am rather confused, which is rather unusual, I admit. But Mr. Eberle advanced, I think, as a reason for adoption of these rules that the people are getting quite tired of delays, and the Bar and Bench I think have acquired a reputation for delays and technical decisions. Now when I ask a question of the gentleman who just responded, he in effect says that the principal source of our delays will still exist, that under Rule 12, subdivision "e", Motion for more definite Statement, that will merely substitute for a special demurrer a motion for a more specific and enlarged statement. In other words, while Mr. Eberle suggested a very fine reason for adoption of these rules, now comes an explanation which shows that we are going to have just as much delay, just as much difficulty getting at the issues as we had under the old rules, so I am wondering if the changes do all that is claimed.

My friend says the Federal Rules provide for extreme simplicity, and moreover for a very exceptional inquiry into the facts. It happens I am in the Federal Court on a negligence case, and Mr. Casterlin's suggestion as to a negligence case hits my case exactly. I filed a death action in a page and a half. No one verified the complaint, and the other side filed an answer, and I immediately submitted about thirty interrogatories. Should he answer them we will know as plaintiffs everything about his defense, everything about his case. And I assume there is some advantage in the plaintiffs knowing before hand just exactly every move of the opposite parties, the reason for their failure to avoid the accident.

Now if that is furtherance of justice, or if that is going to help out the cause of justice, I am afraid I don't see the point.

MR. CASTERLIN: I wish to make one further observation as to my idea of doing substantial justice. One of the old school of lawyers told me years ago substantial justice was not accomplished through chicanery.

KARL PAINE: Mr. Eberle contemplates some remarks from the floor. I thought he spoke delightfully, but I do wish to take issue upon one thing he said. He seems to take the view that we should be divided into two camps, the young and the old. Possibly he considers himself as still a young man. I will admit he is a little younger than I am and that he can still skate and get a skate on. I can't take issue with him in respect to the latter.

I have lived in this state now a long time and have practiced law here a long time. At one time we had a very difficult time getting the lawyers to substitute the transcript for the old exceptions and their own statement of the case, a very difficult time. There are old men of the bar, but we can't be divided according to that line. All of us wish to see justice done or to see the administration of law



improved, but as Mr. Hawley suggested, we don't accomplish that merely by substituting one procedure for another and we never will.

I would rather, if I had a controversy with somebody that was close enough to necessitate a law suit, shake dice with him, if the dice were honest. I know what is involved in a law suit, the labor and expense and we can never avoid that. I am not afraid of Court made rules, because such rules are the product of the Bench and Bar. They are not merely approved by the legislature, and through these rules we are given the right to formulate the rules. As Mr. Hawley suggested here, under these new rules latent defects may be present, but the moment they are discovered, we can have them changed and we don't have to ask the legislature to do that.

The time will never come when we can practice law as rapidly as an airplane flies. We must always think of the expense to our clients. We should remember the law is a substitute for a fight and it is a very great improvement on that.

BRUCE BOWLER: I would like to hear an explanation from some member of the Committee of the practical effect of Rules in the other states where they have been adopted.

MR. EBERLE: I think Dean Ladd has had some experience and has made some study of this, and if he would give that, I know we would all appreciate it greatly.

DEAN MASON LADD: I hardly know what to say as to the actual experience of the other states, because this is all rather new. The State of Arizona has adopted the Federal Rules. And the State of Minnesota did likewise. I visited with a number of lawyers from that State, and they seem to be very much satisfied with them. Whenever you have a transition from one system to another, there is always a tempering period in which they have to learn the operation of the new rules. I noted that particularly in the State of Illinois, which adopted a complete new code on civil procedure about two or three years preceding the new Federal Rules. They had worked under the common law system of procedure before that time, and even after nearly every other state had some form of code procedure they used the writs and the forms of action very similar to the common law. Then they adopted this new code, and there was quite a problem for the lawyers in that transition period, but I have yet to hear of a lawyer in Illinois who would be willing to go back to the other system.

We in Iowa have had quite a bit of contact with the new Illinois Code. The only comment I have heard is "I only wish we might have waited until the new Federal Rules came into effect, because after

the very extended study by the lawyers of all America, rather than just our local group, which was working somewhat in the dark. I think we would have profited a great deal in the matter of simplification, in interpleader, cross claims and third party claims, and in other regards, too." They seemed to feel the new Federal Rules had done a remarkably better job than their own state. I have heard that comment by a number of lawyers practicing in Chicago who practice under the new Federal Rules and in the Illinois Courts too, and they seem all to favor the new Federal Rules after they went into effect there. They prefer the practice in the Federal Court to the State Court.

The Illinois rules are based on a different philosophy; they are based on a philosophy of "cause of action" rather than "claim", which is the basic idea underlying the Federal Rules of Practice. They have quite a different problem.

I am going to close with this: In the State of Iowa we have had an experience somewhat similar to your own. Rather than a grant of power, it seemed to me the Courts have the inherent rule making power to govern the operation of Court business, but in the State of Iowa, we presented to the legislature two years ago a bill similar to the one you now have. It was passed unanimously in the Senate but was lost when it came to vote in the house, and it was resubmitted. Then our Iowa State Bar Association and Committee and other men, too, worked upon it and it was again presented to the legislature, and it was just this spring, late in February, that our State of Iowa adopted the rule-making power, I think exactly as I have heard it outlined here, and our Committee and our Bar Association are working on this problem much as you are doing it here. Without going into too great detail, from what I have heard here this morning, I think your program is very similar to what we are doing, and it is our great hope that we will follow our new Federal Rules in its entirety. By reading these rules in their entirety one can get the complete theory behind them.

Whenever the Federal Rule is inapplicable to our State practice, a new rule would be adopted and this would be enacted in lieu of that provision and would necessarily have to be a change to conform to the State requirements. For instance, under the Federal rules, executions, attachments and garnishments, they still apply and use the State practice, and I assume a plan somewhat similar would be used here.

I do know that in the State of Arkansas they have been very happy about their procedure, and it is almost a verbatim set-up of the Federal procedure, except on appeals, and I personally feel very favorable to that.

Judges Armistead and Dobie of the Fourth Circuit in Virginia



have worked out a new book on procedure, and I worked on that, and we made a very careful study of state procedure. Our State practice is similar to yours in that both borrowed from the old Field Code of 1840. We adopted that as the second state in 1851. Many of our provisions are similar to yours, but there has been an additional growth on top of that.

I am satisfied that in the State of Iowa we are going to have some changes, and I believe we are going to have a very similar procedure to that of the Federal rules.

A. L. MERRILL: The suggestion has been made that we consider the Colorado rules. They early adopted new rules of procedure, one of the first states to make the change. Their rules are based on the Federal Rules, but there have been various changes. I made inquiry and found that the lawyers are not too happy about the Rules there, particularly because they have to depend on two sets of rules, rather than on one. They feel that if rules are adopted, they should have followed exactly, where possible, the Federal Rules, not only because of requiring two sets, but also because of the numerous interpretations of the various Federal Courts on those rules. If we follow that suggestion, we would have a body of law back of them to help us in our interpretations of those rules and our everyday practice.

ROBERT AILSHIE: It appears that for about the past twenty years every effort has been made in this Court to make uniform the laws of the various states, to make uniform the practice. Now this committee is at work attempting towards uniformity between State and Federal practice, striving for uniformity between the two systems. Always it has been called to my attention since I was admitted to practice the defects in the various laws, at least in Idaho, and particularly noticeable in going from one Court to another.

The older members of the bar carry into the courts when they are involved in litigation, a certain knowledge of the procedural system and set-up, and they then have a decided advantage over the other practitioners. I think this is a step towards a uniformity that will put all barristers in just a little closer relation and in seeing justice is done for their clients. I have always believed if one lawyer is a little better, or a little more cagy, he should be able to retain that as part of the experience he has built up in practice, but at the same time, isn't the practice of law an effort to try and do substantial justice? And if that is true, I think this is a step in the right track; a step to limit openings for technicalities as much as possible, and limit the advantage of the lawyer thoroughly acquainted with both systems. Those of who don't have an extensive Federal practice, and that is most lawyers, don't have the time to become thoroughly familiar

with it. When we do have any Federal practice, and go into Court on a more or less simple suit, we are very apt to be in very much of a daze, which would not be true with the uniformity of procedure in both courts. It seems a very definite step forward in following the path of the American Bar in the past twenty years in getting uniformity of decision and practice.

PRES. GOFF: Is there any other discussion? I again wish to remind you, if you have any suggestions, put each one on separate sheet, one original and five copies and send them to the Secretary. We are adjourned.

## AFTERNOON SESSION

### (July 11, 1941)

VICE-PRES. THOMAS: Gentlemen, the meeting will come to order. In the absence of our large and distinguished looking president, I am taking over. He is now up at the Trail Creek cabin entertaining the ladies.

The next order of business is an address, Modernization and Clarification of Rules of Evidence—A Proposed Code of Evidence by Dean Ladd.

Dean Ladd is indeed qualified on this subject. He has given extensive study to it. I believe his brother at one time practiced in the State of Idaho, and Dean Ladd is thus a brother under the skin.

Dean Mason Ladd will now address us.

DEAN LADD: Gentlemen and ladies of the Idaho Bar:

The subject of evidence is in the spotlight of public attention in the law today. For many years it has been generally recognized by forward looking members of the bench and the bar that simplification and clarification of the rules of evidence were needed, and that the rules of evidence should be made more realistic to perform their function in settling disputed questions of fact in court trials and administrative hearings. There is no subject more important than evidence, because it extends into every field of the law where the problem of solving factual disputes is involved. Yet less has been done in the way of improvement in the law of evidence up to the present than in almost any subject. The efforts attempted have usually been to abolish all the rules of evidence leaving nothing in their place. This has clearly been the case in administrative agencies. Other efforts have been in the nature of patch work without considering the rules in their entirety or making a general study of the subject. Until two years ago, when the American Law Institute started its work of drafting a modern code of evidence to be complete, comprehensive, and simple in form, yet retaining principles deemed basically sound, nothing had been done of this sort. Extensive critical treatises had been written and were very valuable. A statement of the rules as they existed had been done by various authors. Also, much had been written both by courts and text-writers, pointing out the needs in the field. The American Law Institute's model code of evidence, with the thought that it be adopted by the legislatures or by rules of court, represents the first major effort to present a modern working system of evidence without the quirks, confusions, oddities, and rigidities which has developed over the past four centuries. Forward-looking lawyers and courts were looking for it. The federal rules waited for such a code. There is widespread recognition that administrative agencies need such a code. It is hoped that in the coming year, before the final draft is prepared, any remaining problems in the code will be ironed out so it will be ready for final adoption and use.



#### Historical Development of the Law of Evidence

The rules of evidence as we know them today are not ancient in their origin, considering the whole expanse of historical development in the law. There was no place for evidence in primitive law, nor was there a place for it from the tenth to the sixteenth centuries where trials were conducted by inquisitorial proceedings rather than through the presentation of evidence by the adverse parties to an independent tribunal. In this earlier period the jurors were also the witnesses, and they decided fact problems by comparing their knowledge with each other. Thus there was no need for rules of admissibility or exclusion.

The rules of evidence first came into being with the development of the adversary system of trial arising in the sixteenth and seventeenth centuries when juries became independent bodies, deciding cases upon the evidence introduced before them rather than facts within their own knowledge. In this process two movements took place. The first, created the law of competency, keeping from the jury witnesses regarded to be unreliable. In this period parties at interest were excluded from giving tstimony. Wives or husbands were eliminated. There was also the incompetency because of conviction of crime or because of a lack of certain religious beliefs regarded as essential to qualify a witness. Second, the law of exclusion developed, in which much testimony was kept from the jury because of its tendency to mislead them. However, these reasons given for the rules establishing incompetency of witnesses and exclusion of evidence really developed in the latter part of the eighteenth and nineteenth centuries, but were not present at the time the early rules were established. The jury system was often spoken of as the reason for the rules of evidence by the nineteenth century witness but it is believed

to be rather found in the transition from the inquisitional to the adversary system of trial. As the adversary system of trial emerged, crowding out trial by inquisition and compurgation, we first see the rules of evidence appear. The jury was really its foster-parent created by the judges and text-writers of the nineteenth century.

The nineteenth century championed the adversary system and paid great respect to exclusionary rules. The rules of evidence became most significant. Exclusion was carried to an extreme, and the principles were revered with almost religious sanctity. It was an age of rulism but not realism. There was strict construction of rules, new exclusions were created, and old ones sustained. Courts sought to sustain existing authority by reason rather than examine the rules critically with a view of testing the function they performed. The rules might break but they would never bend. Seldom questioned the principles of exclusion flourished during this earlier period.

**Twentieth Century Attitude**

The twentieth century has taken a different view and may be regarded as establishing an open-door policy on the admissibility of evidence and the competency of witnesses. Many recent cases have created exceptions to the rule of exclusion and today forward-looking courts examine critically rules which make valuable evidence in solving disputes inadmissible.

The process of change has been a piece-meal job. Up to the present there has been no complete study with a view of modernizing and clarifying the rules of evidence as a whole. Forward-looking courts have done so here and there as the occasion was presented. Writers have given valuable analyses and criticisms of objectionable exclusionary rules. The need of a complete study was felt so great that the task of drafting a modern code of evidence for use both before the courts and administrative bodies was recognized by the American Law Institute which has sponsored a model code of evidence to replace all existing statutes and decisions upon the subject. It is contemplated that the code will be adopted by rules of court under the rule-making power, or that it be adopted through direct legislative enactment. The code is the result of two years of intensive study by leading authorities in the field under the sponsorship of the American Law Institute. The code is now in its final tentative draft. This draft is being presented to the various bar associations of America, with a view of interesting them in the study of the subject and to obtain suggestions from the bar on the tentative draft before its final adoption by the Institute. Adoption of the code of evidence is contemplated similar to the wide movement for procedural improvement arising under the impetus of the new Federal Rules of Civil Procedure. The Federal Rules specifically omitted a comprehensive treatment of the



subject in Rule 43 with the thought that this was a specialized job which when completed could be incorporated. The model code of evidence of the American Law Institute now presents a comprehensive complete treatment of a modern code, including the best of present-day thought. After this year's testing period in which criticisms and suggestions may be considered and incorporated, it should be ready for adoption and use.

The plan of the organization of the model code consisted in setting up various sections under each of which there was a statement of the existing law or an analysis of the confusion in existing law if that was the case. If the existing law was deemed satisfactory, the section simply restates it in a clarified form. If there is a change in the existing law the reasons for the change are set out followed by illustrations of the operation of the new code. The code intends to be complete in covering the entire subject, and attempts to bring together the many advances in the subject of evidence, so as to present them all in a compact unit. It both restates law and creates new law where it is necessary for a realistic treatment of evidence problems. The new code is based upon logic, psychology, and the experience of the courts, and treats evidence on the basis of the actual function it performs, eliminating many of the ancient exclusionary rules, some of which arose purely through historical accident. The model code carries out the view expressed by Justice Sutherland of the Supreme Court of the United States in the case of Funk v. United States, 290 U. S. 39, in which he says, "The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason —is their adaptation to the successful development of the truth. And since experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule."

The model code of evidence covering the field completely obviously cannot be treated in full at this meeting. I propose rather to tell you about it and distribute copies of it for your later study and consideration. I will, however, mention a number of its provisions to illustrate the approach which we have given to the subject. In rules 9 and 12 all existing rules of evidence are repealed and all disqualifications and privileges of witnesses and other exclusionary rules are abolished. These rules are necessary if we are to wipe the slate clean and start anew in our statement of the law. In other words, while we retain many of the sound and recognized principles of evidence, we have set these up in a new statement in a simplified and clarified form. Our task was greatly simplified by making a wide clearance,

then restating the existing law retained and adding the new law created.

In Chapter II on the qualification, examination and credibility of witnesses, every person is made qualified to be a witness unless the judge finds incapability of the witness to express himself or to be understood or incapable of understanding the duty of a witness to tell the truth. This section, of course, wipes out all disqualifications including the ancient relic of the Dead Man Statute. Perhaps no other rule has caused the laymen to call lawyers a scheming bunch of hair-splitters more than the Dean Man Statute. Moreover, in its ramifications it has bewildered even the best lawyers. A lawyer hardly knows whether the witness he presents can testify against the estate of a deceased person and often the judge is even more bewildered as to how to make his record clear in his rulings upon this delicate and intricate subject. No one claims the Dead Man Statute is logical or psychologically sound. The most that can be claimed for it is that it has an intriguing, musty past and once the lawyer has fitted his mental wrenches to its various parts he likes to use the statute to see if he can make it work again. The new code eliminates it, following the theory of the Connecticut Act where practical experience has shown its abolition to be desirable. In studying this rule consideration should be given to the new treatment of hearsay in chapter VII. Here the hearsay declarations of the decedent made upon personal knowledge and testified to by the person who heard the decedent speak are admitted in evidence to counteract any effect of permitting the survivor to testify. South Dakota, just last year enacted a statute accomplishing this same result and it has been recommended by the administration of justice committee of the American Bar Association in their study of the subject. In the model code, however, it fits into the whole plan of the code and thus is not set up in the same language as in this special statute. Survivors are made competent and the declarations of the decedent came in under the treatment of hearsay.

Rule 105 collects into a concise statement with 13 parts the whole of the subject of presentation of evidence in court. It covers order of evidence, the number of counsel who may examine or cross-examine witnesses, the number of witnesses, the judge's control upon the examination of a witness in order that the witness be not misled, intimidated, harassed or unduly disconcerted, the subject of leading questions, scope of cross-examination and other incidents of the judge's control over presentation of evidence in trial. There are some changes in the law principally in enlarging the scope of cross-examination in accordance with the federal doctrine but generally this rule restates existing law.

The treatment of evidence affecting credibility is one of the



very interesting parts of the code. Rule 106 permits impeachment of party's own witness. Some twenty-two states have partially done this job by statute but none have given the comprehensive treatment found in the code. It allows impeachment by any conduct or other matter of substantial provative value upon the issue of credibility. In impeaching by use of prior inconsistent statement it eliminates the obstacle of the Queen's case by permitting the attorney to examine without reading the statement first and yet before use of impeaching witnesses the judge may require that the witness be given opportunity to deny or explain the statement. The code permits character tests of honesty or veracity to test credibility and also the conviction of a crime involving dishonesty or false statement. In this, general moral character as a test of veracity has been excluded. The test used in the code is one sound psychologically and from the standpoint of practicability. All the confusion on the condition of honesty or veracity or truthfulness has been eliminated by the simple test of traits of honesty or veracity as a measure of credibility. This approach has been carried into the character of crime, the conviction of which may be used to test credibility. Obviously every crime does not relate to truthfulness. Indeed, Jeremy Bentham speaks of the absurdity of the early common law in holding a witness incompetent because he was convicted of murder committed because another called the person a liar. Today in most states such a conviction could be used for impeachment although it tended to prove truthfulness rather than falsity.

In respect to credibility tests, division 3 of rule 106 contains a significant provision, namely: That conviction of crime cannot be used to impeach an accused person who takes the witness stand and testifies unless the accused has first introduced evidence of his good character to support his credibility. This provision is believed to bring fairness to the accused in the trial of criminal cases especially in view of the code's provision that comment may be made upon the accused's failure to testify in rule 201.

In rules 404, 405, and 406 the subject of proof of character has been treated in accord with the best of modern thought. Opinion as well as reputation is admissible to prove character. However, specific instances are excluded on the issue of credibility but they are admitted where the trait of a person's character is one of the facts in issue on liability or in measurement of damages.

The code has a revision of the attorney-client privilege, marital privilege, priest and penitent privilege, retaining the basic principles by redrafting them to eliminate some of the accidents and absurdities found in some of the cases and statutes. The privilege against self-incrimination is retained as basic and significant to our American way of life. It has, however, been limited to testimonial communica-

tions in accordance with the history of the rule. Thus, under the rule, an accused has no privilege to refuse to submit his body to examination or to refuse to do any act other than communicate his ideas. The treatment of the whole subject of self-incrimination is careful and complete and consistent with the constitutional provisions of most states.

There are so many interesting things in the modern code of evidence that it is difficult to cut this discussion short. Each phase of the subject has its interesting development and our conclusions are based upon experience found in different states and upon logical and psychological analysis. Although it would be interesting to discuss the treatment of other rules also, I will conclude with a brief comment upon the code's treatment of hearsay. Rule 601 (1) defines a hearsay statement as being a statement by words or other conduct, evidence of which is offered as intending to prove the truth of the matter stated. A hearsay **declaration** is a hearsay statement, but it is one to which, if he had been present, the declarant could have testified in court. Rule 602 makes hearsay **evidence** inadmissible except as stated in Rules 603 to 629. Our basic treatment of the hearsay problem comes in Rule 603 which makes a hearsay **declaration** admissible if the judge finds that the declarant is unavailable or that his deposition might not have been taken without undue inconvenience or expense. In other words, declarations based upon personal knowledge of the absent witness come in as an exception to the exclusion of hearsay evidence. The basis of the code's inception is personal knowledge of the declarant told by a witness who personally heard the statement when made by the declarant. Also, if a witness is present in court and subject to cross-examination his extra judicial statements may be admitted as substantive evidence as well as to impeach. This is done on the theory that the declarant is present in court and, in accord with Dean Wigmore's view, has really met the hearsay test. The discussion of the rule adequately could be the complete subject of an address. It is significant, however, to note that the code has eliminated multiple hearsay, gossip and rumors and these are regarded as the real objectionable proof. The hearsay that is admitted under the new provision is based upon personal knowledge of the declarant and comes from an immediate rather than a remote source. Believing fully in the hearsay rule we must recognize that a great deal of admissible evidence comes in through exceptions. The model code seeks to place those exceptions upon a rational rather than the present fanciful basis of imaginary substantial probability of trustworthiness now relied upon to create the exceptions. In this discussion of the rules I have sought simply to stimulate your study of the code itself and it is my hope that you will spend a number of thoughtful evenings which I believe will be real enjoyment in reading through and thinking through this great effort of the American Law Institute.



The model code has been presented to many states and has generally been enthusiastically received. Copies of the code have been distributed to members of the bar of different states with the thought that the code be studied and suggestions be given, so that the final draft which will be prepared during the present year will represent the best thought of the legal profession of this country. It is hoped that this model code of evidence, sponsored by the American Law Institute, will fill the needed place in the improvements of the law, so that administrative bodies as well as courts will have a sound body of principles of evidence to guide them in the determination of their fact issues. Evidence problems will continue to appear, however perfect a system of substantive law may become, and in the field of evidence the law must keep abreast of the time. In this introspective era of testing the sufficiency and correctness of law by the task it performs the law of evidence needs study and improvement perhaps more than any other subject. It is hoped that the work of the American Law Institute in the model code of evidence will have filled this need.

VICE-PRES. THOMAS: Dean Ladd, on behalf of the Idaho Bar I wish to thank you for your very fine address. The ringing applause is ample evidence of the pleasure of your audience.

I note that President Goff has returned. It only took him two and a half hours to have lunch.

PRES. GOFF: Gentlemen, the ladies are all enjoying themselves, so you may rest at ease.

The next matter for discussion is the 1941 Bar Approved Legislation, a Committee Report with Recommendations. This is to be given by Jess Hawley, Jr. It is a real pleasure to have the son of one of our leading members taking such an active part in the work of our organization.

JESS HAWLEY, JR.: Mr. President, Members of the Bar. This is my first official appearance before a meeting of the Bar of this state, and it is a real pleasure for me to present the legislative report to you.

In the past few years I understand that legislation approved and sponsored by our Bar has met with a great deal of ill luck, that the Legislature has failed to see eye to eye with us on the matters which we have submitted for their consideration.

Probably this lack of success can be attributed to the failure of general support from the individual members of the Bar and from the district associations, and perhaps some blame can also be laid upon the shoulders of the legislative committee.

But what has been the case in the past does not necessarily hold true today. The report which I shall give today is a favorable one —and one that reflects the wholehearted efforts of our legislative committee and of many individual members of our association.

During the 1941 session of the Idaho State Legislature a total of twelve bills approved and sponsored by this Bar were presented for legislative consideration. Of this proposed legislation nine bills were enacted into law, and three were vetoed by the Governor after passage by both Senate and House. I doubt that this Bar has ever been more successful in its official lobbying activities.

With your consent I will give a short resume of the measures sponsored by this Bar during the 1941 session.

1. DEFINING PUBLICATION REQUIREMENTS OF NOTICE. (Chapter 22.) An act defining publication requirements of legal notice —requires publication once each week for the number of weeks required; ten days notice satisfied by two weekly publications; twenty day notice by three publications, and thirty day notice by five. This statute clarified the prior legislation which was uncertain, to say the least.

2. STAYING WRITS OF EXECUTION. (Chapter 24.) This statute provides for the staying of writs of execution pending the disposition of a motion for a new trial, judgment notwithstanding the verdict, or motion for relief from judgment.

The previous code provisions on this subject, which was amended, contained no limitation upon the execution of judgment, other than the five-year period of limitation.

3. SUPERSEDEAS BOND ON APPEAL. (Chapter 56) This act amended Section 11-204 of the Code which provided that the supersedeas bond on appeal had to be double the amount of the judgment. Under the amended statute if the supersedeas bond is executed by a surety company authorized to do business in the State of Idaho, it need only be equal to the amount of the judgment, plus fifteen per cent.

Certainly as the statute now stands it should be satisfactory to everyone—with the possible exception of the surety companies.

4. REDEFINING SEPARATE PROPERTY OF HUSBAND AND WIFE. (Chapter 62) This was an act redefining the separate property of either the husband or wife, and amended sections 31-303 and 31-306 of the Code where the definition of the separate property of each had theretofore been set out.

The present law reads as follows: "All property of either the husband or wife owned by him or her before marriage, and that acquired afterward by gift, bequest, devise or descent, or that which either he or she shall acquire with the proceeds of his or her separate property, by way of moneys or other property, shall remain his or her sole and separate property."



5. RULE-MAKING POWER IN THE SUPREME COURT (Chapter 90.) This act recognizes the power of the Supreme Court to make rules governing procedure before all the courts of Idaho. It is probably the most important legislation sponsored by our bar in a long period of time. I needn't impress upon you the good work done by our committee in securing passage of this bill. Similar legislation has been introduced two or three times in the past, only to be ignominiously defeated. Discussion of this bill has already been assigned a definite place on our program, so I mention it but briefly in passing.

6. REMOVING CLOUD OF DELINQUENT TEN YEAR TAX. (Chapter 89.) This legislation removes the cloud, lien or encumbrance of a tax on real property delinquent ten years prior to the effective date of the act and prohibits any action for the foreclosure of the same. The value of this act is readily apparent in the examination of abstracts.

7. RECORDING OF CONVEYANCE (Chapter 119.) This act was submitted pursuant to the suggestion of the R. F. C. It provides that the recording of any conveyance executed by one who thereafter acquires an interest in the said property is constructive notice of the contents thereof to subsequent purchasers and mortgagees.

8. PERMITTING SALE OF MINING INTERESTS OF DECEDENT. (Chapter 139 and 140) This statute, or both statutes amended the previous law to provide that mining property, interests in mining property, or shares therein, of a decedent in this state, may be sold in the same manner and by the identical procedure as the sale of other real estate of a decedent.

It is my understanding that prior to this time mining property of a decedent was as a practical matter tied up until distribution of the estate.

9. SALE OF DECEDENT'S PROPERTY GENERALLY (Chapter 131) This statute governs generally the sale of property of a decedent's estate. It amends Sections 15-713, 15-715, 15-717 and on through 15-724 of our Code. One of the most important features of this act is that it permits the sale of real property of decedent's estate under contract, option, or title retaining contract.

Now so much for the bar sponsored measures which found their tortuous way to the safe harbor of enacted legislation.

I will next touch briefly on the three measures sponsored by this

bar, which passed both Senate and House, and then foundered on the executive shoals and reefs.

Senate Bill 78, which added a section to the definition of community property, was designed to clarify a particularly confusing question. This bill was to add a provision to the code definition of community property, by which real property conveyed by one spouse to the other was presumed to be the separate property of the grantee, and provided further that only the grantor spouse need execute the deed of conveyance.

Governor Clark's veto message on this bill is of interest, I quote:

> "This bill will permit a direct conveyance of the wife's interest in community property to her husband, thereby divesting her of all interest therein. From the beginning of statehood, Idaho has through its laws protected the wife's interest in community property. One of the most effective ways of protecting her is not to permit her to convey her interest in the community property, that property which is derived from her work as well as her husband's, to her husband."

Next on our list of failures is Senate Bill 149, which provided for the exemption from execution of one motor vehicle not exceeding $200.00 in value belonging to a bond fide, legal resident of Idaho, and further provided for the method by which the debtor claimed such exemption. The purpose of this act was to clarify the uncertainties of the existing law with respect to such exemption.

Here is Governor Clark's veto message:

> "This bill makes it practically impossible for a person whose modest automobile is levied on to satisfy a judgment to obtain his $200 exemption as allowed by the present laws. It places the burden of filing two affidavits on the owner of the automobile. The effect would be to make it necessary for the owner of the car levied upon to obtain the services of a lawyer and incur considerable expense to procure an exemption which is allowed by law at present without such red tape."

I think we can safely say that someone missed the boat that time.

House Bill 225 limited actions for wrongful dispossession—it provided for the issuance of a writ of possession immediately upon filing of the complaint in unlawful detainer actions upon the filing of a redelivery bond. The bill passed both houses and was vetoed by the governor.

His message to the Secretary of State is as follows:

> "House Bill No. 225 by Judiciary and Uniform Laws Committee, is filed with you herewith, without my approval. My objections to this bill are as follows:
>
> "This bill permits a landlord to dispossess a tenant almost immediately upon filing a complaint against the tenant in an action in unlawful detainer. Although the plaintiff would be required to file a bond before ousting the tenant, the bond would be poor comfort for the wife and children, who could be turned out into the cold of winter, in spite of unemployment, sickness, or even death in the family.
>
> "The landlord is already permitted to obtain judgment for three times the amount of damages sustained by the landlord, in addition to his rent.
>
> "I am not entirely unmindful of the problems of the landlord, but he has the facilities to know the tenant's financial status before he rents to him. If he makes a bad bargain, he should not be permitted to oust helpless women and children at any season of the year."



The last bill I should like to discuss is the Judge's Retirement Bill, House Bill 41. While this Bill was not officially a Bar sponsored measure, undoubtedly it had the general approval and support of the rank and file of this Bar. In spite of the support that concentrated behind the judiciary, it is clear that this last session of the Legislature was death on retirement or pension legislation. The Judge's Retirement Bill met the same fate as the rest. Even though it passed the House, it was laid on the table in the Senate and expired without a vote.

From my limited observations, I firmly believe that it would be attempting the impossible to get a favorable passage of legislation of this type.

Those of the Legislature with whom I discussed this measure were apparently willing to accede to a general raise in the Judge's salaries, yet they were absolutely opposed to the idea of the retirement fund.

I think I have covered sufficiently everything required by a report of this nature. Our legislative committee is certainly to be commended for the work they have done, and the way they have, in the main, put these Bar sponsored bills across. Not only have they kept a close check on our own measures, but they have watched all the bills introduced which affected the practice of law in our state.

For instance, a bill backed by the association of Probate Judges was introduced in the Senate. This bill, if passed, would have vested in Probate Judges the power to discharge attorneys for procrastination in handling estates and guardianships.

Our committee was instrumental in keeping this obnoxious piece

of legislation in the dark depths of the judiciary committee, where it never was allowed to see the clear light of day.

**RECOMMENDATIONS**

Now as to recommendations of the Committee:

First: That the Bar secure passage of the three bills that were vetoed at the last session—especially Senate Bill No. 78 in regard to conveyances between husband and wife.

Secondly: That members of the bar who have suggestions as to new legislation or as to amendments of existing statutes communicate their suggestions to the legislative committee.

Third: That the present program be continued, with the full-hearted support and cooperation of the Bar.

**CONCLUSION**

In retrospect, the legislative session of 1941 was an extremely favorable one insofar as our Bar approved legislation was concerned. To the legislative committee belongs the credit for the successful completion of their work—and of course we owe much also to the fine cooperation received from the members of our Bar who sat in the last Legislature.

PRES. GOFF: It seems good to hear another Jess Hawley address the Bar. Are there any comments? The Commission will not appoint the legislative committee until the legislative year. So some work may be commenced at this meeting. I am going to appoint a special Committee for legislation at this meeting to make their report tomorrow. O. R. Baum, Pocatello, Chairman; Eugene Anderson, Boise, Ray Durham of Lewiston, and Joe Hedrick of Hailey are appointed.

Another younger member of the Bar is going to give us a committee report on Proposed Legislation eliminating appellate procedure technicalities. I am pleased to present a member of the legislature this year, Mr. Hamer Budge.

HAMER BUDGE: All of you have undoubtedly read the address of Mr. O. W. Worthwine at least years' annual meeting, and which is printed beginning at page 138 of the 1940 Proceedings. Therein are outlined some of the pitfalls waiting for the unwary or the inexperienced practitioner in endeavoring to have his case heard on its merits in the Supreme Court. That a case should be heard on its merits and not be disposed of on some technical procedural point arising out of an inadequate or ambiguous statute, or the interpretation of it or of rules of Court, is too plain to require argument.

The disposal of cases in that way is not only bad for the lawyer



and for his client, but for the Court itself and the public regard for dispensation of justice through the Court system. Whenever procedure becomes of more importance than the merits, or becomes so technical that more time must be given to it than to the rights of the parties, there is definitely something wrong with the procedure.

Such disposition of causes is at least one of the causes of complaint, not only from lawyers, but from the public which supports the Courts and whose rights are involved, and one of the causes for the creation of lay agencies, who are given power to, and do, make their own rules, many of which are strange and disconcerting to the judge and the lawyer, but do seem to effectuate disposition of matters on the facts. Ask yourself how many cases before the Industrial Accident Board or the Public Utilities Commission, or other Boards go off on procedural points and you may awake to what is in part causing the creation of Boards, the decline of litigation, the disrespect for courts and lawyers, the loss of income to members of the Bar.

Yet neither the Courts by change of rules, or recommending changes of statutes, nor the Bar by formulating proper or corrective statutes, or exerting pressure for correction, seem to do anything about it. One would naturally assume that errors which the Court itself finds in the pursuit of its business of adjudging disputes and errors which the lawyers see in the conduct of their every day business, and which affect the survival or non-survival of both of them would demand attention if only for self preservation, leaving out of consideration the matter of simple justice. Yet like Rip Van Winkle we, Bench and Bar, yawn and stretch—and go back to sleep, while the world, and new Boards, and clients and litigants go on by.

Without further comment this Committee offers the following proposed statutes, hoping grandpappy will get out his specs, turn on the 200-watt light, and read; and after correction may secure enactment, together with the adoption by the Court of rules or interpretations designed to alleviate the situations pointed out in Mr. Worthwine's address of last year.

AN ACT AMENDING SECTION 19-2706, I. C. A., TO PROVIDE FOR THE SERVICE OF NOTICE OF APPEAL IN A CRIMINAL CASE UPON THE ATTORNEY GENERAL BY REGISTERED MAIL.

**Be It enacted by the Legislature of the State of Idaho:**

SECTION 1. That Section 19-2706 be amended to read as follows:

"19-2706. NOTICE OF APPEAL. An appeal is taken by filing with the clerk of the court in which judgment or order appealed from is entered or filed, a notice stating the appeal from the same, and serving a copy thereof upon the attorney of adverse party. Provided, that on

an appeal by defendant copies of the notice of appeal shall be served upon the attorney general and the prosecuting attorney*; **provided, however, that service of notice of appeal upon the attorney general may be had by sending the same to the said attorney general at his office in Boise by United States registered mail, return receipt requested, and that proof of said service may be had by an affidavit by the defendant, or his attorney, or stenographer, agent, or clerk of the defendant's attorney, which ever actually registered the same."**

See: State v. Paris, 58 Idaho 315.

AN ACT AMENDING SECTION 7-1107, I. C. A. TO PROVIDE FOR THE PLEADINGS NECESSARY TO BE CONTAINED IN A JUDGMENT ROLL ON APPEAL.

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

SECTION 1. That Section 7-1107 be amended to read as follows:

"7-1107. JUDGMENT ROLL—CONTENTS.—Immediately after entering the judgment the clerk must attach together and file the following papers, which constitute the judgment roll:

1. In case the complaint be not answered by any defendant, the summons, with the affidavit or proof of service, and the complaint, with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment; and in case where the service was made by publication, the affidavit for publication of summons, the order directing the publication of summons and proof or affidavit of publication of summons must also be included.

2. In all other cases, the pleadings **on which the cause went to trial and such other pleadings as might be necessary to a complete determination of the appeal,** a copy of the verdict of the jury or findings of the court, or referee, a copy of any order made on demurrer, or relating to a change of the parties, and a copy of the judgment. If there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons, with proof of its service upon such defendant, must also be added to the other papers mentioned in this subdivision; and if the service on such defaulting defendant be by publication, then the affidavit for publication, the order directing the publication of summons and the proof or affidavit of publication in such cases must be also included.

3. In case of service of the summons by publication and the jurisdiction of the court depends upon a seizure of the property under writ of attachment, a copy of the affidavit for attachment, undertaking on attachment or certificate of the clerk of the deposit of a cash bond, and writ of attachment and return thereon."



AN ACT AMENDING CHAPTER 2, TITLE II, IDAHO CODE ANNOTATED, RELATING TO APPEALS TO THE SUPREME COURT FROM DISRTICT COURTS BY ADDING THERETO A NEW SECTION TO THE DESIGNATED SECTION 11-221A PROVIDING THAT THE FAILURE O FAN APPELLANT TO TAKE ANY STEPS REQUIRED BY LAW TO SECURE REVIEW OF A JUDGMENT APPEALED FROM OR OPPEALABLE ORDER AFTER FILING AND APPROVAL OF THE UNDERTAKING ON APPEAL SHALL NOT AFFECT THE VALIDITY OF THE APPEAL BUT SHALL ONLY BE GROUND FOR SUCH ACTION AS THE SUPREME COURT MAL DEEM APPROPRIATE.

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

SECTION 1. That Chapter 2, Title II, Idaho Code Annotated, be amended by adding thereto a new section to be designated Section 11-221A reading as follows:

"11-221A. APPEALS—VALIDITY OF.—Failure of the appellant to take any of the further steps required by law to secure a review of the judgment appealed from or appealable order after filing and approval of the undertaking required by the provisions of Section 11-203, Idaho Code Annotated, shall not affect the validity of the appeal, but shall be ground only for such action as the Supreme Court may deem appropriate, which may include either dismissal of the appeal or disciplinary action against the offending attorney or both.

AN ACT AMENDING 7-604, IDAHO CODE ANNOTATED, RELATING TO PROCEDURE IN MOVING FOR A NEW TRIAL, BY DELETING THE PROVISION FOR NOTICE OF INTENTION AND PROVIDING FOR THE MOTION FOR A NEW TRIAL TO REPLACE THE SAME, AND AMENDING SECTION 7-605, IDAHO CODE ANNOTATED, RELATING TO HEARING OF MOTION, BY DELETING REFERENCE THEREIN TO THE NOTICE OF INTENTION AND CONFORMING SAID SECTION TO SECTION 7-604, IDAHO CODE ANNOTATED, AS HEREBY AMENDED.

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

SECTION 1. Section 7-604, Idaho Code Annotated, be and the same is hereby amended to read as follows:

"7-604. * * * MOTION FOR NEW TRIAL.—The party intending to move for a new trial must, within ten days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, if the action were tried without a

jury, file with the clerk and serve upon the adverse party a * * * **Motion for new trial** designating the grounds upon which the motion * * * is made, and whether the same * * * is made upon affidavits, or the records and files in the action, or the minutes of the court.

1. If the motion is * * * made upon affidavits, the moving party must, within ten days after serving the * * * same, or such further time as the court in which the action is pending, or a judge thereof, may allow, file such affidavits with the clerk and serve a copy upon the adverse party, who shall have ten days to file counter affidavits, a copy of which must be served upon the moving party.

2. When the motion is * * * made upon minutes of the court, and the ground of the motion is the insufficiency of evidence to justify the verdict or other decision, the * * * motion must specify the particulars in which the evidence is alleged to be insufficient; and, if the ground of the motion be errors in law occurring at the trial, and excepted to by the moving party or deemed excepted to, the * * * **motion** must specify the particular errors upon which the party will rely. If the * * * motion does not contain the specifications herein designated the moving party may at any time within twenty days after filing such * * * motion, or within such further time as the court may allow, file a * * * **motion** containing such specifications and serve a copy of the same upon the adverse party, and unless he do so the motion must be denied."

SECTION 2. Section 7-605, Idaho Code Annotated, be and the same is hereby amended to read as follows:

"7-605. HEARING OF MOTION.—The application for a new trial shall be heard at the earliest practicable period after the * * * **motion is filed and served,** if the motion is to be heard upon the minutes of the court, and in other cases, after the affidavits are filed, and may be brought to a hearing upon motion of either party. Any motion not brought to a hearing within sixty days after the filing of the * * * **motion** for a new trial shall be deemed waived, unless the court, for good cause shown, extends the time therefor. On such hearing reference may be had in all cases to the pleadings and orders of the court on file, and when the motion is made on the minutes, reference may be had to any depositions, documentary evidence and phonographic report of the testimony on file."

AN ACT AMENDING SECTION 11-202 OF THE IDAHO CODE ANNOTATED RELATING TO THE FILING AND SERVING OF NOTICE OF APPEAL AND FILING UNDERTAKING ON APPEAL.

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

SECTION 1. That Section 11-202 of the Idaho Code Annotated be, and the same hereby is, amended to read as follows:



"Sec. 11-202. MODE OF TAKING APPEAL.—An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on * each adverse party **who has entered an appearance in the action or proceeding,** or his attorney. * * * The appeal is ineffectual for any purpose unless * * * **prior to or at the time of filing** * the notice of appeal **or within five (5) days thereafter,** an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, by the adverse party in writing."

**PRES. GOFF:** We are indeed indebted for the fine suggestions made. I appoint at this time a special committee to consider those recommendations and report back to this assembly, Robert Elder, Karl Paine and A. L. Merrill.

We now come to the discussion, "We Suggest and Recommend to the Idaho State Bar." This is the time for any local Bar to make suggestions. I will call on representatives from each association. If you have no recommendations, just so state.

The president of the Shoshone County Bar Association is here, do you have anything to say at this time, Mr. Hull?

**HAROLD J. HULL:** No, not at this time.

**PRES. GOFF:** The Clearwater Bar Association.

**A MEMBER:** No, sir.

**PRES. GOFF:** The Third District Bar Association? . . . We are getting along beautifully, gentlemen. How about the Fifth District Bar Association?

**ROY BLACK:** The suggestion that I have was brought up at a number of association meetings. The question is whether or not something might be done to creater a greater interest in the local bar associations, to create a closer relationship between them and th State Bar, and a resolution was passed that the President or Vice-president of each local bar association meet periodically with the State Bar Commission, or at the annual meeting and their expenses be paid out of the State Bar fund. A little more incentive among the local bar associations will arouse interest in the State Bar work, and it will permeate back down to the local Bars. When they meet with the State Bar Association the questions brought up there will be brought back and discussed in the local Bar meetings. I believe there is merit to it.

**PRES. GOFF:** This matter will be discussed at our business meeting tomorrow. How about the Seventh District Bar Association?

(No response.) The Eighth District Bar Association? (No response.) The Ninth District Bar Association?

O. A. JOHANNESEN: Mr. Chairman, a number have asked me to call the attention of the Bar again to some of these old troubles, that we have been bothered with, particularly the growing tendency on the part of realtors, and now many of the Federal Bureaus and Administrations, in drawing leases and contracts, practicing law unlawfully. We were wondering if there was not some way by which the Bar, as such, could deal with these problems. It is rather embarrassing for a local attorney to file a complaint or find fault with the actions of such organizations, and it is also embarrassing to find fault with some of these Federal Associations. The thought they want me to express and place before this group is that the Bar, as such, might render some aid in the individual communities with the local associations in the settling of these matters.

Another matter many of our members feel should have the attention of our State Bar, as such, is that of minimum fees and see if there isn't some way in which the older memers of the Bar in our State could line up the younger members, advising and cooperating with them in that respect. There has been a considerable tendency on the part of the older members to feel themselves growing a little old and beyond such efforts. We have had quite a little difficulty in the Ninth District Association in bringing out some of the older and more successful practitioners. We would like to have them out to the meetings. The thought is, perhaps the State Bar could devise some ways, means or scheme by which a more cooperative effort could be brought about.

PRES. GOFF: The next is the Eleventh District Bar. Is there any report from that organization? (no response.)

We will complete our program with a discussion on the Soldiers' and Sailors' Relief Act by Mr. Frank Stephan of Twin Falls.

FRANK STEPHAN: Mr. Chairman, and gentlemen of the Bar.

The Soldiers' and Sailors' Relief Act became effective on October 17, 1940. It was designed to protect persons in active military service against loss or injury or prejudice to their civil rights, and in appropriate cases, to effect relief in the matter of the enforcement of civil liabilities in judicial proceedings conducted against them in their absence. The Act is strictly remedial in character and effect. It is far reaching in its effect upon our practice, pleadings, and proceedings, both state and federal, as well as upon the substantive rights of many of our citizens. While the Act was intended to prevent injury to the civil rights of those persons engaged actively in military service so as to enable them to devote their entire energy to the protection of



the nation, it most certainly was not the intention of the Congress that the Act should be employed so as to unduly prejudice the rights of persons not in the service, or that it should be employed as a defensive instrumentality to dodge or avoid just obligations. It is not to be regarded as a defense to the merits of any action. It was not intended as a complete shield against liability arising out of contract or tort simply because one has been accepted for military service. It was the intention of the Act to free those in military service from annoyance from litigation while in the service and to effect that purpose stays or extensions of time are accorded to them, but they are not given immunity from liability or responsibility.

The act is not a new kind of Act in this country. As early as 1802, the Congress had granted relief to those persons in active military service and again during the period of the Mexican War, the Civil War, and the last World War, Federal laws were passed and approved by the President extending protection to persons in military service. As a matter of fact, the 1940 Act is almost identical with the Act of 1918 and, although only few cases arising under the 1940 Act have found their way to the trial courts, the decisions handed down by the Courts of last resort construing the provisions of the 1918 Act will continue to be most helpful in construing the present law.

The constitutionality of all of the Relief Acts has been upheld. The validity of the 1918 Act was attacked on two grounds: First, on the theory that the Act impaired the obligation of contract; and second, that the Act was not warranted as a legitimate exercise of the Federal War Power. The further objection may be raised concerning the 1940 Act that although Congress may validly enact such legislation as a proper exercise of its war power, the exercise of this power at a time when this country is not at war cannot be justified. But it seems to me that the latter objection lacks meritorious support for the reason that our country cannot and must not wait, as unfortunately some of the European countries have done, until we are involved in war to prepare for war, and for the further reason that our soldiers and sailors can be as seriously embarrassed and distressed while in the active service before actual involvement in war as during the period of armed conflict. Article 1, Section 8 of the Constitution of the United States provides that the Congress shall have power to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense, obviously is not limited to providing an army and navy after war has begun. In upholding the prior Relief Acts, our Courts generally adopted the view that legislation of this character was a proper exercise of the war powers of the Federal Governmnt and was a "necessary and proper" adjunct to the exercise of the power to maintain an army and navy. In the case of Pierrard v. Hoch, 191 Pac. 328, it is said:

"It is clear that under the war-making power the National Legislature has the authority to provide for the protection of its soldiers, to relieve them from anxiety and annoyance respecting litigation at home, and to make a general rule applicable alike to all those engaged in its service."

The Act is to remain in force and effect until May 15, 1945; provided, that should the United States be then engaged in a war, the Act shall continue in force until such war is terminated by a Treaty of Peace proclaimed by the President, and for six months thereafter.

Under the provisions of the Act, protection or relief is extended to all members of the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty with the army or the navy. However, mere membership in any of the above described units is not sufficient. The relief intended is accorded only to those in "active" service. Reserves and persons on the retired list are not included until they are actually ordered into service.

The term "Period of military service" means the period of active service. It may be said that on the whole the effectiveness of the Act as to any individual and his dependents ceases with the termination of his "period of military service," either by discharge from active service or his death in the service, but in no case is relief extended beyond the termination of the Act. Apparently the rights accorded to one in the military service do not survive to his estate.

The relief provided for in the Act was intended primarily for the persons in active service, but relief is incidentally afforded to other eprsons, individuals, partnerships, and corporations secondarily liable on obligations contracted by persons in the service.

The term "Court" as used in the Act includes any Court of competent jurisdiction in the United States, its territories, the District of Columbia, and of any state, whether or not a Court of Record. It does not include mere administrative bodies or tribunals.

While the Act will include proceedings coming within its terms which were pending at the time of entrance into military service, it will not include proceedings fully completed prior to the enactment of the Act or prior to one's induction into active service.

In the matter of construing the terms and provisions of previous laws of this type, the policy of our Courts has been that those laws, being remedial and procedural in character, were entitled to a liberal construction to the end that their purposes might be achieved and, accordingly, they have stated that the legislative intent evidenced in the Acts was not to be defeated by narrow technical construction



of the language used and that rather, any doubt as to the construction or application of the Acts should be resolved in favor of the extension of the benefits thereof to persons in military service.

I did not mean to imply by what I have previously said that all persons in active military service are entitled to the benefits of the Act for it is apparent from even a cursory consideration of its provisions that one's active military service must be of such a character as materially to affect one's ability to meet the obligation or perform the duty or to defend himself in the pending action.

Again, the benefits which the Act affords may not be invoked as a matter of right. Except for that part of the Act relating to tolling periods of limitation, the granting of relief under the Act is left to the discretion of the trial Court, and in the absence of a showing of an abuse of discretion, the decision of the Court will not be disturbed.

### DEFAULT JUDGMENTS

The provisions respecting default judgments are necessarily applicable in all types of civil proceedings. They seek to circumscribe and regulate the matter of taking and entering such Judgments, to suspend in some instances the right to take default, and to set up liberal provisions respecting the vacation and relief against such default Judgments as may be obtained.

Section 200 provides that if in any proceeding in any Court a defendant is in default for want of an appearance, the plaintiff must, before the entry of final Judgment file in the Court an Affidavit setting forth facts showing that the defendant is or is not in military service, as the case may be, or that after inquiry plaintiff is not able to determine whether defendant is in the service. If it appears from the Affidavit that the defendant is not in military service, default may be entered and Judgment taken. On the other hand, if it appears from the Affidavit that the defendant is in military service, or if it appears that the Affiant is uninformed on the subject, then default Judgment cannot be entered except pursuant to the express order of the Court, and if the defendant is in military service no such order shall be made until after the Court shall have appointed an attorney to represent the defendant and protect his interests. Under the provisions of said Section, if the defendant against whom a default Judgment is sought is in the service or his status is unknown the Court may, in addition and as a condition of granting Judgment, require plaintiff to post a bond to save the defendant harmless in the event the Judgment is subsequently set asidt.

In equity proceedings involving "unknown" parties it may be doubtful as to what procedure is proper, but it would seem that in-

asmuch as those against whom the default Judgment is sought are unknown, an affidavit as to military service would be a useless formality and therefore, unnecessary and that if the Court sees fit under the circumstances involved in the case to make an Order directing the entry of Judgment, that is all that need be done.

Should the Affidavit specified in said Section not be filed and the Court nevertheless makes and enters its Judgment, the Judgment is not void for lack of jurisdiction. If a default Judgment has been taken against one actually in military service he must in seeking relief from such Judgment make a showing that he was in fact in the service at the time Judgment was entered and that he was hindered in his defense because of such service and in addition thereto he must show that he has a meritorious defense.

When an attorney is appointed by the Court under the provisions of this Act to represent a defendant and protect his interests the attorney's rights and powers are limited to about the same extent as when acting for a Guardian Ad Litem, for it is specifically provided in the Act that he shall have no power to waive any right of the person for whom he is appointed or to bind him by is acts, and accordingly, application to vacate default Judgments may be made even though prior to the entry of the Judgment an attorney was appointed to represent the absent party, but it is specifically provided in the Act that vacating, setting aside or reversing any Judgment because of non-compliance with the provisions of the Act shall not impair any right or title acquired by any bona fide purchaser for value under such Judgment.

The Courts are empowered to grant stays in any action or proceeding at any stage thereof, unless in the opinion of the Court the ability of the plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service and when a stay is granted no fine or penalty shall accrue by reason of failure to comply with the terms of a contract involved in the action, during the period of such stay. In addition thereto, a Court may grant relief against the enforcement of such fine or penalty if it shall appear that the person who would suffer by such fine or penalty was in the military service when the penalty was incurred, and that by reason of such service the ability of such person to pay or perform was thereby materially impaired.

The Courts may set aside or vacate any attachment or garnishment of property, money or debts in the hands of another, whether before or after judgment, and the order staying the execution of a judgment or vacating an attachment or garnishment may be made for the period of military service and three months thereafter or any part of such period but the flat order without conditions need not be



made. The Act specifically provides that terms and conditions may be imposed such as payment in installments.

The Act provides for the tolling of the statutes of limitations. Section 205 is as follows:

> "The period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators or assigns. * * *"

That section says nothing about the tolling of periods of time prescribed within contracts for the commencement of suits, but in construing a similar provision in the Act of 1918 Courts have held that it included the limitation fixed by contract.

In dealing with the provisions of Section 205 it is well to remember that they affect only the "bringing of the action," and have no bearing whatsoever on the periods of time prescribed in the statutes for doing things incidental to its prosecution or defense, such as motions for new trials, motions for judgment not withstanding the verdict, or appeal and the like. Said section affects the commencement of the action, but does not affect the steps supplementary or anciallary to it.

The Act prevents, except upon leave of Court, any eviction or distress during the period of military service in respect of any premises for which the agreed rent does not exceed $80.00 per month, occupied chiefly for dwelling purposes by the wife, children or other dependents of a person in military service. But there again the Court may exercise its discretion in granting leave and the Secretary of War, the Secretary of the Navy and the Secretary of the Treasury with respect to the coast guard are empowered to order reasonable allotmnt of the pay of a person in military service to discharge the rent of a dwelling for his family.

If the vendee, lessee or bailee, prior to entry into military service and prior to the effective date of the Act, has paid an installmnt of, or deposit upon the purchase price, of either real or personal property and thereafter enters military service, the contract of purchase may not be rescinded or the property sold or repossessed for non-payment of any installment falling due during the period of military service, except by way of Court Action. As heretofore indicated the section is limited in its application to contracts entered into prior to October 17, 1940, the effective date of the Act, and has no application to such contracts made thereafter. And it is specifically provided in the Act that no Court shall stay a proceeding to resume possession of a motor vehicle, tractor or the accessories of either, where encumbered by a

purchase money mortgage, conditional sales contract, lease or bailment with a view of purchase unless the Court shall find that at least fifty per cent of the purchase price has been paid.

The Act likewise provides for appropriate protection against foreclosure of mortgages and trust deeds, and against default in the payment of premiums on policies of life insurance and for protection against the ordinary consequences resulting from delinquencies of taxes assessed against real estate and for deferment of payment of both state and federal income taxes.

When any general or special taxes or assessments against land used for dwelling, agricultural or business purposes by one in the military service or his dependents, fall due and remain unpaid, such person or someone in his behalf may file with the collector of such taxes an affidavit setting up the levy of the tax, that it was unpaid, that the property against which the tax is levied falls within the classes outlined in the Act, and that the military service of the person responsible for the payment of the tax has impaired his ability to pay. When such an affidavit is filed, the land against which the tax is levied may not be sold to satisfy the tax except upon order of court.

Unpaid delinquent taxes are made subject to a flat interest charge of 6% per annum but are not to be subject to any penalty charge whatsoever.

No right or license in public lands is permitted to be forfeited because of absence from the land or failure to work upon the land when the person holding the same is in military service. Military service is to be counted as residence and cultivation required for preservation of homestead rights, except that no patent will issue where less than one year has been spent on the land. However, if anyone having an allowed homestead entry is killed or incapacitated as a result of his service, he or his representatives may secure a patent to the land without further residence or cultivation. Desert land entries may be held without the making of required improvements by one in the service, and military service is equivalent to the required labor under mining claims, provided proper notices of the service, etc. are filed in local land offices. Residence requirements for irrigation water rights may be waived for one in military serivce, and where homestead entries were allowed before this Act, farm labor anywhere will be counted as constructive residence during any actual war in which the United States becomes involved. Minor in the service are accorded all the privileges for obtaining rights in land and leases upon public lands afforded to those over 21, and the benefits of the Act extend to those United States citizens who fight in the forces of any allies of the United States during a war.



Appropriate penalties are prescribed for violation of the Act.

The Act of necessity is broad in its scope. Over a long period of years, the American people have felt impelled to take affirmative steps to safeguard the rights of those who have either volunteered or been drafted into the service of the army or navy to protect our country. In its operation and effect it may seem a bit harsh and that the rights of those not in military service seeking to protect their rights have been disregarded or pushed into the background of insignificance, but it is my conviction that after all is said and done, the provisions of the Act are wise, and only reasonably beneficient to those impressed into military service and that the Act will have the wholehearted support of the bar of this Country. (Applause.)

O. R. BAUM: Mr. Chairman, I would like to ask a few questions of the speaker.

PRES. GOFF: Go right ahead, Mr. Baum.

MR. BAUM: You referred to the fact that before a default judgment might be rendered an affidavit must be filed. In such case, where you do not know whether the party is in the service, how far does one have to go to determine that fact? Should he get his information from the Secretary of Navy or Secretary of War or is an affidavit on information and belief sufficient, or should one inquire of the proper military authority?

MR. STEPHAN: It is my opinion he would have to make inquiry before he was enabled to say whether a person was not in the military service, for the reason the Secretary of Navy and the other officials, must keep a record and furnish that information whenever necessary.

MR. BAUM: Is there any similarity between the Soldiers' and Sailors' Civil Relief Act of 1918 and 1940?

MR. STEPHAN: It is almost identical. There have been a few revisions, but in the whole it is almost identical.

MR. BAUM: Assuming a sale of certain property has been had under foreclosure in satisfaction of a mortgage, and thereafter during the period of redemption the mortgagor is drafted or enlists, is the period of redemption extended?

MR. STEPHAN: There isn't anything in the act specifically extending the period of redemption.

MR. BAUM: Does the Soldiers' and Sailors' Civil Relief Act affect proceedings by foreclosure by affidavit and sale?

MR. FRANK STEPHAN: I don't know about that. If I had a case of that kind in my office I wouldn't attempt to foreclose

it by affidavit and sale. I refer now to the provisions I called to your attention here. I would resort to the Courts, if I determined that the foreclosure should be commenced, because I am inclined to believe one of the provisions of this act might cover it, and that is regarding the taking of possession of personal property. But that doesn't specifically cover the case where personal property is foreclosed by affidavit and sale.

MR. BAUM: Assuming the induction of the principal into the military or naval services, would that exonerate the bail in a criminal action, assuming first voluntary enlistment?

MR. STEPHAN: There is a division of authority on that. Some courts determined in the first instance there is no exoneration. Some of the more recent decisions have gone the other way.

MR. BAUM: Suppose the defendant is drafted?

MR. STEPHAN: I would say, in that case, that there is every reason for exoneration of the bail.

MR. BAUM: Assuming a member of the United States Army has a claim against an individual, and the individual dies, and he presents a claim against the estate, and the claim is refused, and the statute requires the suit must be brought within ninety days. Does the act provide for an extension of time there?

MR. STEPHAN: Yes, I think it would.

MR. BAUM: Assuming a tenant has a business lease, or a lease on business property, and he is drafted, and his business was closed and he was required to abandon the building. Is the tenant relieved of paying rent, or is he relieved from paying the difference of the rent he would have paid and the amount the landlord does receive?

MR. STEPHAN: There are a number of cases which say that he is still bound, but some of the cases have gone as far as to say one in this position should be relieved.

MR. BAUM: Principially the New York Courts, is that not true?
MR. STEPHAN: That is correct.

MR. BAUM: Where a person is in the military service, but claims no interest in the premises being foreclosed, but is merely security on the mortgage note, can the mortgage proceedings proceed?

MR. STEPHAN: Judge, do you mean by that, the guarantor is made party defendant?

MR. BAUM: If not made a party defendant, can the mortgage be foreclosed?



MR. STEPHAN: Had he been made a party defendant, there is no question but what he could get a stay himself. Under certain circumstances the matter could proceed to trial against the other defendants, if he is not a party. Nobody else can take advantage of the privilege extended to this person given for his own benefit.

MR. BAUM: Then what happens after he returns from his service, and there is a deficiency judgment. Could they maintain that against him in view of the fact he was not present to protect himself at the time of the foreclosure sale?

MR. BAUM: Assuming this party was not made a party to the foreclosure proceedings, after deficiency had been obtained, could such action be brought against the party after he had returned from the army?

MR. STEPHAN: I am inclined to think the action could be brought against him and prosecuted. If anything happened in the foreclosure suit that was unusual, and he would have had, had he been out of the service, a defense that he could have prepared and offered to reduce the amount of deficiency, he should be entitled to set that up.

MR. BAUM: To obtain a stay of proceedings to foreclose a mortgage where a person is in the military service, is it actually limited to the owner of the land?

MR. STEPHAN: It is not. If he has any interest.

BR. BAUM: Are the provisions of the Soldiers' and Sailors' Civil Relief Act broad enough to cover a contract entered into in January, 1941, where the party was drafted in February, 1941? That is, what type of contract comes within the act, entered into in January, 1941.

MR. STEPHAN: The act provides for stay, of course, where the contracts were made prior to October 16, 1940.

MR. BAUM: Does that apply to rent contracts?

MR. STEPHAN: No. Where one is in the service and goes out and rents a house for his family, he knows what he is doing. He knows the provisions of the act when he does that.

MR. BAUM: Assuming, Mr. Stephan, a lad from the State of Utah enlists in the United States Army, and is stationed at Boise, and while off the reservation or base, becomes involved in an automobile accident, and thereafter and before suit is brought against him, he is then transferred. Can service be made on him by service on the Secretary of State under the provisions of that act passed in 1933?

MR. STEPHAN: I see no reason why that could not be done.

MR. BAUM: There is a recent case on that, 151 SW (2nd) 609; it is now just in the advance sheets.

One more question. "A" is a married man. His family consists of himself and his wife. He is a member of the Idaho National Guard. He purchases for his wife certain furs, signing a conditional sale note. He is inducted into service. All the time of his marriage, his wife is working, and quite recently, then the holder of the note went to his wife and demanded the furs, and then when he didn't get them he brought a suit in Court and alleged an action on open account and attempted to attach the wages of the wife. "A" is in the army. What relief has the wife of this soldier?

MR. STEPHAN: In the first place the contract was not the contract of the wife, but of the husband. The payments were to be made by the husband, and he should proceed against the contracting party, not the wife.

MR. BAUM: Mr. Stephan, have you had occasion to read any report or book being prepared on the Soldiers' and Sailors' Civil Relief Act of 1940?

MR. STEPHAN: In response to that, I was advised recently, after working on this subject, that Mr. Walter Anderson of your city, was engaged in a treatise on this act. I wrote Mr. Anderson and Mr. Anderson wrote back that his work was practically finished and it was in the hands of the publishers, and that they galleys would be out, perhaps, before the day of this convention, and I got five or six galleys from Walter Anderson yesterday in the mail on the first part of this work, and by the way I want to say that the part I examined is a very fine treatise, and undoubtedly it is going to be a work of great interest and value to us all. Do you happen to know the publisher of that?

MR. BAUM: Courtright Publishers of Denver, I believe.

Mr. Anderson advised me it would be complete in about two weeks. But I might say there is a very fine discussion and annotation in 130 A. L. R. 741.

PRES. GOFF: We will stand adjourned until tomorrow morning at 9:30 A. M.

## SATURDAY, JUNE 12, 1941

### (Morning Session)

PRES. GOFF: Mr. Marcus J. Ware, of Lewiston was to give a report on the matter of the economic status of the bar, and this was to be a committee report. He wasn't able to be here, but he did send down the report of the committee. I see that Mr. Sheneberger, a member of that committee is here, and he will submit the report of that committee.



F. C. SHENBERGER: Mr. President and Members of the Bar:

At the 1940 meeting of the State Bar Association a committee was appointed to make a survey of the economic status of the Bar of this state with the view of determining present conditions of the Bar and the possibility of recapturing and expanding the business of our profession. The following persons were appointed to serve on the committee: Robert Brown, Kellogg; James F. Butler, Boise; F. C. Sheneberger, Twin Falls; Ben B. Johnson, Preston; V. K. Jeppesen, Nampa; E. E. Hunt, Sandpoint; Shelby H. Atchley, Driggs; R. D. Merrill, Pocatello; Thomas M. Robertson, Jr., Twin Falls; W. Melvin Jensen, Lewiston, since deceased, and Marcus J. Ware, Lewiston.

After considering the matter, the Committee decided that it could best perform the task given it by three-fold process. First: It was deemed advisable to submit a questionnaire to the Bar generally to give the Committee some concrete idea of the condition of the Bar throughout the State. Secondly: It was deemed advisable to give expression to the views of those members of the Bar in the State who have considered the problem and to state their views upon the subject. Lastly: It was thought advisabl to give the general recommendations of the Committee.

The questionnaire was prepared and sent out to each member of the Bar of this State of which there are over 500 members. Some 39 questionnaires were returned to the Committee.

The questions asked and the answers given are as follows:

1. Sources of law business:

| | Increasing | Decreasing | No Change |
|---|---|---|---|
| General Court practice (Including all cases where suits are filed..... | 7 | 10 | 2 |
| Probate of estates and guardianships.... | 9 | 5 | 6 |
| Conveyancing, loans and abstract examinations ..... | 3 | 10 | 8 |
| Contracts, wills and other instruments | 2 | 7 | 8 |
| Consultations ..... | 4 | 2 | 11 |
| Retainers ..... | 7 | 2 | 4 |
| Governmental agencies ..... | 6 | 1 | 2 |
| Income Tax work ..... | 3 | 4 | 1 |
| Administrative law ..... | 2 | 1 | 2 |

Decreases of sources of income are attributed to various causes. The three principal reasons described being the depression, the increase

in the field covered by governmental agencies which were formerly served by a private enterprise and the dilatory tactics of lawyers in the trial practice and the slow moving procedure of the trial courts, which discourage the public from submitting their controversies to judicial tribunals.

Attorneys answering the questionnaire generally could see no hope for increasing any of the sources of income unless business conditions generally improved, although several expressed the opinion that income could be augmented by specializing in the field of taxation and in the work of governmental agencies and in the field of administrative law. At least two who answered the questionnaire felt that income tax work was a special field which should be left to accountants.

In the matter of fee schedules, 23 had fee schedules in their district and 8 did not have fee schedules. 25 were in favor of fee schedules while 10 were opposed to them. Of the 10 attorneys answering the questionnaire who had no fee schedule in their districts, 5 favored the adoption of a fee schedule and 5 were opposed to any fee schedule. Five attorneys in districts having a fee schedule were opposed to a fee schedule. 3 persons favoring a fee schedule expressed themselves as feeling that the fee schedule was not being enforced in their districts and believed the fee schedule to be unenforceable unless the State Bar set up machinery for its enforcement.

The attitude of the Bar on advertising, as reflected in the questionnaire, is very interesting. 24 were in favor of group advertising in behalf of the Bar, while 14 were against it. 17 favored advertising through the State Bar Association and one through the local Bar Association. 9 favored advertising both through the State Bar Association and the local Bar Association. 14 favored advertising by radio, 21 by newspaper, 4 by pamphlets, 5 by billboards and one through schools and clubs.

Several attorneys, in answering their questionnaire, saw fit to write a letter on the subject, some of which are included in this report for the information of the Bar.

One attorney from the southern central part of the State writes as follows:

> "During the years 1928-29-30 and into 31, I had a steno employed continuously. Many times I worked straight through on Sundays in succession including Holidays. Clients waited their turn.
>
> "Sources of law business consisted of practice before the State and Federal Courts. Also, general office practice, including conveyancing, contracts, collections, consultations, probating and so on. At no time was I dependent upon retainer or income from any taxpayers source. Since 1930 this practice has gradually decreased, excepting a spurt once in awhile.
>
> "My personal experience indicates that at the depths of the depression every Tom, Dick and Harry who was in a bank, real estate office or Justice of the Peace or Probate Judge grabbed every opportunity to try and draw a contract, write a will, to give legal advice, sometimes with pay at other times to hold a political job, which meant their bread and butter. Meanwhile members of the bar were compelled to meet that competition in order to get bread and some butter themselves. They were not compelled to but they did resort to cut-throat competition among themselves to their disaster. The Prosecuting Attorney not infrequently gave free advice on civil matters in order to be re-elected, and hold his job. The Probate Judge, following the forms of attorneys has probated estates and issued Letters of Guardianship, at charges that no lawyer can afford.
>
> "The Justice of the Peace under the Small Claims Depart-.. ment has been spoiled. He considers himself both judge and lawyer. He takes cases beyond the $50.00 limit, prepares and files the complaint, orders the defendant in, the plaintiff needs no counsel and the defendant thinking of the Small Claims Court does not employ one.
>
> "Finally there has been so many lawyers in the various departments of government where the public gets free advice I do not know how the private practitioner of the law is to survive unless he gets on the public payroll, or drastic action is taken by the bar along the lines of other organized groups—skilled labor is an outstanding example—medicine, the railroads, and so on and so on. The time when we were too proud to set a minimum fee is passed. A lawyer violating a minimum fee schedule could be disbarred."

Another lawyer from the southwestern part of the State makes this comment:

> "The attorneys in our City have lost the greater part of the work of drawing deeds, mortgages, contracts, wills and other instruments for the reason that the same are being prepared by Realtors, Banks, Notaries Public and most any other person who has a typewriter in his office, home or place of business. These instruments are prepared by the said parties at a fee much less than that charged by the Bar Association.
>
> "The Bar Association in the State of Idaho as an organiza-

tion has done nothing to correct this condition which unquestionably exists in other cities and towns of the State the same as in our City.

"This business could be recovered if the State Bar Association would increase the fees of each member at least $5.00 per year and employ (full time) some young attorney to investigate and prosecute all violations.

"The work of the Bar Association along this line so far has been hap-hazard and useless.

"Unless the Bar Association sees fit to take a definite stand and vigorously prosecute all violators it is useless to make complaints.

"Personally, I can stand the loss of this business as well as as any one else."

A member of the Bar from Boise writes as follows:

"The mere fact that the question has been raised in the State Convention indicates to me that the status of the Members of the Bar is extremely unsatisfactory as regards the matter of income of the entire membership.

"This I know to be the fact in Boise. I believe that conditions in most other towns in the state are somewhat less stringent than in Boise, but, even at best, are none too good.

"Starting with the assumption that my beliefs as above outlined are true, and being unable to devise a method of proving the truth of the assumption, but in the belief that proof of a well-recognized fact is not necessary in this circumstance, I have come to the conclusion that the Fee Schedule method is an unsatisfactory solution since it attempts to remedy the result of a bad situation without in any way attacking the cause.

that there is a surplus of legal talent. The Bar in Idaho has failed to do for its own protection and for the protection of the public what the medical profession was forced to do several years ago. I believe that we should drastically reduce the number of young men admitted to practice each year. On what basis this reduction is made is of small concern to me so long as the basis has some reason behind it. It must be recognized by the members of the Bar that the necessary consequeace of such an action is that a number of young men who might otherwise become substantial and reputable members will be deprived of their opportunity to do so. This is a serious but not unanswerable indictment against the proposal. The answer seems to be



that the step must be taken for the economic benefit of those men who are already members of the profession, and for the benefit of the public, even at the cost of the opportunity of the few individuals thus deprived.

"It must be recognized that this proposal is simply one further step in the same direction as others already taken by the state in requiring lawyers, doctors, barbers, plumbers, and members of many other trades and professions to submit to, and pass, examinations before permitted to engage in the occupation of their choice. I am aware of the point that: 'because a little is good; more is not necessarily better,' but do believe that in this case **more has become absolutely necessary.**

"I have discussed this proposal with a number of the Members of the Bar and find sentiment on such a proposal somewhat divided; those favoring the idea following the argument just advanced, and those opposed following the argument that America is a free country' and that the Bar should not slam the door of opportunity to practice law in this state in the face of any young man who has qualified himself in a satisfactory manner. Their conclusion is: that if attorneys already practicing cannot hold their practice and make a living against the onslaught of younger and less experienced men, the older practitioner should be forced from the profession into other lines of work by the pressure of economic necessity.

"The difficulty with the conclusion reached by those opposed to my suggestion is, that Members of the Bar who are unable to secure and maintain satisfactory economic stability **do not ordinarily retire from active practice in favor of other lines of work. They remain in competition** with more successful members and frequently resort to 'sharp practice', if not down-right dishonesty. It is this class of lawyers who reduce their fees below the minimum fixed by the local Fee Schedule, in the hope that a reputation for making 'bargain-day rates' will offset whatever handicap the particular practitioner may have, which makes it impossible for him to maintain himself in competition with his more successful contemporaries. His hope in this regard is a snare and delusion but seems to be attended by a partial success in some cases, with the result that the particular attorney, who resorts to this practice, finds himself in a condition of dignified starvation. He may for years keep a few jumps ahead of the wolf and the sheriff but his borderline economic status leaves him open to temptations which would not ordinarily harass a man with a more promising outlook for future security.

"I am of the belief that the vast majority of attorneys are essentially honest, and that those who resort to shady tactics are forced to do so because of a pride which will not let them retire from their profession, though forced to unprofessional and unethical practice in order to survive. I am not one who believes that an unsuccessful attorney would starve if he were the only attorney in the state. This may be true of a few, but I believe that most men, who can pass the tests required of them in a modern law school and in a modern Bar examination, will, in time, develop into satisfactory lawyers, if the competition is reduced to a reasonable degree.

"I do not believe that argument or proof is necessary to establish the proposition that unsuccessful attorneys do not give up their professions and look elsewhere for employment. The further corrollary of that proposition seems to be that the young man just entering the profession has no guarantee that he will not, in turn, be forced in later years into an economic position entirely inconsistent with his abilities, education, experience and reasonable expectations.

"I am satisfied that the exceptional attorney, like the exceptional man in any other field, can make an excellent living in law even under present conditions or worse. The man who suffers under present conditions is the man of moderate abilities, integrity of character, honesty of purpose and action and of perhaps fair to poor personality, salesmanship or showmanship. This type of man can, if there are not too many like him in the practice, become a very able business-man's advisor and a substantial member of his community, even though he may never excel as an advocate in the trial of causes.

"By sharply limiting the number of new applicants to be admitted to practice, the Bar may lose a few exceptional men, but this loss will be largely off-set by the fact that the men admitted will have a much better opportunity to become economically solid and thus in a position to refuse to handle causes without substantial merit and to thrust aside the temptation of financial gain at the expense of personal integrity.

"It must be recognized that while the existing membership of the Bar will reap an economic benefit from this proposal, the real justification is the benefit which will accrue to the public at large. The conditions now existing being largely the result of over-crowding of the profession, the public suffers as clearly as does the profession. The fact that lawyers as a class are looked upon with suspicion by a large class of the public is sufficient indication that the profession must soon



put its own house in order, and that failure to do so is very likely to result in a public demand that the Legislature enact laws to that end. The public disfavor and consequent pressure which resulted a few years ago from the great number of irresponsible 'quack' doctors brought about a change in the medical profession that has reinstated that profession in the eyes of the general public. The public is now enjoying a much more responsible medical service and the members of the medical profession are now enjoying increased incomes and more highly honored positions in their respective communities as a result of drastic steps taken to assure the qualifications of all new members. The precedent is established. The path is straight and clear before us. We must travel the road **voluntarily** or we shall be **kicked** along it ultimately.

"Finally, there remains the question of the disposition of members who persist in violating the ethics and standards of the profession, even under the protection of the program just outlined. There always have been men of this character in this as in every other walk of life and here again the Bar must shoulder its own responsibilities. The persistent offender must be vigorously investigated and, if need be, prosecuted, by members of the profession for the protection of the public as well as the protection of the profession. The Supreme Court must be impressed by the concerted demand of the Bar that unworthy members must be disbarred and not merely suspended.

"In this connection there must be taken into consideration the fact that the relationship between lawyer and client is, by its very nature, one which frequently gives rise to suspicion on the part of the client and for this reason a hasty judgment against any attorney should be scrupulously avoided. On the other hand, **the multitude of complaints** that arise from the practice of a few attorneys should not be disregarded. In cases of **repeated complaints,** where investigation shows censorable conduct upon the part of the attorney, disbarment should follow recidivists after suitable prior warnings.

"In conclusion: Decrease new membership drastically. Rid the profession of its unworthy members without further delay. The lawyer will enjoy increased respect from his fellow citizens and a corresponding increase in income. The public will receive better treatment with less risk of robbery at the hands of unscrupulous counsel."

Another lawyer from a city in the northern part of Idaho makes the following statement:

"It does not seem to be that in this particular area we have any particularly subject to outside agencies.

"Part of the reason for the present low economic condition of the average lawyer may be in the fact that there is perhaps a tendency to concentrate the practice in bigger centers and take it away from the lawyer in the smaller communities. All of these factors may be due to the effort of certain financial institutions to secure either for itself or its officers the administration of estates. Some of the lawyers here have kicked about the fact that the bank in this City has conducted a very persistent advertising campaign in the newspaper on how widows should bring their problems to the bank and talk it over with the officers when their husbands have passed away. Also that the bank or its officers will handle estates more effectively and should be appointed executors. All through this winter practically every week there has been an advertisement on why the bank should handle estate matters. Of course this means that the Bank then fix who is to handle the estate as attorney and this has aroused some feeling among some of the attorneys here.

"I am sure this advertising has exerted quite an influence and it makes me feel that something of this nature might prove very effective for lawyers as a class. I consider newspaper advertising much more effective than any other kind. The radio is all right when you want to arouse people's emotions in an election campaign but not in a thing of this kind."

While less than ten per cent of the Questionnaires were answered and returned to the Committee, the questionnaires and the letters referred to reflect a general pattern from which your Committee is able to draw a certain conclusion. The questionnaire shows generally that the law practice is decreasing in many of its most important fields. This is particularly true of the trial practice. Furthermore, the increasing role which governmental agencies are assuming in fields heretofore restricted to private enterprises is narrowing the field to general practice except in the case of attorneys employed by or having connections with the governmental agencies in question. While there is a field in income tax work, federal taxation, administrative law and governmental agencies, which may open additional sources of income to the profession, the percentage of income for the general practitioner runs from zero to as high as 25% or 30% of total income, with the average of those answering the questionnaire hovering around from 1% to 5% of the total income of the attorney. This field apparently will not be a general source of income to the profession except in the case of those few attorneys whose connections are such that they are able to secure a substantial practice in this field. The Committee is unable to draw definite conclusions from the questionnaires and its investigation but the following suggestions are made:



While legal work involving administrative law, federal taxation, income tax work and governmental agencies is not large for the average practitioner in Idaho, that it should not be overlooked or underestimated as a substantial source of an attorney's income over the period of the life of his practice, in view of the fact that this trend toward administrative law, governmental agencies in the field of private enterprise and the importance of a knowledge of federal taxation are, and will continue to be of paramount importance to the clients and potential clients of the law office. If this field is not cultivated by the general practitioner, it means that his clients will get in the habit of consulting an accountant or an attorney specializing in these fields and these are the fields in which substantial questions are arising today. Therefore, an attorney who wishes to keep clients coming to his office must be in a position to answer the questions arising in these fields though the fee which can be charged may be relatively small in each particular case. In the long run the collective result of exploitation in this field may be of decided economic value in getting people in the habit of coming to attorneys for solution of their problem.

The fee schedule is generally favored and it would seem that every effort should be made to encourage the use and enforcement of local fee schedules. Some means must be devised to enforce fee schedules through the State Bar Association as many difficulties arise and render impracticable their enforcement locally. This subject might well be assigned to a special committee for investigation and recommendations.

The handing of legal business by laymen should be discouraged. While prosecution can and should be had in individual cases, it will probably be found to be of negative value unless some means is resorted to of informing the public of the advisability of consulting an attorney on legal matters. While the answers to the questionnaires show that 24 are in favor of group advertising and 14 are against it, a substantial majority seems to be in favor of group advertising, that it should be through the State Bar Association with the local Bar's assistance and that it should be by means of newspaper, the radio and billboards. If the Bar can fairly get before the public the idea of consulting an attorney on matters within the province of law practice, it should go a long ways toward eliminating the illegal practice of the law by laymen.

One of the lawyers answering the questionnaire suggested that something should be done to encourage the public to consult an attorney before settling with insurance companies. The public could

be properly informed on this subject in connection with group advertising. But the suggestion by this attorney suggests a field which the profession, as a profession, has been ignoring, namely the adjustment of insurance claims. To date there is no law in Idaho covering the adjustment of insurance claims. Decisions of the Supreme Court of this state in which settlements by lay-adjusters have been set aside such as Bennett vs. Deaton (1937) 57 Ida. 752; 68 Pac. (2nd) 895, indicate that this might well be a field in which the Bar of this state should insist that the adjustment of claims against insurance companies should be handled by lawyers resident in this state. Many of the insurance companies are now employing resident attorneys for the handling of these settlements and with proper encouragement by the State Bar backed up with Legislation, if necessary, many more companies could be encouraged to put the settlement of these cases where they belong, namely in the hands of the legal profession.

The trial practice has always been considered the peculiar province of the practicing lawyer. That the trial practice is decreasing in this state is evident to every lawyer as well as to every trial judge in this state. This practice can only be restored by making the determination of court cases and the adjudication of the rights of litigants certain, speedy and accurate. The greatest step which can possibly be made in this direction is by the adoption of court rules governing the trial practice and procedure. This must be followed by the proper attitude of the members of the Bar. They should remember that in addition to the representation of the rights of their clients that they are also officers of the court, a part of the administration of justice, in which their duty is perhaps as great as that of their respective clients. Once a procedure is adopted by which the ascertainment of the true facts of a given case is made more simple and expeditious and the delay in disposal of cases reduced to a minimum, the public will once again with confidence turn to the courts for the adjudication and protection of their rights.

Respectfully submitted,
MARCUS J. WARE,
Chairman.

In the absence of Mr. Ware, I wish to state that the work of this committee was done mostly by the chairman, and the honor is certainly due in a great part to him.

JUDGE RAYMOND L. GIVENS: There is a question I would like to ask Mr. Sheneberger. What if anything does the committee recommend or suggest in regard to the average lawyer as to source of information that he might have get to enable him to advise in the field of governmental activity?

MR. SHENEBERGER: I would be delighted, Judge Givens, to answer that if I could. As I stated, the work was done mostly by the Chairman, and as far as I know, little consideration was given to the sources of the average lawyer for this material. Of course there are so many rules from each agency that it is very difficult, and I certainly know it would be quite expensive to maintain in each library the rules of the various governmental agencies or departments. I suppose that information is quite necessary, and for practical purposes three or four lawyers, or two or three law offices could get together and purchase the services that are available from one or more of the law book companies.



WILLIAM H. WITTY: I think this report refers to considerable that is of prime importance to the lawyers of the state. That is the matter of fee schedules and what is really the "practice of law". The members of the Bar of this state could do nothing that would immediately mean more to them than to adopt fee schedules where there are none, and to take necessary steps to enforce fee schedules in existence. I know of no better way to emphasize the importance of uniform fee schedules than to recite actual experiences, if you will pardon me for doing so.

We have a fee schedule in our district, and it is not being enforced. A man some time ago called on me with reference to a bankruptcy proceeding. He wanted to know what the fee was. I told him our schedule provided for $100.00, and he said, "I think I can get it done cheaper than that." And I said, "Go to it, if you can." I mentioned the matter to another member of the bar, and I learned from him that man had visited five different offices shopping for the least fee he could get. I think that illustrates the attitude of the public towards the members of the bar where there is a fee schedule not being enforced.

Just one more illustration. I had been employed by a citizen of our town to incorporate a small business. He didn't discuss with me the matter of fees. I went ahead and prepared the various papers. He came back and said, "What is this going to cost me?" I said, "Our schedule of fees provides for a minimum fee of $100.00." He said, "I can get it done for just half by one firm, and another will do it for $35.00," and I said, "Go ahead, I wouldn't do it for $99.99. There isn't a reputable attorney in this town that would do it for that," and he then gave me the name of one of the prominent practitioners of our town.

I think the Bar of this State ought to take some steps not only to establish fee schedules, but to see them enforced.

With respect to the other question. It is of prime importance we have some definition, either by legislative enactment or court ruling, as to what constitutes the practice of law. Our Supreme Court

in the case of Lee Mathews, has laid down the rule that lay members of the community, and particularly real estate men may engage in what most of the lawyers consider to be a part of their field of activities; that they can draw all sorts of mortgages, deeds, real estate contracts, where they use partly printed forms. Now, I think it doesn't need any extended discussion to bring about agreement among the members of the Bar that is particularly a field of the attorney. This prticular individual did a very substantial business in drawing contracts and leases and deeds and mortgages. In other words, he did four times as much business as the lawyers who lived in that town along that line.

I think the legislative committee of this association ought to undertake, if that is the procedure, to get through a legislative enactment defining particularly what the practice of law is, and if that isn't practical, get Court rulings or Court definition of what is the practice of law, to recapture that type of business.

Those two considerations should be given very serious consideration to bring about the results we should have.

L. E. HUFF: I would like to elaborate on the mention made in this report concerning work with adjustment of insurance. I happen to be half lawyer, half insurance man. I solved that problem by engaging in two businesses. I find in many instances clients have insurance problems, and many times they go to the insurance man for advice, but the attorneys could get that. It will take quite a while to get that business, but it is worth while. The attorney is in a position to handle this business, and the community ought to know it.

The fee schedule is used wrong, not in a salesmanship like manner. I have had years of experience selling. I don't mean going out and soliciting business, but I mean taking a salesman's attitude towards clients. Quoting the minimum fee schedule, I think is the best way to have a client mad at you. Just say that the minimum fee schedule is so and so, and he has reason to get mad. Why not just quote the fee and keep quiet about the minimum fee schedule. When the N. R. A. first came in, I went to buy a kitchen sink and it was $16, but they said the N. R. A. made it $18.00. I didn't mind paying $18.00, but when they said the N. R. A. made it that price, I was madder than hell. Why not just say the fee is so much and forget about the minimum fee schedule. That is the minimum. You should start about twice that. If the minimum is $100, make it $200.00, and if the client murmurs about that, say $150.00, but don't talk about minimum fee schedule.

TOM JONES: With respect to fee schedules, they might be all right in certain instances, but frequently you have people coming in to have an estate probated. You can't say $100 . . . $200 but you



must base it on the work involved and complications that arise. We have a fee schedule for that based on the amount of work, and I have found it very satisfactory in working with respect to estates. Most of the cases you have in your office you don't have to worry about fee schedules, but most particularly with estates. It works very satisfactorily to both your client and to the lawyer.

MR. HUFF: I found in estates that a man should be quoted one fee if there is no serious contest or argument among the heirs, and that if there is an argument among the heirs, another fee.

V. K. JEPPESEN: This is a subject that has been before every Bar meeting for the past five or six years at least. In those discussions we have just looked at the dwindling incomes, and we have just seen our business dwindling, and we failed to go back and see where the original source of our income was. We are like a farmer living in an arid territory and using water for irrigation. If he sees his water supply dwindling, he can go back up and patch up the leaks on his ditches, and he might get a little more water and a little better crops than if he hadn't patched up that ditch. But I think the better idea is to go back still farther and find out what is the trouble with the source. Perhaps the source is not as it used to be.

In all our towns we see what is happening; we are seeing our individual enterprises gradually dying out, there isn't much of that left. You see our hardware stores run out of business by chain stores; you see ten cent stores coming in and replacing the drug stores. All of us know about what business we get from these chain stores, these dime stores, these larger chains, and it is practically nothing. There is no business from them. If you will look back through the years you will find the big income to the lawyers is from the business of the towns; there isn't too much from the farmers. It isn't the farmers, but it is mainly the businesses we make our living from. When these businesses vanish, our business vanishes. This is just a fundamental thing in our economic condition today.

I don't see how we can change it or what we can do about it, unless we want to change public opinion. I don't think there are any of you who doubt this fact. It is this that is taking away money from the lawyers. That is why, I think, we get scrapping among ourselves on fee schedules. It doesn't do us much good that we can't get together on it. We just stand and argue on things that can't help the situation any. It is just the very trend of economic conditions of the country that is depriving the lawyers of business today.

P. J. EVANS: I think the suggestion of travelling back to the source is a very good one. A source I found very profitable was the practice of criminal law, the same as my friend Mr. Jones. There is nothing better from a lawyer's point of view than a good murder

case, rape case, or burglary case. The unfortunate thing I find is that the citizens who thirty or forty years ago used to go out and get in an argument and then shot it out, don't do it any more. That source now is some bird who hasn't got a penny to his name and the Court has to appoint some attorney to defend him, and you know the tendency of the Courts in what they think is a reasonable fee to be allowed in that type of case.

I think the Bar Association ought to devise some means of increasing the number of men who can at least pay his attorney for the consequences of going out and settling their troubles in their own way.

That is the best business I have ever had, and since that has dwindled my income has got down to a point where it is giving me very much concern. I think it is a good practical suggestion. I haven't given it much thought, but I really do want to draw the attention of the committee to this source of business, and perhaps they can get some of the financially able citizens to go out and commit a few good crimes. (Applause and laughter.)

C. H. DARLING: There is one factor I know of but you haven't considered. It is one of the principal reasons for loss of business. That is the extension of the Federal Government into our work. I happened to pick up a little treatise in a current magazine on St. Paul, who happened to be a great Roman lawyer. I don't remember his exact words, but what he said about the Roman Government infringing on his practice is very applicable to the Federal Government today. Consider the things we used to do for our clients that are now being done or performed for them by the Federal Government, and you can see in dollars and cents where we lose business. I am not criticizing the government in its paternalistic program; some of those things should have been done, but I do suggest to this committee the reason why the source of income of the lawyers has diminished. I can't suggest any specific solution of the problem. If we had a Congressman or Senator down here, we could get some suggestions as to how to stop the free advice being given from the governmental agencies.

PRES. GOFF: The next subject for discussion is to be presented by Mr. Tom Martin of Boise on the Future of Reclamation Development in Idaho. Mr. Martin.

TOM MARTIN: Mr. President and Members of Idaho State Bar:

Idaho has an area of 84,000 square miles. It is larger than the combined area of the States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, New Jersey, Delaware, Maryland and Rhode Island. Its 53,000,000 acres are classified as:



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|---|---|
| Agricultural lands | 21,000,000 |
| Timber lands | 20,000,000 |
| Grazing lands | 7,000,000 |
| Mineral lands | 5,000,000 |

When we think of irrigation we naturally think of the great plains and valleys of southern Idaho and the rivers whose waters are reclaiming these lands—the Weiser, Payette, Boise, the great Snake, and their tributaries; and in the extreme southeastern portion the Bear River; nor should we overlook the Lewiston area and the Clearwater.

### THREE STAGES OF IRRIGATION DEVELOPMENT

Irrigation has advanced through three distinct stages of development. The first stage was the settlement of the river and creek bottoms. The irrigation problem was not difficult. The homesteader built his individual ditch, bringing water from the stream to his land. He grubbed the sage brush, diverted water and put his land under cultivation. There was plenty of land and water for everyone. Neighbors began to arrive and the original ditch was enlarged to serve additional farms; thus began development in irrigation by cooperative effort.

With passing years came more settlers and the river and creek bottoms were no longer sufficient. Then began construction of canals leading from the streams to the bench lands. Every community in southern Idaho furnishes an illustration of this development—shows the pioneer spirit and optimism of those who visualized farms and homes far removed from the river bottoms. The larger canals during this period of development were constructed entirely with private capital. The canals and water rights were privately owned and the water rented to settlers. Our farmers were not long content to rent water, so our Legislature devised a plan (S. L. 1895, p. 183) whereby irrigation districts could be organized and the farmers thereby acquire water rights and distribution systems. That act is the foundation of our present irrigation district law; every irrigated section of Idaho illustrating the soundness of the plan.

### THE SECOND STAGE

There was a limit beyond which private capital could not go in the construction of large and expensive irrigation systems with long transmission canals. Idaho had tremendous areas of agricultural land susceptible of irrigation and valuable only if irrigated. The expense was beyond the ability of private capital under then existing laws. The first great impetus toward irrigation of large tracts, far removed from the streams, was the enactment by Congress in 1894 of the Carey Act, which authorized the Secretary of the Interior, upon application of the arid states, to withdraw from entry land susceptible

of irrigation from a common source. As illustrative of its benefits I refer to the Richfield Tract, and the North and South Side Twin Falls Tracts. The financing under this Act still was by private capital.

There were let large areas susceptible of irrigation which were beyond the ability of private capital to reclaim even under the Carey Act. So in 1902 Congress passed another law creating the United States Bureau of Reclamation. That act authorized the entire initial investment made by the government to be repaid over a period of years, without interest. Idaho again became the beneficiary of congressional legislation. Illustrations under the Reclamation Act are the Boise, Minidoka, Burley, Black Canyon and Owyhee in Idaho and Oregon, and Island Park (a supplemental water supply) projects. The government could construct the necessary distributing systems and, in addition, build dams, thus creating storage capacity.

### THIRD AND LAST STAGE

The third and last stage involves providing storage capacity so that water normally wasted during the non-irrigation season will be stored for use during the irrigation season. This last stage perhaps is the most interesting, and beyond doubt will be the most beneficial and permanent of all the stages in irrigation development.

We have accomplished much in water storage but that stage is yet in its infancy. Should you think we are standing still while water is going to waste, let me direct your attention to some of our accomplishments in storage. We have constructed about 400 storage dams. A few of the larger ones are:

American Falls, Jackson Lake, Blackfoot Marsh, Arrowrock, Deer Flat, Magic Dam, Salmon Falls, Island Park, Deadwood, Rock Creek, Mud Lake, Lake Walcott and Crane Creek. These reservoirs each impound from 60,000 to 1,700,000 acre feet.

We now have a total storage capacity of approximately 6,000,000 acre feet. To this we can safely add the Anderson Ranch Reservoir on the south fork of the Boise River of 500,000 acre feet, of which 338,000 are available for irrigation; 700,000 acre feet at Cascade on the north fork of the Payette River, and we hope we may soon add 1,300,000 acre feet at the Palisade or Grand Valley on the south fork of the Snake River and many small reservoirs in various stages of development. This is encouraging, particularly since only within comparatively recent years has storage received serious consideration.

I confidently believe the time will come when all available water will be impounded. We shall build sufficient supplemental reservoirs to impound water during abnormally wet years for carrying over to abnormally dry years. The peaks and valleys of the water distribution



will then disappear. We shall improve our methods of irrigation so the available water will be put to the highest possible duty. We shall reduce transmission losses to the minimum. When these things have been accomplished, and only then, will Idaho have reached the maximum in irrigation development.

The fundamental foundation, and the motivating force, of our accomplishments have been individual, group or community effort, assisted only when necessary by sympathetic and understanding, existing federal agencies. We have seen ditches built, lands cleared, crops planted and homes erected. We have seen trails across the sagebrush plains (then called roads) replaced by paved highways. We have seen cities, schools, churches, hospitals and public buildings replace drab and barren wastes. We have seen industries, factories and processing plants established. We have seen hydro-electric developments and electric power distributed for our comfort. This is a permanent civilization capable of ever increasing wealth. All of these accomplishments because water has been applied to productive soil by a people who have confidence in themselves, confidence in each other, confidence in the resources of our state, and a willingness to work and build together.

### WHAT DOES THE FUTURE HOLD FOR IDAHO?

The more serious the problem the more careful and deliberate should be the approach to its solution. The future of Idaho in reclamation development may be serious. I shall try to present as briefly as possible wherein our danger lies, because of certain legislation now pending in Congress.

During recent years individuals and groups in Washington, and elsewhere, have advocated the creation of federal regional authorities covering various portions of the United States. Finally, the Tennesee Valley Authority was created as a testing ground of the practicability of such authorities. It is doubtful whether that authority has been in existence long enough to prove its feasibillty or justify its expenditure by the government.

Notwithstanding this, a number of bills have been introduced in Congress this year seeking to create such federal regional authorities. The first was introduced in the House of Representatives on January 10, 1941, No. 1823, with a companion bill in the Senate, creating "Arkansas Valley Authority". The proposed act embraces the drainage basins of the Arkansas, St. Francis, Red and White Rivers. It would create a corporation with three directors appointed by the President, with the advice and consent of the Senate, each with an annual salary of $12,500.00. One member would be designated as Chairman. The only qualification of the directors would be that they shall be citizens of the United States. This corporation would have succession

in its corporate name; could sue and be sued; adopt and use a seal; adopt, amend and repeal by-laws; acquire by purchase, lease or condemnation, both real and personal property, and specifically, "shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, power houses, power structures, irrigation canals, divresion facilities, ditches, laterals, conduits and pipe lines, levees, floodways, structures, and facilities useful for navigation, flood control, reclamation, irrigation, and sites for defense projects, together with appurtenant facilities, at any point along the Arkansas, St. Francis, Red and White Rivers, or any of their tributaries."

By Section 15 (a) of the proposed act the corporation could issue and sell bonds not to exceed $50,000,000 outstanding at any one time for the construction of any dam, steam plant, canal, pipe line, conduit or other facility. The number of such structures is unlimited; therefore, the total amount of bonds thus authorized is unlimited.

By Section 15 (b) and (c) the corporation could issue an additional $100,000,000 in bonds for the purposes therein specified. The far reaching effect of this power to issue bonds will be better understood from subdivision (d) of said section, from which I quote:

> "Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the faces thereof, and such bonds shall be lawful investments, and may be accepted as security for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof."

The proposed act further provides that in the event of default in either principal or interest, the same shall be paid by the Treasury of the United States.

As evidence that this Act intends specifically to disregard all state rights, I quote a portion of Section 22 (a):

> "To insure the integrated and coordinated promotion of navigation, control, and prevention of floods, safeguarding of navigable waters, reclamation of the public lands, and protection of the United States, no dam, appurtenant works, sewer, pier, wharf, bridges, trestle, landing pipe, buildings, float, or other or different obstruction or polluter affecting navigation, the use of navigable waters, flood control and prevention, the public lands, or property of the United States, shall be constructed, or operated or maintained, over, across, along, in or into the Arkansas, the Saint Francis, the Red, or the White River, or any tributary of any of said rivers, except in accordance with plans for such construction, operation, and maintenance approved by the Corporation. The requirements of this section shall be in addition to the requirements of all other applicable laws of the United States or of any State;"



If the above provision should become a law, all state rights to control the waters of the four rivers named therein would wholly cease to exist.

Now as to agreements between States. The Constitution of the United States provides that states may enter into agreements and compacts between themselves, if Congress consents thereto. The proposed act would abrogate this right by Section 23, which provides:

> "The consent of the Congress, subject to the provisions of this section, is hereby given the several States to enter into agreements and compacts between or among any two or more States (1) to further and supplement on behalf of the States the purposes of this Act; and (2) to carry out on behalf of the States appropriate projects and activities in relation thereto; **Provided, however,** That no such agreement or compact shall become effective or binding upon the States party thereto unless and until it shall have been submitted to and approved by the Corporation and ratified by Congress. The Corporation shall approve any such agreement or compact if it finds such agreement or compact and the projects and activities contemplated thereby, to be feasible, practicable, and appropriate to and consistent with the policies and purposes of this Act, and shall, insofar as practicable, cooperate with and furnish information and assistance to the States for the purpose of negotiating, entering into, and carrying out agreements and compacts pursuant to this section."

You thus see the rights of states to enter into agreements and compacts would be abrogated unless and until such proposals are first submitted to and approved by the Corporation and then be ratified by Congress. In other words, the corporation would be supreme.

Under the proposed Act there is not a natural resource of any kind within the river basins of the Arkansas, St. Francis, Red and White Rivers which would not be subject to the absolute will and authority of the Corporation.

The next bill, No. 831, introduced in the Senate on February 10, 1941, seeks to create an authority over the Missouri River and its tributaries in the states of North and South Dakota, and known as "Dakota Valley Authority".

The next bill, No. 4128, introduced in the House of Representatives on March 21, 1941, is the "Conservation Authorites Act of 1941".

Under this bill nine authorities would blanket the entire United States. I present a map illustrating by colors the area which would be controlled by each of such authorities.

The next bill, introduced in the House of Representatives on June 23, 1941, No. 5129, seeks to create the "Columbia Power Authority", better known to us as the Columbia River Authority. That Authority, if created, will extend over the Pacific northwest—which area is defined in the bill as "the states of Oregon and Washington and other portions of the United States which form part of the Columbia River basin, or which are within economic transmission distance of the generating facilities within the foregoing areas producing power available for sale under this act."

Section 3 of that Act would create the "Columbia Power Authority * * *, a regional agency in the Department of the Interior". The chief executive officer is the Administrator. "All of the powers of the Authority shall be vested in the Administrator and shall be exercised by him subject to the direction and supervision of the Secretary of the Interior." The Secretary of the Interior appoints the Administrator and his two assistants.

Under Section 4 (b) the Authority **shall** make estimates of the increased needs for electricity and make plans for the construction and operation of dams, reservoirs, and other works for the use and control of water in the entire Columbia River basin. The theory is one of co-ordinated, unified and integrated development of the entire region, without reference to any particular portion thereof. Section 4 (b), regarding plans and recommendations, specifically prescribes:

> "In making these plans and recommendations the Authority shall take into account the policy of the Congress that the water resources of the region shall be used so far as practical to meet the combined requirements of navigation, irrigation, flood control, power, and other purposes and to bring about the greatest possible benefits to the entire drainage areas of each river system in the region."

Subdivision (c) of Section 4 would require other federal agencies to report to the Authority any proposed development, and certain requirements would be exacted of those agencies before they could proceed with construction or grant a license therefor. Then follows:

> "In making its reports, the Authority shall consider the unified and balanced development of the region, the relationship of the proposed reservoir, dam, or other works to existing or proposed works of a similar type and character in the region, the most beneficial order of construction or installation of reservoirs, dams, or other works in the region, and the relationship of the proposed works to plans theretofore developed or adopted by the Authority."



Then, subdivision (d) of section 4 reads:

> "Other Federal agencies, before undertaking the construction of dams, reservoirs, and other works for the use and control of the water of any stream flowing in, through, across, or out of the river or any tributary of such stream, shall consult with the Authority as to the desirability of including facilities and structures for the generation of power to be marketed by the Authority in the original construction of such works or at any time thereafter; * * *."

No power could be developed except upon the Authority's approval of the design of construction or installation. There always would be the problem of including additional facilities designed to generate added power for marketing by the Authority. Such problems could easily prevent multiple purpose dams in Idaho.

When all the above provisions are considered together, it is perfectly evident that if the Columbia Power Authority is created under this proposed Act all waters of the State of Idaho will be absolutely subject to the jurisdiction of the Administrator appointed by the Secretary of the Interior.

Generally, and without limitation (sections 6-7), the Authority could acquire, in the name of the United States, by purchase, lease, condemnation or donation, any and all electrical systems operating in the region, in whole or in part; could construct hydro-electric plants and transmission systems without limitation; operate any plant so acquired or constructed; sell electrical power; purchase the stocks or bonds of existing utilities and sell them; sell distribution facilities acquired by it, and, with the approval of the Secretary of the Treasury, issue and sell not to exceed $200,000,000 in face amount of notes, bonds or other obligations outstanding at any time. If the Authority could not pay its obligations when due, either principal or interest, the Secretary of the Treasury would have to pay them.

In addition, by section 15 (b), the Authority would have broad power to acquire other property; thus:

> "The Authority is authorized, in the name of the United States, to acquire by purchase, lease, condemnation, or donation such real and personal property or any interest therein, including, but not by way of limitation, lands, easements, rights of way, franchises, and patent rights, as the Authority finds necessary or appropriate to carry out the purposes of this Act."

Section 19 contains an unusual provision, apparently unlimited in scope, which reads:

> "The Authority may establish, organize, and use such agencies, including corporate agencies, as it finds necessary to carry out the purposes of this Act."

Thus, we find Congress asked in the above Act to create a federal agency which shall also have power to create other agencies, including corporations. Where would this thing stop?

Again, section 22 is unusual:

> "The Secretary of the Interior may make such rules and regulations as he may deem necessary or appropriate to carry the purposes and provisions of this Act into full force and effect. The determination of the Secretary, whenever made, that a particular activity or understanding is authorized by this Act, shall be final and conclusive upon all officers of the Government."

This means that Congress is asked to delegate to the Secretary of the Interior the absolute and exclusive power to determine what activities or undertakings are authorized by the Act, and the determination of the Secretary "shall be final and conclusive upon all officers of the government". Even Congress itself would doubtless be bound by the Secretary's decision.

Another provision is this Act which requires very careful consideration and analysis is section 13, by which the Columbia Power Authority Fund is created and section 14 authorizing the use of the moneys in the Fund. In section 14(a) priorities are created for the use of these funds and it would seem impossible in advance to determine the amount allocated by the first paragraph of subsection (a) of section 14, which is the first priority. In (2) there is a provision for the payment of certain sums in lieu of taxes. This, however, is very restricted in its scope. It applies only to properties acquired by the Authority pursuant to section 7(a) and owned by the Authority during the taxable year. It has no application to plants, transmission lines or to the facilities constructed by the Authority but only to privately owned plants, transmission lines and facilities acquired by the Authority under section 7 (a), and only during such time as owned by the Authority. When this is considered in connection with section 7 (b), which specifically provides:

> "The Authority is hereby directed to sell or otherwise dispose of, and it is authorized to convey, the distribution facilities acquired pursuant to subsection (a) of this section, and any improvements thereof, * * *."



It might cinch the point here by giving the total taxes paid in Idaho today by utilities and ask if the rest of the people stand ready to absorb this loss, for if such legislation is passed, the whole amount would be potential loss. All state, $2,000,000; federal $1,000,000. You will readily see the anticipated amount to be received in lieu of taxes may be little or nothing, and is certain to decrease year by year. When the Authority sells any of these facilities it will immediately become non-taxable under the constitution and laws of Idaho, and such apparently is the ultimate purpose of the Act.

All these bills, to which I have referred, apparently are designed to accomplish one purpose: To establish Federal Regional Authorities with absolute power over all natural resources of one or more river basins. Such a theory fails to take into account the variations of climatic conditions, altitude, rainfall and diversity of natural resources. As said by Governor Carr of Colorado in a recent address before the United States Chamber of Commerce in Washington, D. C.:

> "There are mountains and prairies, river valleys and deserts, mineral sections and farm lands; there are areas which are covered with snow many months in the year, while elsewhere frost is unknown. And so long as men live in such differing atmospheres just that long are there going to be local problems which can be solved only by local agencies alive to localized needs and conditions."

The Columbia River basin has an area of 259,000 square miles, of which 39,000 square miles are in Canada and 220,000 in the United States. Idaho comprises more than 38% of the basin's area within the United States. Every stream in this state, save Bear River alone, is a tributary of the Columbia River. Under the proposed Columbia River Authority no man could divert water from any natural stream included in the Columbia River basin, or impound water therein without the approval of the Authority. Please make no mistake in that regard.

Perhaps you will say that such a law would be unconstitutional, and quoting from Section 3, Article 13, of our Constitution:

> "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied."

You may seek to fortify your position by the first section of the Idaho Admission Bill, enacted July 3, 1890, in which the Congress declared:

> "That the State of Idaho is hereby declared to be a state of the United States of America, and is hereby declared ad-

mitted into the Union on an equal footing with the original States in all respects whatever; and that the Constitution which the people of Idaho have formed for themselves be, and the same is hereby, accepted, ratified, and confirmed."

The citizens of Idaho have been justified in assuming that the waters within our borders are under the control and jurisdiction of our state and its Constitution and laws. However, two decisions of the Supreme Court of the United States, handed down within the last few months, are disturbing. The first is known as the New River Decision or United States vs. Appalachian Electric Power Company, decided December 16, 1940, and the other, State of Oklahoma vs. Atkinson Company, reported a few days ago in the United States Supreme Court advance sheets in Volume 85, page 977, being Advance Sheet No. 15.

It may be argued that the New River Decision does not change the law as heretofore announced by the Supreme Court. Whatever we may think of that decision, I suggest you read an article by Honorable John W. Scott, member of the Federal Power Commission, setting forth his interpretation of the scope of the decision and the authority which he believes it gives federal agencies over the waters within the various states. Among other things he said:

> "Streams, river basins, and watersheds are unaware of State boundaries, and their proper development cannot be confined thereto. Rains fall and snows blanket the slopes of our mountains without regard to state lines. These blessings of nature are bestowed without regard for political subdivisions."

The Oklahoma decision is even more distressing, as applied to the arid states; quoting therefrom:

> "We would, however, be less than frank if we failed to recognize this project as part of a comprehensive flood control program for the Mississippi itself. But there is no constitutional reason why Congress or the courts should be blind to the engineering prospects of protecting the nation's arteries of commerce through control of the watersheds. There is no constitutional reason why Congress cannot under the commerce power treat the watersheds as a key to flood control on navigable streams and their tributaries. Nor is there a constitutional necessity for viewing each reservoir project in isolation from a comprehensive plan covering the entire basin of a particular river. We need no survey to know that the Mississippi is a navigable river. We need no survey to know that the tributaries are generous contributors to the floods of the Mississippi. And it is common knowledge that Mississippi floods have paralyzed commerce in the affected areas and have impaired navigation itself. We have recently recognized that 'Flood protection, watershed development, recovery of the cost of improvements through utilization of power are . . . . parts of commerce control.' United States v. Appalachian Electric Power Co. supra (311 US p. 426, ante, 218, 61 S. Ct. 291). And we now add that the power of flood control extends to the tributaries of navigable streams. For just as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries."



Under these decisions, a farmer in Idaho living on Pole Creek may have an ideal reservoir site where he could build a dam and impound water for the irrigation of his farm; but Pole Creek flows into Rattlesnake Creek; Rattlesnake Creek flows into Skunk Creek and Skunk Creek into Snake River, and Snake River into the Columbia River, which is a navigable stream. Therefore, the farmer cannot build his dam on Pole Creek because it is a tributary of a navigable stream.

### THE UNIFIED, COORDINATED AND INTEGRATED THEORY OF DEVELOPMENT

If Idaho is to be considered only in connection with a unified, coordinated and integrated development of of 220,000 square miles, I predict little, if any, reclamation development in this state during the next half a century. That statement is based upon these facts:

The Columbia plateau surrounding Grand Coulee dam has available 1,200,000 acres awaiting reclamation. The development between Arlington, Oregon, and Pasco, Washington, along the Columbia, and between Pasco and the eastern border of Washington along the Snake, would bring under cultivation 450,000 additional acres. That means placing under irrigation 1,650,000 acres of new land in Oregon and Washington by government projects, at a cost greatly in excess of $600,000,000 for power, navigation and irrigation. The colonization of this land at the rate of 50,000 acres per year (which is impossible), would take a third of a century.

I submit to you whether a Columbia Power Administrator will be interested in further reclamation development in Idaho, **under a coordinated and integrated system**, so long as lands are available under projects already constructed, in which the government's invested money can be repaid only by the colonization and productivity of those available lands.

All the proposed bills are proceeding upon the theory of the necessity for further power development, flood control and navigation.

There are no navigable streams in the arid portion of Idaho in a federal sense so that element of benefit to us may be eliminated.

We can aid in flood control by the construction of dams on the upper reaches of our rivers and, while thus aiding, we, at the same time, will be storing water for beneficial use, the reclamation of our lands, power development, the building of permanent homes, and the creation of permanent wealth.

Now regarding power development, Idaho perhaps is the most fortunate state in the arid west in potential, feasible hydro-electric power possibilities. We want this power developed, but we want the people of our state to derive the benefit of its development. We desire and we have the right to have the revenues from electric power developed in this state used to carry part of the cost of reclamation. Let me illustrate what I mean. Boise Valley has 350,000 acres under cultivation—including the government project of about 176,000 acres. We seldom have sufficient water throughout the irrigation season and sometimes suffer severe shortage. After thorough investigation we found a reservoir site on the south fork of Boise River at Anderson Ranch, which will impound 500,000 acre feet at a cost of between 13 and 14 million dollars. That cost would be prohibitive for irrigation alone. We worked out a cooperative agreement between the farmers, the Bureau of Reclamation and the corps of army engineers allocating the capacity thusly:

| | |
|---|---|
| Irrigation | 338,000 acre feet |
| Power development | 117,000 acre feet |
| Flood control | 45,000 acre feet |

Cost for irrigation about $4,650,000—balance power and flood control. Thus our farmers will receive the direct benefit of both power and flood control, as well as irrigation water.

Now let us consider a very important and necessary development at Grand Valley, or the Pallsades, on the south fork of the Snake River. Capacity about 1,300,000 acre feet. Cost about $22,000,000.

Cost for irrigation alone prohibitive.

For power alone—cost perhaps not justified.

Flood control alone—in excess of requirements.

Suppose we cooperate with the Bureau of Reclamation and the corps of army engineers in that construction, and allocate portions of the cost respectively to irrigation, power, and flood control? The project then becomes feasible. The irrigation and flood control take care of themselves. But what of the electric power? Do you realize that within a short transmission distance of that reservoir site Idaho has approximately five billion tons of phosphate rock? That the estimated world supply is only 16,450,00 tons? That the total supply in the United States is only 6,515,000,000 tons? That we in Idaho have 76% of the United States' supply and 39% of the world supply? There is the answer to the power development. We have a product which our country needs in its defense program, and our farms will need for all time.



By these illustrations I have tried to demonstrate what it means to the people of this state to receive the benefits from power marketing. On this latter question I want no misunderstanding of my position, which is:

If a federal power agency can take Idaho's developed power at the generators at a price more beneficial to the project affected, under all the conditions, than will be paid by privately owned power companies, then it should be marketed by such federal agency. On the other hand, if the greatest benefits can be derived through private agencies, then that method ought to be pursued. I am not interested in either privately owned utilities or federal power agencies. I am interested in any feasible plan for the development, as rapidly as possible, of hydro-electric power within the state, and that the benefits from such development be used to reduce the cost to our farmers of reclamation development. The power developed ought to assume as large a percentage as possibl of the cost of reclamation and farm lands pay only that amount which cannot be paid from power revenues. We should not be interested in cheap power for cities and industries at the expense of agricultural development because, if it were not for agricultural development—the backbone of all industry—we would have neither cities nor industries.

If you feel that I am pessimistic concerning our future development under the proposed authorities, I will cosider further the proposed Columbia River basin development. I have a portion of the report of Dr. Raver, Administrator of the Bonneville Power Administration, of December 30, 1940, to the Secretary of the Interior and transmitted by the Secretary to the Speaker of the House of Representatives. This report includes several plates showing the contemplated development on the Columbia and Snake Rivers. I have had these plates enlarged so you may readily see and understand them.

Plate No. XVII shows that by December, 1945, the Boise area will have a power deficiency of 8,000 kilowatts, and by 1950 (Plate XVIII) a deficiency of 50,000 kilowatts. Each of these plates contain the following statement:

"Existing capability of utilities assumed not to change after 1940."

I would take this to mean that existing power companies will not be permitted to increase their production facilities after 1940.

Plate XIX shows how it is proposed to supply the above deficiencies. In 1945 the Boise area is to be supplied 8,000 kilowatts from Bonneville and Grand Coulee. In 1950 (Plate XXI) the same area is to be supplied 49,600 kilowatts from Bonneville, Grand Coulee and Umatilla. There is certainly nothing in this report which indicates an intention by the Bonneville Power Administrator to develop hydroelectric power in the State of Idaho before 1950.

You might properly say that the Umatilla dam construction is a long way off. Not as far as you might imagine! This year the Rivers and Harbors Committee of the House of Representatives recommended $23,700,000 for construction of the Umatilla Dam. According to tentative plans the dam would be constructed for navigation only, but would include foundations or facilities later to be utilized in the installation of machinery for development of electrical energy.

Do not overlook this fact, that every argument, which has been, or can be, made in favor of destroying state rights in the control and use of water within state boundaries, can be made with equal force regarding every natural resource we possess. Any man or group of men who control the waters in a given region will control the lives, the future and fortunes of the people within that region. The proposed Columbia Power Authority would create a new kind of government, neither state-like nor federal in its operation. The Administrator and his two assistants woud be responsible to no one, not even Congress, save only their creator, the Secretary of the Interior, who alone would make the rules and regulations by which the game is to be played; decide what will be done and how it shall be done.

Once this character o ffederal encroachment is recognized and acquiesced in we may logically expect its extension, one by one, to include all Idaho's natural resources. Once begun, there is no logical place to stop.

When we discuss the future development of Idaho we are not thinking in terms of the immediate future, nor even of development confined to a period within our lifetime. Changing conditions will present their problems. Based upon our developments to date, and the methods by which these developments have been accomplished, we should be able to set forth certain fundamental principles as a guide for our future; namely:

1. Not only is it proper and advisable, but it is necessary for the public welfare that our river basins be developed to the maximum. In this development there should be cooperation between the affected states with the federal government, acting through its appropriate existing agencies.



2. It is recognized that our river basins, if properly developed, are capable of producing permanent and ever increasing wealth through the protection and proper use of our range and forest lands, by the construction of dams for irrigation, flood control and power development, and the development of our other natural resources.

3. In arid states security, permanency and future progress are wholly dependent upon irrigation. A denial of the right to use our water within our state will be the first step in our disintegration. Therefore, in all legislation affecting our river basins all rights heretofore acquired, under any state or federal law, should be scrupulously safeguarded, and future development should be encouraged and protected.

4. In the development of river basins it is not necessary, nor in the public interest, that present developments be jeopardized or that rights already acquired be made doubtful or insecure; or that future development and acquisition of future rights be prohibited or discouraged. We believe that every part of, and every resource within, river basins may be developed to the maximum without adversely affecting existing rights or interests of any part of the basins or of the people therein.

5. Finally, we believe in state rights as contemplated by the founders of this government and as guaranteed by the Constitution of the United States. Therefore we are opposed to any form of federal legislation designed to interfere with, or which would permit interference with, the rights of the various States to develop the natural resources within their boundaries, or which would in any way interfere with a state's right to adopt such policies and enact such laws as it may deem necessary for the control and development of its natural resources, or which would interfere with the rights of any citizen heretofore acquired or which may hereafter be acquired.

To such a program of development we can and should give our unqualified support.

PRES. GOFF: That is a very fine talk by my friend, Tom Martin. We will now have the discussion lead by Judge Bothwell of Twin Falls.

JAMES R. BOTHWELL: After listening to this discussion by Mr. Martin of the vast and far reaching consequences of this Columbia River Authority, nothing can be added that will be of any immediate benefit. I inquire of Mr. Martin what program should be followed. He has given considerable attention and a great deal of study to the various phases of these authorities.

As he stated, our constitution provides that the right to appropriate the public waters of this state shall never be denied. I should like to ask Mr. Martin if he has given that subject any consideration in view of these congressional proposals. That seems to need our immediate support to preserve rights at this time.

MR. MARTIN: I will speak now, not as a speaker, but from the floor. Unless we, as attorneys who are regarded as the leaders of public thought in our various communities and who advise our clients as to their rights and how to protect them, give some attention to the present trend of Federal Legislation and advise our clients on that matter, we are going to find this kind of legislation on our statute books. But our clients come to us with only their immediate problems. We owe it as members of the Bar and as citizens of this State to get these proposed laws, to study them, analyze them and inform our clients what such legislation means to them and what it means to the State of Idaho. I know of no other means than by the information such as I have just given you, can reach the man on the farm, who is first, primarily and directly affected, except that it be done through the attorneys of this State. It takes time, and it takes a tremendous amount of work. It will take any attorney at least a whole day, if not longer, to analyze any one of these bills and get the purport of it.

If we agree the present trend of legislation for the creation of regional authorities would not be for the best interest of the people of Idaho, then we should be willing to seriously attempt to prevent the enactment of any of the proposed Federal Authority bills. You naturally ask, what can we do? It occurs to me we should first be willing to give the necessary time and study to the proposed legislation and then make it our business to acquaint our clients, farmers and businessmen alike, with the effect such legislation would have on the development of our state. In this connection it should be borne in mind that committee hearings will be held in Washington and we should aid in every way possible those who are to appear before the appropriate committees. We have many farmers and businessmen whose judgment and opinions would be appreciated by these committees. The committee will not be interested in oratory but is vitally interested in a presentation of the facts and proper conclusions drawn from these facts. In this we can render valuable assistance to our clients and to the congressional committees.

People have been reading about these proposed authorities and there will be no difficulty in acquainting them with the facts through existing agencies, which cover every part of the state. For instance, we have a National Reclamation Association which has an Idaho director; Idaho State Reclamation Association; Idaho State Chamber of Commerce; Junior Chamber of Commerce; local chambers of commerce; Idaho State Grange with all its local and Pomona Granges; Regional Chambers of Commerce such as North Idaho Chamber; Associated Chambers of Commerce of Southwestern Idaho and Eastern Oregon; Southern Idaho Incorporated; Eastern Idaho Chamber of Commerce, and Southeastern Idaho Chamber of Commerce. Clubs such as the Rotary, Kiwanis, Lions, Exchange, Business and Professional Woman, and many others which will readily occur to you.



I see in this group many young men. You young fellows must realize that we older men will do what we can and go as far as we can, but we are facing limitations. You have your lives before you, and this State is in its infancy. While some of us have seen it come a long way, it is still going forward to much greater development. Many of us are starting to look backward, but you fellows cannot do that. Idaho not only must be a producing State, but it must be a processing State, too.

We talk of pioneers. The pioneer of tomorrow is the builder of today. It makes no difference what age he is living in or what he is building, if it is beneficial to his state and community. We don't have to go back to the 60's to find pioneers. We had pioneers thirty years ago when somebody dreamed they could irrigate the lands around Twin Falls from the Snake River. We had pioneers in Boise who built the first Court House in Boise, and those who built the new Court House will be pioneers to our children and grandchildren. Don't think you are unfortunate in not living in the Pioneer Age, because you are living in the Pioneer Age today, and the builders of today will be the pioneers of tomorrow, just as the builders of yesterday are the pioneers of today.

KARL PAINE: I would like to know whether you believe it would be possible to have cooperation with the Federal Government and protect our State rights at the same time? You know and must recognize the law announced in Judge Douglas' opinion as to flood control, and I was wondering whether we could rely upon our constitutional provision, or whether flood control as a national problem will supersede that. Perhaps we have to treat that as a national problem.

MR. MARTIN: Karl, it is pretty hard for me to answer that as I am so shocked at this opinion by Justice Douglas. I haven't been able to see that through yet, and it is a matter for very careful deliberation and thought. If necessary, we may have to comply with that philosophy and still aid the State of Idaho in some way to develop itself. It can be done. It could be done, for instance, in my judgment, by the Bureau of Reclamation and Corps of Army Engineers. We have worked for forty years with them, and it is my idea, there would be no encroachment on State rights or interests if we

could go with them, those tried and true organizations, but if we get a bill such as the Hill Bill, where the Secretary of Interior appoints a man responsible to the Secretary only, and the Secretary makes the rules by which the game is to be played, I don't know what the answer is.

You must understand in all of these bills, each provides for the appointment of a little group. Out goes the Bureau of Reclamation and Corps of Army Engineers, both of them becoming subservient to this little group.

A. L. MERRILL: After all, isn't this the logical result of acceptance of paternalistic benefits of the government? Can we continue to accept the Federal aid and Federal benefits without being compelled to yield in some of the things you have mentioned? I have wondered if that isn't the real heart of the things?

MR. MARTIN: I think all states have been selling themselves down the river for several years. We judge the capabilities of our representatives by the amount of money they can get from the Federal Treasury, not realizing that the Treasury never had a dollar, and never will have a dollar, except it takes it from the citizens themselves, and yet we want more and more. I am not referring to those activities which are properly federal in character, such as the federal highway program, in which the government aids states in building highways over lands, a large portion of which is public domain; or to forest service roads and trails making the federal forests accessible, or to reclamation projects which create national wealth and provide permanent homes. I do refer to purely local problems, such as swimming pools, recreational grounds, drain ditches, road repair, local buildings and enterprises of this character which have no federal significance whatever. I agree with Mr. Merrill. We cannot indefinitely ask the federal government to provide the funds for purely local enterprises without ultimately sacrificing the broad principles we know as state rights.

MR. BOTHWELL: Mr. Paine raised the question that the immediate problem is, at the present time so far as the future development of reclamation in Idaho is concerned, the actual remedy for the situation in which we are now concerned. As Mr. Martin stated, perhaps there can be some bill worked out which will preserve the rights in Idaho and preserve the beneficial use theory, and still get the reservoirs. It seems to me there could be some plan worked out so that the State can cooperate with these Authorities, if we are going to have them and evidently we are. It seems to me the real crux of the situation, as maintained by Mr. Paine, is whether or not we can make a place for our constitutional rights so far as our national rights of water are concerned.



Phosphate development is coming, and we must have the power development and development of flood control before we can have irrigation in Idaho. But in Idaho we have to have the Federal support; we have to have the reservoirs.

MR. MARTIN: I am personally willing to admit we must have some kind of Federal authority in respect to power development by the Government of the United States, but in my judgment that is where the authority should cease. It should begin when the power developmed is ready for market; there should be a marketing authority, not an authority with power to construct and operate and maintain, but it should take the power when it is developed; if it is to be marketed by the government of the United States or a Federal agency, have them do it in order to accomplish that end, but not to give them power to acquire properties and construct and to operate and to buy and sell these many plants. It isn't the question of marketing excessive quantities alone. We must have power development in Idaho from now on with the development of our reclamation, but I want Idaho to get the benefit of that power. With how it is marketed, I am not concerned so long as we get the benefit of it, but the Federal agencies should go no further than to take the power when it is ready for delivery and then market it.

MR. PAINE: By benefits you mean the reducing of the costs of irrigation; to the farmers, Mr. Martin?

MR. MARTIN: Yes. The Anderson dam is a good illustration of that. It is costing between thirteen and fourteen million dollars. It impounds 500,000 acre feet of water, and the farmers get 338,000 acre feet and they will meet about four million dollars of the cost, and the rest is absorbed by flood control and revenue from power. That is the ideal situation and it makes no difference to us whether it is marketed by the Government or by private enterprise, so long as our people get the benefit of it.

JUDGE ALFRED E. BUDGE: Who would control it during construction and after construction? The Federal Government would give thirteen million dollars and have no control over the expenditures?

MR. MARTIN: Let's take the Anderson dam. There is a certain amount of power developed, which is to be marketed. Suppose the power is to be marketed, then the development is by the Bureau of Reclamation and Corps of Army engineers. These irrigation districts would get together and do as they have done, the Bureau have control of the construction and control of the operation until it gets into operation. Say we have eighty thousand kilowatts ready for you; you take it and market it and distribute it through the Federal selling agency.

PRES. GOFF: I am happy to present Mr. Everett Taylor of the New York Bar, who will address us on the subject "New York Lawyers Examine Idaho Divorce Laws", Mr. Taylor.

MR. EVERETT B. TAYLOR: Mr. President, Members of the Idaho Bar, honored guests.

In the east, this part of the country is often referred to as the rough and ready west. Having spent a part of each winter for the past four years, as well as the last ten months, out here, I feel I am well qualified to testify on both counts. I have just finished taking your bar examinations and I must say you are quite rough on an innocent and unsuspecting member of the bar of another state, but rightly so.

On the second count I find that the west is ready—ready with its hand of welcome and friendship outstretched. I consider it a privilege and an honor to have been invited to attend and participate in your meetings here at Sun Valley.

Now the tables are going to be turned and for the next few minutes you gentlemen are to be New York attorneys. You are sitting in your 52nd story office in lower Manhattan gazing down the bay and admiring the graceful figure of that grand old girl, the Statue of Liberty. You are thinking how fortunate you are to be living in a country where liberty still lives.

Your door opens and your secretary announces that there is a young lady waiting to see you. She enters and introduces herself. You immediately recognize her as the young married daughter of one of your clients. She informs you that she wishes to retain you as her attorney in divorce proceedings against her husband.

After hearing her story of incompatibility, lack of consideration and cruelty, you are convinced that she has just cause for divorce. The husband will appear in the action. You inform your client, however, that she has no grounds for divorce in New York State, since adultery is absolutely the only grounds recognized in that state.

You advise your client that if she wants a divorce, it will be necessary for her to take up residence in some other state; being the average New York attorney, you immediately think of Nevada and suggest that she go there. Your client has other ideas. She would like to avoid any publicity and she knows that as soon as she steps off the train in Nevada, reporters will flash the news to all the world that another New Yorker is in that state for the usual six weeks' stay. So Nevada is out.

Your client tells you that she has heard of Idaho and that as a place to live there is no comparison. The state has ideal climate,



unsurpassed natural beauty, and is a state in any part of which six weeks residence would be a happy experience. She would avoid the atmosphere of the divorce mills, which is repellant to her, and likewise avoid publicity. Can she go to Idaho?

You inform your client that you are not familiar with the divorce laws of Idaho, but you will be glad to investigate the matter. Before your client has had a chance to reach the street level, you are on your way to the bar association library on Forty-fourth street, just west of Fifth Avenue, where a complete set of Idaho Codes and reports are available.

Upon investigation you find that the divorce laws of Idaho include your client's alleged grounds for divorce, and that the jurisdictional requirement of residence is six weeks.

Next you are interested in the methods and degree of proof required. You find out that Idaho's law (I. C. A. 31-703) provides that no divorce shall be granted solely upon default or confession, but that corroboration is required. That presents no problem, however, since slight corroboration will suffice where there is no collusion between the parties. (Platt vs. Platt, 32 Ida. 407, 184 Pac. 170; Olson v. Olson, 47 Ida. 374, 276 Pac. 34.)

You examine Idaho's law further and find I. C. A. Sec. 31-207, which reads in part as follows:

> "A subsequent marriage contract by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife is illegal and void from the beginning unless:
>
> 1. The former marriage of either party has been annulled or dissolved more than six months . . . "

At first glance this appears to be a stumbling block because your client has told you that she wants to remarry just as soon as her divorce is obtained, and that she may return to New York to live. So the question assumes an aspect something like this:

> Can your client, after obtaining her divorce in Idaho and upon changing her domicil in Idaho, remarry in another state within six months after the decree of divorce is granted? Does the prohibitory clause of the Idaho law have extraterritorial effect and follow her? Will her subsequent marriage be valid or invalid if she goes back to New York to live?

Your further research convinces you that the remarriage of your client would be valid, providing the requirements of the state of celebration of marriage are complied with.

There may have been doubt in your mind at first on this point because your search disclosed such cases as McLennan vs. McLennan (Ore. 1897, 50 Pac. 802). The distinguishing features there are that the party, upon divorce in Oregon and subsequent remarriage in Vancouver, Washington, within Oregon's prohibitory appeal period, returned to Oregon to live, and the marriage was attacked in Oregon and held to be void. Going further—in Lanham v. Lanham (Wis. 117 N. W. 878), a Wisconsin case where a resident obtained a divorce in that state and attempted remarriage in Michigan during the one year prohibitory period and thereupon returned to Wisconsin, the state of domicile, the court held that such attempted remarriage of its citizen was void.

However, by weight of authority, notwithstanding the inhibition of the statute of the state in which the divorce decree is obtained, or of the decree itself, a second marriage to another is valid, tested by the law of the place where the marriage is celebrated. At 31 A. L. R. 1118, cases in support of the above rule are cited from United States, Alabama, Arizona, California, Colorado, Illinois, Iowa, Maine, Massachusetts, New York, Vermont, Washington and Wyoming. Van Voorhis v. Brintnall (N. Y. 1881, 86 N. Y. 18, 40 Am. Rep. 505) is an early New York leading case on the subject and supports the majority view. In that case, both of the parties, residents of New York, went to Connecticut to celebrate their marriage, for the purpose of evading the New York law, which prohibited a second marriage by any person during the lifetime of a former husband or wife where the marriage had been dissolved on the ground of adultery, and further providing that "every marriage contracted contrary to this provision shall be absolutely void." The New York court ruled that such statute did not in terms prohibit a second marriage in another state; that in the absence of express words to that effect such law had no extra-territorial effect.

Other New York cases holding likewise are: Fisher v. Fisher (N. Y.) 165, N. E. 460; In re Green's Estate, 280 N. Y. S. 692; In re O'Keefe, 300 N. Y. S. 27; In re Sokoloff's Estate 2 N. Y. S. (2nd) 602.

The cases just discussed are illustrations where the courts have given extra-territorial effect, or refused to give such effect, to the clause prohibiting remarriage within a specified time. In all cases, however, the clause is limited by the court construction to apply only to the residents of a given state. Nowhere has the rule been better stated than in State v. Fenn (Wash. 1907), 92 Pac. 417 at 419. At the time the case was decided, Washington had a statute which prohibited either party from contracting marriage with a third person until the period in which an appeal might be taken had expired, and further prohibited such a remarriage within six months from the date of the entry of decree of divorce. The law further provided "all marriages



contracted in violation of the provision of this section whether contracted **within or without** this state shall be void." In refusing to give extra-territorial effect to such law, excepting insofar as it applied to Washington's own residents, the court said:

> "A state law regulating marriage may and does have an extraterritorial effect when the Legislature so intends, at least where the parties to the marriage have their domicile within the state; and there is no escape from the conclusion that our Legislature intended that all marriages contracted within the state, and all marriages contracted without the state, by persons domiciled here, for the purpose of evading our laws, should be null and void." The statute is undoubtedly broad enough to include all marriages contracted within the time specified, regardless of the place where contracted and regardless of the domicile of the parties; but we do not think that such was the legislative intent." * * * * * "We are satisfied that the prohibition in question was directed solely against marriages within the state, or by persons domiciled within the state, but contracted in other states, for the purpose of evading our laws, and that no other persons or marriages are included or contemplated."

In Fitzgerald v. Fitzgerald, (Wisc. 1933, 246 N. W. 680) a woman was married in Wisconsin. The parties moved to Illinois. The wife left her husband and returned to Wisconsin. The husband obtained a divorce in Illinois, absolute in form. The divorced wife married a second time in Indiana, before the expiration of one year from the date of the Illinois divorce. The Illinois law provided that any marriage within such year was void. The woman and her second husband went to Wisconsin to live. The second marriage was attacked in Wisconsin. The Wisconsin court held that the Illinois law had no extra-territorial effect and that the marriage was valid, citing Lehmann v. Lehmann, (Ill. 225 Ill. App. 513) in support thereof. Quoting from the Fitzgerald decision, the court said:

> "It is to be noted that the defendant in this case was not at the time of the rendition of the decree of divorce from her first husband or thereafter at any time a resident of the State of Illinois. From the date of that decree, if not before (see Restatement of Conflict of Laws, Sec. 30), she was domiciled in the state of Wisconsin so that by the law of the state of Illinois, whether the defendant was a resident of Illinois and abandoned her residence in Illinois, or was domiciled in Wisconsin, she was validly divorced and could contract a valid marriage in the state of Indiana."

One question, however, relates to inhibition against the second

marriage, by decree or statute of the state in which a divorce is granted, as affecting the second marriage in a third state. By way of illustration, suppose a divorce is granted in Idaho to your client. Thereupon she immediately leaves for the East. On the way, say in Connecticut, your client remarries before six months has expired from the time the divorce was granted, the second marriage being performed in accordance with the laws of Connecticut. Your client thereupon immediately goes to New York and lives there. Where the question as to the validity of the marriage has arisen in a third state —that is, a state other than that in which the divorce was granted or the marriage was celebrated,—such marriage has generally been recognized and given effect, where the divorce was absolute, and the remarriage was valid according to the law of the place where it was celebrated, even though one of the parties was prohibited from remarriage by the decree of divorce or by statute of the state where the divorce was granted. The following cases support the majority rule: People v. Woodley (1913 Cal.) 136 Pac. 312; Bauer v. Abrahams (1923 Colo.) 216 Pac. 259; Green v. McDowell (1922 Mo.) 242 S. W. 168; Dimpfel v. Wilson (1908 Md.) 68 Atl. 561; Goodwin v. Goodwin (1913 N. Y.) 142 N. Y. S. 1102, affirming 141 N. Y. S. 175; Roberts v. Ogdensburgh & L. C. R. Co. (1884 N. Y.) 34 Hun 324; Wingo v. Rudder (1909 Tex.) 120 S. W. 1073; Owen v. Owen (Wis. 1922) 190 N. W. 363.

In the New York case of Goodwin v. Goodwin (supra), the parties were married in Illinois within one year after entry of divorce decree in Colorado in favor of one of the parties. The Colorado statute provided that the court should have power to set aside the decree or reopen the case at any time within one year, and prohibited the parties from remarrying to any other person within that year. The New York Court held that the Colorado divorce was absolute, regardless of the provisions of the Colorado Statute. Quoting from the decision: "The prohibition did not render the judgment intermediate or interlocutory, nor did it impair its integrity. Essentially it undid the marriage, and those who were united in it were disunited."

The New York Court discussed the case of Lanham v. Lanham (Wisc. 117 N. W. 787) referred to above, in which the parties involved married within the prohibited period and thereupon returned to Wisconsin, and pointed out that Wisconsin held the marriage involved in that case, void in Wisconsin because of legislative command that divorced parties should not remarry within a year. Quoting further from the New York decision:

> "What would the courts of this state do if decision were required? They would abide the judgment and disregard the legislative mandate. Van Voorhis v. Brintnell, 86 N. Y. 18, 40 Am. Rep. 505; Thorp v. Thorp, 90 N. Y. 602, 43 Am. Rep. 189".



Again referring to the Colorado statute the New York Court said:

> "As its prohibition did not inhere in the judgment but was a legislation prohibition fixing the status of divorced persons, it is ineffective in this state."

Owen v. Owen (Wis. 1922) 190 N. W. 631, 32 A. L. R. 1100 is another example of this enlightening class of cases. A woman who had obtained a divorce in Illinois, married in Michigan, a Wisconsin resident the next day. Thereupon they went to Wisconsin and lived there. The marriage was attacked in Wisconsin. The Illinois law where the divorce was obtained prohibited remarriage within a year. The Wisconsin law likewise forbade marriage within one year from divorce, and provided that any second marriage to a third party should be void. The Wisconsin court pointed out that its law rendered void marriages of its citizens within the prohibited period in instances where they left Wisconsin to remarry for the purpose of evading the law, and returned there to live. Lanham v. Lanham (Wis. 117 N. W. 787). It distinguished the case before it from that classification of cases; quoting therefrom:

> "The case before us, however, is not such a case. Here the decree of divorce in Illinois was absolute praesenti. The defendant was no longer a married woman. She could not remarry within the state of Illinois within a year without violating a penal statute of that state, but such penal statute had no extraterritorial effect. The defendant left the state of Illinois to become a citizen of Wisconsin, and at the time of her marriage to the plaintiff she was no longer a citizen of Illinois. * * * Marriage in Michigan as it is in Wisconsin, is a civil contract, and it is a general rule that a civil contract, valid where made, is valid everywhere. Hence such marriage in Michigan is held to be valid in Wisconsin. We find no case in Wisconsin where it has been held that the laws of a sister state shall have extraterritorial jurisdiction over parties who have abandoned their residence in such state prior to the marriage in another state, pursuant to the laws of such other state."

A case directly in point in considering your New York client is Fisch v. Marler, (Wash. 1939, 97 Pac. (2nd) 147). The extraterritorial effect of the prohibitory clause in Idaho's law was specifically ruled upon. The Washington court held that under the Idaho statute declaring a marriage contracted by a spouse during the lifetime of the other spouse invalid unless the prior marriage had been dissolved more than six months before the subsequent marriage, did not purport to affect marriages in other jurisdictions and, that a marriage contracted in Montana within six months after the divorce decree was

obtained by the wife in Idaho, was valid. At the time the marriage was attacked in Washington, the parties were residents of that state. Quoting from that decision:

> "In so far as the extraterritorial effect of the Idaho statute is concerned, it, * * * does not purport to affect marriages in other jurisdiction, * * *. Restatement of Conflict of Laws, 194, Sec. 130, Goodrich on Conflict of Laws, 2d Ed. 305, Sec. 114, 2 Beale on Conflict of Laws pp. 685 and 686, compels the conclusion that the Idaho law did not invalidate the Montana marriage."

Your attention is directed to the following citations, informative of the various underlying rules on the subject.

> Restatement of Conflict of Laws, Secs. 129-131 19 Corpus Juris 183-185; 32 A. L. R. Annotation 1116 et seq. with particular reference to annotation, p 1142.

You are now satisfied that you can advise your client that after divorce in Idaho, she can remarry elsewhere within six months from entry of the decree of divorce and that she can return to New York to live.

One remaining question enters your mind. Would New York recognize the Idaho divorce on the question of jurisdiction? Glaser vs. Glaser, 12 N. E. (2d) 305, decided by the New York Court of Appeals, the Court of last resort, in January, 1938, is now the settled law on that question in New York. In that case the parties were married in New York during August, 1935. Both parties, residents of New York, continued to reside there after the marriage. Now quoting from the facts set forth in the decision:

> "In November, 1935, the husband left the state of New York and became a resident of the State of Nevada. There he commenced an action against plaintiff for a divorce, in accordance with the laws of Nevada.
>
> "On November 4, 1935, the plaintiff executed and acknowledged a power of attorney wherein she appointed Joseph P. Haller, of Reno, Nevada, her lawful attorney at law and in fact to represent her in the divorce action with full power and authority to do all acts that may be exercised and done by an attorney. Thereafter the plaintiff appeared in the divorce action by Haller, as her attorney. A decree of the second Judicial Court of the State of Nevada, dated January 6, 1936, dissolved the marriage plaintiff and defendant."

In the Glaser case, the wife, not recognizing the validity of the Nevada divorce, alleged, among other things, that the defendant, her former husband, "was not an actual and bona fide resident of the State of Nevada at the time he instituted the divorce, that he went there solely to procure the decree and never gave up his residence in the state of New York."



Actually the testimony (not shown in the reported case) showed that on November 24, 1935, the husband left for Reno by airplane. On the forty-third day after his arrival there the divorce action was instituted, the case was heard and the divorce decree was granted. The husband returned to New York by airplane, resumed his medical practice and his residence in the home which he had left forty-four days before. He did not give up his medical office before he left, as he had arranged with an associate for the care of his medical practice during his absence, nor did he resign from the staff of the hospital with which he was associated; and his bank account in New York was open while he was away. The Court of Appeals ruled (in the reported case):

> "These issues have been resolved by the courts below against the plaintiff. It has been found that defendant 'duly became a resident of the State of Nevada.'"

In answer to the plaintiff's contention in this case that a decree of divorce obtained under such circumstances is against public policy of the State of New York, the Court said:

> "Our courts have many times recognized such decrees as valid and have never indicated in any way that any policy of this state is infringed."
>
> "By Article 4, Section 1, of the Federal Constitution, Full faith and credit shall be given to the judicial proceedings of every other state."
>
> "When we speak of public policy of the state, we mean the law of the state, whether found in the (state) constitution, the Statutes, or judicial records."

The Court of Appeals in the Glaser case pointed out that Massachusetts had a specific law which expressed the public policy of that state forbidding recognition of foreign divorces obtained by its residents in other states for causes not recognized in that commonwealth. In that connection the New York Court of Appeals stated:

> "We have no such statute in this state, and, as we have heretofore recognized these decrees of a sister state * * * * we must affirm the judgment below." (Authorities in support thereof quoted in the decision.) See also Krause vs. Krause (N. Y.) 26 N. E. (2d) 290.

If any of you gentlemen would like to satisfy yourselves further

as to the trend of thought in New York concerning the so-called migratory divorces, I recommend that you read the case of Olmsted vs. Olmsted 190 N. Y. 458; 83 N. E. 569, decided in 1908 and then compare it with the Glaser vs. Glaser case decided in 1938 (supra) which we have just examined. You will see how liberal the New York Court has become in its views on the subject.

The problem of migratory divorce of course is not new. Nor has it begun to give concern only in the last few years; they were disturbing as far back as the Chester A. Arthur administration. The popular attitude towards divorce, however, is totally different today from what it was when the Olmsted case was decided. We might as well admit that society as a whole no longer considers divorce the shocking thing it was at the time the Olmsted case was decided. It has passed through the phases of first being almost a crime, then a social outrage, then a regrettable necessity, until today it has become an event not too greatly different from any other event. Lewellyn, Behind the Law of Divorce, 33 Col. L. Rev. 249, 294 (1933).

Despite warnings in non-legal literature as to the invalidity of migratory divorce (Prosser, Divorce Forum, 1938) every daily newspaper carries accounts of such divorces planned by and granted to persons described as being "of New York City".

Now returning to Idaho:

Gentlemen, the divorce laws of Idaho are all right; some of you may be saying to yourselves right now, "We know that our laws are all right and that they stack up with the divorce laws of Nevada, so what?"

As a New York attorney there has been, up until this investigation, a great deal of doubt in my mind whether a divorce granted under the Idaho divorce laws would be upheld by the New York Courts especially as applied to such a set of facts as your client presented to you when she came into your New York office.

The six months prohibitory clause in your divorce law has created much doubt in the minds of the New York attorneys. The average New York attorney does not know that the six months prohibitory provision is not applicable in cases where his client wishes to go out of the state of Idaho and remarry within the six months period if he or she does not intend to return to Idaho to live.

For example, before I came out here last fall to take up my residence, I went around and called on many of my friends who are attorneys in the large firms in New York and told them I was going to Idaho, and hoped, with the consent of your bar commission, to practice law in that state. I told them about the Idaho divorce



laws. In nearly every instance they asked me the question—would a client sent to Idaho for a divorce have to wait six months before he or she could remarry? To be perfectly frank, I told them I didn't know. You see the average lawyer, and in some instances some of the most outstanding lawyers in New York, do not know the law on this question; the sad part is, that they don't or won't take the time to look up the law and answer such a question in their own minds. Thus the easiest way out for them is to tell their clients to go to Nevada, because under the Nevada laws such a question does not arise to create doubt in their minds.

After my investigation on this subject, there is no doubt in my own mind that the New York courts will uphold the Idaho divorce decrees where a case similar to the hypothetical case, here presented, is laid before them.

If at some future time your bar commission should see fit to admit me to practice in this state, I would not hesitate to advise any attorney in New York, who made such an inquiry as we have just examined, that he can send his client to Idaho and that a divorce decree obtained in this state will stand up with any like decree obtained in Nevada.

Gentlemen, I don't know whether you realize it or not, but for the past five or six years the eyes of this country have been on Idaho more than any other state in union. Idaho has received more favorable publicity than any other state in the United States, every person who has ever visited this state goes home singing the praises of Idaho. They love its natural beauty, its mountains, its valleys, its lakes, its desert, its rivers, its climate. From one end of the state to the other its beauty is unsurpassed by any other state in the west, and I have seen them all. The grand publicity which Idaho has been receiving has captured the imagination of everyone ,and they all want to see the state about which they are hearing so much.

You are probably saying, "Yes, that is fine, but from a practical standpoint, how is that going to affect us as attorneys here in Idaho?" It is going to affect you in this way: Where now your leading industries are agriculture, mining, lumbering and stockraising, I prophesy that in the not too distant future the tourist trade, which is even now an industry of over $25,000,000 per year will be an industry which will match any of them. It will bring people here who will spend money and leave it in the state—this will affect business generally and indirectly will affect you as attorneys. Your local clients who are now hesitating to come to you for urgent professional advice and are putting off consultation because of the expense, will then not only come to see you but will pay you your fees. And of course many of the people coming into the state will take advantage of your

divorce laws and that will be an additional source of revenue to you.

Gentlemen, believe it or not, you as members of the Idaho Bar are the envy of the legal profession everywhere. Before I left the east to come here to live, every attorney I talked to, without exception, said, "I wish I were going with you. You are being wise. What a grand state in the west you have picked out. What an ideal life you will live there in one of the few remaining frontier states where the spirit of the pioneer still lives." Gentlemen, you really have something here in your State of Idaho—an empire in the making. Idaho is going places. You are to be congratulated. I strongly urge you not to sell Idaho short.

PHIL EVANS: Isn't it a fact, Mr. Taylor, that it would be advisable in facilitating the securing of this business to which you referred, to have the prohibition against remarriage in the six months period removed from the statutes, so they could remarry in this state without being compelled to journey to some other state in order to be married?

PRES. GOFF: You must be stirring up business for the Justices of the Peace.

MR. TAYLOR: That is really the stumbling block. They see that six month provision and get leery and won't look up the matter and then they say, "Go to Nevada." It might be better to remove that.

MR. H. B. THOMPSON: In the Glaser case, what would have been the result if the Court had found it as a fact that residence had not been established in Nevada?

MR. TAYLOR: Of course, I am depending entirely on this class of cases for that matter of jurisdiction or residence when clients are going to live or come to Idaho. The Glaser case first came up before the Supreme Court and was decided for the defendant and carried to the Appellate Court. A lot of people were getting a little jittery when the case was appealed to the Appellate Court, because there were a number of Nevada divorce decrees. They got one of the most prominent New York firms to handle the case in the Appellate Court, and the decision by Justice Crane was brief and to the point, and went the fullest extent to uphold those divorce decrees, even where it was apparent the parties didn't intend going on living in Nevada.

FRANK MARTIN: Our local court has required that we state in the decree that the parties are not to remarry anybody except themselves during the six month period. Can you find any authority or necessity for writing that in the decree?

MR. TAYLOR: No.

RALPH BRESHEARS: It has been quite some time since I have read the case, but the Supreme Court of the United States a good many years ago decided the case of Haddock vs. Haddock, in which they refused to recognize the validity of migratory divorces. Did you consider that case?



MR. TAYLOR: No.

PRES. GOFF: We will adjourn until 1:30.

## SATURDAY, JULY 12, 1941

### (Afternoon Session)

PRES. GOFF: We should have the Report of the Committee on Preserving the Practice of Attorneys Called into Military Service, and then following that we will hear from Mr. Boughton.

Edward Johnson of Orofino, who prepared this report is unable to be present. I am going to ask the Secretary to read it.

### REPORT OF THE COMMITTEE ON PRESERVING THE PRACTICE OF ATTORNEYS CALLED INTO MILITARY SERVICE

Among the manifold problems born of the present National Emergency has arisen that of the legal practitioner who has been, or may shortly hereafter be called to serve in the Military forces of this Country, so leaving his business and office for an undetermined period. This matter has called forth discussion and recommendations from the Junior Bar Conference of the American Bar Association, and the Idaho State Bar, in recognition thereof, have named the following committee to study the problem and formulate recommendations calculated to assist in the preservation of the practice of attorneys called into such service:

Edward T. Johnson, Russell Randall, Ray E. Durham, Fred H. Snook, Robert St. Clair, Robert E. Brown, Robert N. Elder, and Eugene F. McCann, with Wilbur L. Campbell as advisor.

It appears noteworthy that, in line with the problem presented, the committee is made up, for the most part, of members of the bar who are most likely to be called to such duty, but it should be borne in mind that many of the older members are equally subject to call.

After careful consideration and study upon the part of your committee we respectfully submit the following report and recommendations:

#### ANALYSIS OF THE PROBLEM

In at least some instances where Idaho lawyers are called to the

colors it will be found that they are, at the time of such call, either members or employees of established law firms which also contain members not so subject to call. We have omitted herein any direct consideration of the problems which might arise with respect to such situations in the belief that the firm relationship will afford protection for the departing member or employee as the case may be.

Our real problem arises when the independent practitioner is called and must leave his office unattended and his clients' business uncared for. He is, of course, then faced with two alternatives: He may either persuade his clients to await his return; a procedure ordinarily impossible to expect; or he may obtain assistance from one or more attorneys not subject to call in caring for such business during his absence.

Assuming the improbability of the first alternative, and therefore disregarding it as a solution to the problem at hand, it would appear that, with the adoption of the second, four personal relationships must be considered.

(a) The relationship between the departing and substitute attorney;

(b) The relationship between the substitute attorney and the established clients of the departing attorney;

(c) The relationship between the substitute attorney and the persons who seek, after his departure, to become clients of the departing attorney; and

(d) The relationship between the departing attorney and his clients, both old and new, throughout the entire situation.

Naturally these relationships are to be made the more difficult by the paramount precept that in all instances the best interests of the client must govern.

### REPORT AND RECOMMENDATIONS OF SUBCOMMITTEE OF COUNCIL OF JUNIOR BAR CONFERENCE ON CONSERVATION OF LAW PRACTICE

"It is the recommendation of the Committee that the Chairman of the Junior Bar Conference in the name of the Conference issue a letter to the various Bar Associations of the United States and affiliate units of the Junior Bar Conference suggesting the appointment of local committees for the conservation of the practice of lawyers in military service and attaching a list of suggestions to those committees when created, the current suggestions to be as follows:

"It is suggested that the duty of this committee be to:



"1. Notify all lawyers practicing in ..... County (or city) of the formation of the committee, its purpose and its willingness to assist all lawyers in service in the conservation of their practice; and give newspaper publicity to this fact.

"2. Maintain a list of reputable attorneys who are willing to assist in conserving the practice of lawyers entering the service by handling their legal matters in cooperation with the committee. Where the lawyer entering the service requests the assistance of the committee, he may select one or more from this list;

"3. Require the substitute to enter into an agreement with the service man who desires the committee's assistance, providing for an equitable distribution of fees, and further providing that for a reasonable time after the service man's return the appointee will not, under any circumstances, directly or indirectly perform any legal services for the client or clients without the express consent of the man formerly in service. The latter provision shall likewise apply to new business of the service man acquired during his absence;

"4. Maintain contact with the service man and the substitute and be ready to render reasonable assistance to the parties at any time upon request; and

"5. Do any and all other acts which, in its judgment, are necessary or required to conserve or assist in the conservation of the practice of any service man.

"It is suggested that the local committee recommend the following course for the lawyer entering the service:

"1. He shall, if practicable, name some lawyer of his own selection to handle all business during his absence, on some equitable basis agreeable to both parties. Notice of such agreement, together with a copy thereof, may be filed with the committee.

"2. In all other cases the lawyer is invited to consult with the committee before entering the service.

"3. When such an agency has been created, in event of disagreement between them, either party may refer the matter to the committee for its consideration and recommendations, and any substitute recommended by the committee shall, at the time of his substitution, agree to follow the recommendations of the committee.

"4. If he has designated a lawyer or lawyers to act for

him in his absence, whether by private arrangement or with the assistance of the committee, he should advise his clients, after securing their previous consent, of the arrangement before leaving the office to enter the service.

"Because the problem of the young lawyers of the country subject to military service is a continuing one and one particularly appropriate for consideration by the Junior Bar Conference, it is the further recommendation of your Committee that it be continued until the annual meeting and that it be authorized to make additional suggestions to local committees as further study might warrant.

JAMES ARTHUR GLEASON,
Cleveland, Ohio.

JAMES D. FELLERS,
Oklahoma City, Okla.

JOSEPH D. CALHOUN, Chairman,
Media, Pennsylvania."

While we here give you the benefit of such report we do not feel that it, at least in its entirety, is necessarily an answer to the problem in the State of Idaho. It appears to be more suited to larger communities than are common here and discounts too much the intense personal relations between attorneys and clients usually found to exist in more rural sections.

**RECOMMENDATIONS**

Without any effort to discuss at length the tremendous number of individual cases which may, and no doubt will arise within the general relationships hereinabove outlined in our analysis, we respectfully submit to this Bar the following recommendations:

1. That each interested attorney make his own arrangements for substitute attorneys to keep his office open in accordance with the particular situations found in his particular business.

2. That, in making such choices, such attorneys freely advise with their clients in an effort to satisfy them, as nearly as possible, with the substitution, giving the facts of his departure wide publicity by news items and letters.

3. That all lawyers throughout the State conscientiously aid in this protective program and that the President of the Idaho State Bar address a letter to each member calling his or her attention to the situation and personally requesting cooperation.

4. That this committee be allowed to retain its entity during and throughout the present National Emergency in order that new situations, as they arise, may be studied with a view to action by the State Bar and by Local Bar Associations.



Respectfully submitted,

(Signed) EDWARD T. JOHNSON

Edward T. Johnson, Chairman.

PRES. GOFF: This matter could well be referred to the Commission for the protection of these young lawyers and their practice. If there is no opposition this report will be referred to the Bar Commission.

I have here the report of the Canvassing Committee from the Northern Division.

July 11, 1941

**TO THE IDAHO STATE BAR COMMISSION**

Your committee canvassing the votes for commissioner for the Northern Division for the ensuing term, have met and canvassed the vote. A total of thirty-four regular ballots were cast. All ballots are in favor of Mr. Paul W. Hyatt of Lewiston, Idaho. We report that Mr. Hyatt is duly elected commissioner for the Northern Division for the ensuing three years.

Respectfully submitted,

FRANK F. KIMBLE

E. V. BOUGHTON.

PRES. GOFF: I will officially introduce Mr. Paul Hyatt as the new Commissioner for the Northern Division. Mr. Hyatt has been quite ill, was at Mayo's, and returned to Lewiston only a few days ago and is not able to be here. Mr. Hyatt has been on our program committee and has been a very active member of the Bar. I am sure he will bring something of real value to the Bar.

Mr. Boughton was to discuss some of the phases of the paper, by Mr. Taylor. Mr. Boughton of Coeur d'Alene.

E. V. BOUGHTON: Mr. President, Officers and Members of the Idaho State Bar, Ladies and Gentlemen:

What is the matter with Idaho's Divorce laws anyway? I am convinced that, under the laws of this state, a divorce granted by any competent court absolutely dissolves the marriage.

I. C. A. Section 31-601 provides, that

"Marriage is dissolved only:

"1. By the death of one of the parties; or

"2. By the judgment of a court of competent jurisdiction decreeing a divorce of the parties."

And "That the effect of a judgment decreeing a divorce is to restore the parties to the state of unmarried persons". (I. C. A. Section 31-602.)

It will be noted that Chapter 6 of Title 31 deals with the subject of Divorce.

Chapter 2 of Title 31 deals with the subject of Marriage—Nature and Validity of Marriage Contract, and
Section 31-207 provides:

"That a subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning unless;

"1. The former marriage of either party has been annulled or dissolved more than six months; or,

"2. Such former husband or wife was absent and not known to such person to be living for the space of five successive years immediately preceding, or was generally reputed, and was believed by such person, to be dead at the time such subsequent marriage was contracted.

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

Clearly Section 31-207 of I. C. A. establishes the policy of this state with reference to the qualifications of persons who are married in this state, and it applies alike to parties who seek a marriage license, who may be domiciled in another state and if they have been divorced within six months a license will not be granted. On the other hand, our laws with reference to the qualifications of those seeking a marriage license in this state are not extraterritorial and cannot have any force or effect upon parties marrying in another state under the laws of that state.

It is a general rule of law and so far as I know, or have been able to find, there are no exceptions to the proposition that a marriage valid under the laws of the state where the marriage is consummated is valid everywhere.

Moreover, our Section 31-209 provides, that



"All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, are valid in this state."

Our law with reference to marriage was taken generally from California, and California in an early decision, (In re Wood's Estate, 69 Pac. 900) the Supreme Court of California laid down the following:

"Section 61 of Civil Code (corresponding with our Section 31-207) being general legislation prohibiting marriages between certain persons, has no extraterritorial operation. An exhaustive review of this question is found in State v. Shattuck, 69 Vermont 403, 38 Atlantic 81, 40 L. R. A. 428. It is there said: 'The language of our statute is general, and it is a fundamental rule that no statute, whether relating to marriage or otherwise, if in the ordinary general form of words, will be given effect outside of the state or county enacting it. * * * * * Hence, if a statute, silent as to marriages abroad, as ours is, prohibits classes of persons from marrying generally, or from intermarrying, or declares void all marriages not celebrated according to prescribed forms, it has no effect upon marriages, even of domiciled inhabitants, entered into out of the state. Those marriages are to be judged of by the courts of such state, just as though the statute did not exist. Bishop on Marriage and Divorce (Section 867) declares the same rule. Therefore when Section 61 uses the language, 'a subsequent marriage contracted by any person,' etc., it only refers to a subsequent marriage contracted in the State of California by any person, and the section should be read as though the words 'in the state of California' followed the word 'contracted'. It cannot be possible that the legislature by this section attempted to declare what particular marriages contracted in the tSate of Nevada, or any other place in the whole world, would be invalid and void. Section 63 of the Civil Code, hereafter quoted, shows that the legislature never thought of such legislation. By inserting the words 'in the state of California' in the section,—words which it is perfectly apparent should be inserted by construction,—then there is nothing left in this case for respondent; for the marriage here contracted and which we have here under consideration was not contracted in the state of California, but in the state of Nevada, and therefore Section 61 has no application to it whatsoever. Section 61 refers to marriages contracted in this state, exactly as does Section 60, which declares, 'All marriages of white persons with negroes or mullattoes are illegal and void.' In the face of that law, this court held that a marriage between a white man and a negro woman, contracted in the territory of Utah, being valid there, was a valid marriage in this state."

This is the general rule followed by the state of California, and in the late case of McDonald v. McDonald, 43 Pac. (2d) page 362, the Court held:

> "That a contract entered into in Nevada between a boy of 18 and a girl of 16, who were residents of California and went to Nevada to evade California law and were married there without obtaining consent of their parents or guardians, and thereafter immediately returned to California, must be recognized as valid in California, notwithstanding California law making consent of parents or guardians indispensable, since marriage was valid under Nevada law."

See generally, 18 R. C. L.—subject MARRIAGE, paragraph 9, page 388, wherein it is stated:

> "It is the generally recognized rule that a marriage valid by the laws of the country where contracted will be recognized as valid everywhere. This rule is apparently without exception so far as the question of validity depends upon the manner or form of its solemnization." (28 Corpus Juris 1276)

I am advised that in one Judicial District of this state, the Court insists that the provisions of Section 31-207 be written into the divorce decree by a clause reading to the effect "that plaintiff and defendant are prohibited from marrying excepting the one to the other, for a period of six months from the date of the decree." I am not advised as to the reason for this requirement because the Court has jurisdiction to grant an absolute divorce. We have no interlocutory decree and no decree nisi. The only jurisdiction that the Court has is to grant or refuse a decree. When a decree is granted the Court would seem to have no authority to place any condition in the decree which is not authorized by the statutes of the state. It will be conceded, I think, that people who come to the State of Idaho for a divorce have a problem of property interest and heirship, and also the problem of legitimacy or illegitimacy of the children born of a subsequent marriage, but if the marriage is contracted by a party divorced under the laws of this state, even though within the six month period, if the marriage contract is solemnized in a state the laws of which state do not place such a restriction as provided by our Section 31-207, that the marriage is valid; property rights are protected and there can be no question as to the heirship or legitimacy of the children.

I have not attempted to discuss the effect of a divorce in this state as construed by courts of other states where the decree is awarded the plaintiff based upon substituted or constructive service where the defendant does not submit to the jurisdiction of the Idaho Court. That is a subject over which Idaho has no control and no state is bound to recognize such a decree and there is nothing we can do about it.



In the case of Haddock v. Haddock, an early case decided in 1906 by the United States Supreme Court and reported in 201 U. S. 562; 26 Supreme Court Reporter 525, in which the Supreme Court holds,

> "That mere domicile within the state of one party to the marriage does not give the courts of that state jurisdiction to render a decree of divorce enforceable in all the other states by virtue of the full faith and credit clause of the Federal Constitution, against a nonresident, who did not appear and was only constructively served with notice of the pendency of the action."

This case has been approved in the case of Davis v. Davis, decided in 1938, and reported in 305 U. S. 32; 59 S. Ct. page 3.

In many jurisdictions, especially in Canada, foreign divorces will not be recognized at all, unless:

> 1. Such a domicile existed as according to international law would give the foreign court jurisdiction to dissolve the marriage.
>
> 2. Proper notice of the proceedings was given to the respondent or defendant by actual personal service or by substituted service, and
>
> 3. The divorce was not secured by fraud, collusion or connivance.

I am indebted to attorneys Abbott & Auxier of Edmonton, Alberta, for an interpretation of Canadian law as follows:

> "That the only Court whose jurisdiction in divorce is recognized is the Court of the jurisdiction where the husband is domiciled, that is, not only must he have resided in that jurisdiction at the time of the divorce suit, but he must have had a bona fide intention at that time of making his permanent home in that jurisdiction."

In other words, so far as Canadian courts are concerned, a party coming to the states for a divorce with the intention of returning to Canada, the court will refuse to recognize the validity of the divorce.

Illustrating the tenacity with which those courts cling to the domiciliary jurisdiction:

An Alberta Court refused to grant a divorce on the ground

that the plaintiff was not domiciled in Alberta although he had resided and had carried on a business there for twenty-five years. The plaintiff, who had migrated to Edmonton from Wisconsin, had expressed on numerous occasions his intention to return to Wisconsin to live when he had accumulated sufficient money to retire. While he had accumulated considerable personal property he had no investment in real estate and the court refused to grant the divorce on the ground that he was not domiciled according to international law.

It will be conceded, I think, that the Idaho divorce laws are quite liberal. There are one or two particulars in which our statutes might be amended so as to clarify proceedings somewhat, and I am of the opinion that the further ground of "incompatibility" should be added to Section 31-603 of I. C. A.

Then under the provision of Section 5-905, it is provided:

"When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant, or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action."

This particular provision has been emphasized in Martindale-Hubbell Idaho Digest, where the following language is used:

"Defendant served by substituted service and having good defense may appear within one year and have decree set aside."

Compare this provision with a similar provision of the Nevada Statute, which reads as follows:

"Where a default decree has been entered, the defendant may thereafter, on written consent of plaintiff, enter a general appearance in the action with the same effect as if entered before trial. Thereupon court may make modified decree showing such general appearance and enter same nunc pro tunc as of date of original decree. Parties may stipulate for further modification of decree. (1931, p. 250; 1935, p. 209)."

From this, it will be observed that default cannot be set aside without written consent of plaintiff.

In conclusion, I am of the opinion that,

(a) An Idaho Court has jurisdiction only to grant or refuse to grant an absolute decree of divorce, so far as the divorce itself is concerned. Of course it will be conceded that in an action for a divorce the Court may grant relief by way of separate maintenance.



(b) When a divorce is granted it is final and absolute divorce dissolving the bonds of matrimony and restoring the parties to the state of unmarried persons.

(c) That Section 31-207, which merely defines the qualifications of persons seeking to be married in this state should not be construed in connection with the divorce laws and has no force or effect outside of the State of Idaho, and that a marriage contracted in and under the laws of any other State is a valid marriage for all purposes and must be so recognized here as provided in Section 31-209, which provides:

"That all marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, are valid in this state."

I recommend that the question of possible changes in our divorce laws be referred to a Committee appointed by the Bar for investigation and report.

FRANK MARTIN: I would like to say in regard to Mr. Taylor's paper and in connection with Mr. Boughton's, I had occasion this spring to go very deeply into this same subject with a firm of prominent New York attorneys, and we arrived at the same conclusions these gentlemen have arrived at.

The question I would like to ask Mr. Boughton is this: In a number of the judicial districts the courts have taken the attitude in a divorce action, after service and the defendant makes an appearance, that it is necessary to wait the full period of twenty days after service, even though the defendant and plaintiff both agree testimony can be put in at once and decree issued. I find nothing in the statute to justify that position, and I wondered if you had?

MR. BOUGHTON: We never had any experience of that kind in our particular district, but I have understood some of the courts have taken that position. It seems to me under the law either party to an action, when it is at issue, may call it up at any time. I know of no authority in our statute authorizing that conduct by the court.

MR. MARTIN: Doesn't the statute say the contrary?

MR. BOUGHTON: I thought so.

MR. MARTIN: It seems to me the Bar ought to take some consideration of that matter, and where those rules are made, they should be abrogated, unless there is good reason for them.

MR. J. G. HEDRICK: I have heard some criticism of the lawyers taking and handling those cases, but perhaps the lawyers don't know what it means to the communities of the state to have this business. Each one of those clients that comes from the east spends from $1500 to $3000 during their stay of six weeks. That money all means a good deal to this state. They are all going back and sending their friends out here. We should in no way detract from that business.

MR. E. B. SMITH: Mr. President, just remember, "don't sell Idaho short. Keep your fees up."

PRES. GOFF: I want to announce that the West Publishing Company has offered if the Secretary would send them the names of any attorney in active military service, to send free of charge the Pacific Advance Sheets to them at their military address, and they would keep track of them and send it to them at their changing addresses.

Many of you no doubt know of attorneys who are in the service or are going into the service, and if you will send or remind them to send, their names to the Secretary it will be taken care of.

We are now about to take up the next matter on our program, an address by Dr. Joseph R. Beeman of the Oregon Medical School of Portland, who will address us on the Modern and Scientific Aids to Civil and Criminal Trials. Dr. Beeman.

DR. BEEMAN: Gentlemen of the Bar, Mr. President. First I wish to state that I sincerely appreciate the invitation to appear before this convention.

Getting down to business, I am not going to discuss the scientific problems, but I am simply going to tell you what our service is and what we can do at the Crime Detection Laboratory, and what you gentlemen can expect us to do.

The difference between a civil and criminal investigation is entirely due to our statutes. In other words, if I should drive off a bridge, and I was drunk it would be covered by statute and there might be grounds for a criminal action. Also the same set of facts might give rise to a civil action. When a series of events occur such as an automobile accident or motor wreck, somebody has to know in the first place something happened, either by their eyes or what they heard, and the investigation can go just so far from natural observations. Then it may become necessary to get and use specialized equipment to determine other facts, and when you get through with that, you have a case being proved either for the defense or prosecution.

The Crime Detection Laboratory of the Department of State



Police was organized approximately two years ago. It was started to perform a few autopsies, and it has built up to where it does a great many autopsies; then it started working to determine whether or not this or that was human blood or not, and it has finally worked up to where it has a good many pieces of specialized equipment devoted just to this particular work, and then it put somebody in to run it, and it paid them a salary. At the present time I am lucky enough to get that job.

This crime detection laboratory was organized principally for criminal investigation. The facts we determine are by statute made available to the defense upon Court order or agreement of the Prosecuting Attorney. I would like to say here and now the purpose of our work is to determine the facts, not to build a case for the prosecution or defense or their attorneys. After our investigation, if a certain state of facts fit the case, fine; if they don't, it is not our fault.

The medical profession and the legal profession many times have worked at cross purposes. They are afraid of each other. The medical examiner is afraid of the cross examiner, and the attorney is afraid of the medical examiner. Several years ago we had a good deal of trouble that way, but by more work on both sides, the problems of each were recognized by the other and the matter has progressed nicely. Competent expert testimony has helped, too, and by that I mean, many facts are admitted by one side when reliance is placed on the examiner by both sides. We are trying to get at the truth, and are trying to express it in plain language, not in medical terms, many of which we don't even understand ourselves.

I think you men as attorneys are "damn fools" to have an expert witness on the stand unless you have gone over the case thoroughly with him. I think you should have him write out the questions and answers so you yourself will not get caught up in something you don't understand. That is the easiest method to handle experts.

I would like to show you some lantern slides, showing you what this work consists of, and the material I am using. In the majority of the cases they are criminal cases, but you can see for yourselves how important many of these things would become in civil actions.

Just remember, that in all of these investigations, where you have any doubts, get your autopsy then, instead of three months later, and in cases of deaths by accident or homicides, have casts of the wounds taken right then, if you are going to get them, and then you will have it in a form that the jury can see the real situation and can appreciate it.

Another thing, suppose a man dies and later there will be some

litigation come up over his death. If you wait around until you are about to try the case, and you have had him buried or cremated, where will you be? Your evidence is gone. In most autopsy cases the cause of death is shown in sixty per cent of the cases to be heart failure, and if you have any suspicions, don't wait too long after death of the party.

I would like to go over some of these slides I have and show you the results in some autopsies, and I will continue to discuss these questions then.

I would like to say there is no greater field in the world for fraud than there is in this field of so-called expert testimony. In many places they are getting two, three and four thousand dollars for ten or fifteen minutes testimony. It just isn't worth it, and these men will stretch their evidence and conclusions to fit the case.

The third thing I would like to say is that we have in the west been getting better, and the courts have become more lenient, in the admission in evidence of photographs, but even up to two or three years ago photographs were not admitted in evidence in one state. Nothing is as descriptive to a jury as a good photograph.

May I state here that all or any statements made by me are my own personal statements and do not reflect the views of the State Police Department.

If we can put out these lights, we will now proceed with these lantern slides.

(Whereupon Dr. Beeman showed a series of slides, and discussed each one in detail. The following is a summary of the data given by Dr. Beeman during the course of this discussion.)

Any investigation is made to determine the facts of a given set of circumstances; namely, who, what, when, where and why regarding the event. In the vast majority of cases these facts can be determined by utilizing thoroughness and common sense. In certain cases, expert aid and opinion may be of value in determining facts which are beyond the utility of common experience. An expert may come from all walks of life, and by no means is he necessarily a scientific worker. The purpose of a laboratory is to determine, so far as possible, the facts, and to present them to the layman in a simple unbiased manner.

In preparing a given case for trial, the attorney should not only familiarize himself with the technical facts but should understand them. An expert may be of aid in assembling the facts, these facts, if controversial, should include both sides of the question so that the attorney will know what he may



expect from the opposition. Prior to the trial, we feel that the attorney and expert should confer and decide the questions to be asked and the answers to be given. In a technical matter the questions should not be deviated from, as one word may change the entire meaning of the question and disconcert the witness, often with disastrous results.

The Crime Detection Laboratory is a cooperative institution between the University of Oregon Medical School and the Department of State Police. It is a part of the Department of State Police. The Laboratory by statute is available to any law enforcement agency and to the defendant upon order of the court. The staff and material of the Laboratory are also utilized in teaching medical students the fundamentals of medical jurisprudence.

The following types of examinations may be of aid in a particular case:

POST MORTEM EXAMINATIONS: A complete post mortem examination should determine the exact cause of death, the presence or absence of disease or injury, and the relationship of such a process to the death. The examination should be **complete**, thorough, and the results recorded in detail. It should substitute facts for guesswork. The autopsy should be performed as soon as possible, and if poisoning is suspected, the body should be unembalmed. Photographs and casts of pertinent injuries should be made when necessary.

Pathology is a medical specialty, and such examinations should be done only by those physicians who have had extensive training in the act. An inexpert examination is worse than none at all. An autopsy is indicated whenever litigation is expected.

In civil cases, the lesions may be demonstrable; the value in industrial deaths is obvious. Suspected accidental deaths may be on a natural or homicidal basis. Suspected suicides may be proven to be of accidental nature. Insurance payments may hinge on the results of such an examination.

In criminal cases, the following pertinent questions may be answered:

BLUNT INSTRUMENT wounds: Size and shape of weapon, direction of blow, order of several blows, and relationship of such blows to death.

STAB WOUNDS: Extent, depth of wound, amount of injury, direction of blows.

ASPHYXIA: Mechanism of suffocation (manual, mechanical, gases, drowning). If drowning is suspected, was death due to drowning or to a natural disease process.

BURNING: Identification of body through sex, size, color of hair, stomach content, teeth. Was the body alive when the fire started?

GUNSHOT: Entrance and exit wounds, direction of the angle of fire, extent of injury. The distance of gun from body may be approximated roughly but is not exact. Powder debris may be deposited inside the body in very close wounds without external burning or tattooing. The clothing may be preserved. Bullets removed from bodies should be wrapped in cotton and not disfigured by the surgeon. From the examination of the bullet it may be possible to tell the calibre of the weapon used, the make of the weapon, and an opinion may be given as to the identity of the weapon used. We feel that the latter is purely opinion, and should be given credence only in a corroborative degree; we feel that the methods now in use have a serious inherent error and that the results should be scrutinized with care.

POISONING: In suspected poisonings, excreta, vomitus, and household utensils should be saved. In non fatal cases, body fluids and blood should be secured at the earliest opportunity. Fatal poisonings should have a complete autopsy and the entire viscera transmitted to an analyst, using dry ice as a refrigerant. Embalming fluid will vitiate tests for alcohol and cyanide. If the body is embalmed, samples of the embalming fluid should be secured. The stomach content alone has no legal value in a poisoning case. The result of an investigation in these cases should tell the amount of poison, identify the poison, show that the symptoms are those of the poisoning, that the autopsy findings are compatible with poisoning, and that death was not due to a natural cause. Often the type and source of the poison may be indicated.

The alcohol content of blood is an index of the degree of intoxication at the time the blood was taken.

RAPE: Semen may be identified as being present and being of human origin. It may be detected on the genitalia or clothing of the victim.

BLOOD: May be identified as blood, as to whether of animal or human origin, and the direction from which it has fallen. The determination of the blood group in stains is unsatisfactory.



PATERNITY: From the blood grouping of the child, admitted parent and suspected parent, it may be possible to prove the defendant not to be the parent. It is impossible to prove him to be the parent.

CHEMICAL: Analyses of materials may show their identity or non identity. Standard methods of examination including spectrographic analyses may be resorted to. Examples are glass, paint, and dirt comparisons. Inflammables in arson cases may be detected.

MICROSCOPIC EXAMINATIONS: May be used to determine the identity of materials. Hairs may be compared but cannot be shown to come from the individual. Fibres may be identified. Defects in tools may leave characteristic impressions which may be compared. Fibres, textiles, and papers may be compared. Torn edges may be matched.

PHOTOGRAPHS: Are used to preserved the incident as it occurred. They allow the jury to see what took place, and technical photography may be used to magnify typical portions of an exhibit, or to disclose materials invisible to the eye but visible to the camera. Motion picture photography is of value in fraud cases, where permanent injury has been claimed.

DOCUMENTS: May show erasures or alterations; tracings of signatures may be demonstrated; difference in papers may disclose a fraud. Typewriters may be identified. Opinion evidence of forgeries should be used only as corroboration.

PRES. GOFF: I am sure, Dr. Beeman, it has been very worth while that you did come to Sun Valley. Are there any questions that you have?

GEORGE VAN DE STEEG: I have one question in connection with the test of blood for alcohol. Where the defendant has been charged with driving a car under the influence of intoxicating liquor, the man's blood test was taken an hour or an hour and fifteen minutes after he was shown to have been driving the car. What would you say was the value of that blood test in determining whether or not he was intoxicated when he was driving the car?

DR. BEEMAN: The blood test is valuable or not depending on the time it was taken. It takes some time for the system to absorb the alcohol. There is another thing. A man may have had a couple of sandwiches, and then a couple of high-balls, and that slows up the time, too, and then you may have from that the alcohol level rising from the time of the accident to the time the test was taken. We

don't like to use that test exclusively, but only in corroboration with other evidence and tests.

PRES. GOFF: The next matter for discussion before us was discussed to some degree last year, and this is More Problems in Community Property Law, which is a continued discussion from 1940, by Mr. Frank Martin, Jr., of Boise, Mr. Martin:

FRANK MARTIN, JR.: Mr. Chairman, Gentlemen of the Bar: Last year we had the pleasure of listening to Mr. Schimke present some problems of community property as related to Life Insurance. This year I wish to present some of the problems of community property as related to Real Estate, and particularly from the view point of a practical title examiner.

In order for there to be community property, there must be, of course, a marriage relationship between the parties at the time of the acquiring which is recognizable under the laws of Idaho. Any real estate acquired by either spouse after marriage, is, from the view point of the examiner, to be considered as community property. Humbird Lumber Co. v. Doran, 24 Ida. 407. The only exception to this rule is where, by the instrument of conveyance or other proper record, sufficient facts are disclosed to show otherwise. Our Supreme Court has in many instances, held this presumption to be rebuttable, but has placed the laboring oar in the hands of the party claiming adverse to the presumption.

This presumption is very inclusive and from the title examiner's viewpoint, is controlling unless, as said before, the record facts disclose definitely that the property comes within the statutory definition of separate property of the spouses. (See Chapter 62, Session Laws. 1941.)

Our Courts have said that the husband and the wife are equal partners in the community realty, each having the same vested interest, without distinction as to degree, quantity, nature, or extent. (Peterson v. Peterson, 35 Ida. 470; Ewald. v. Hufton, 31 Ida. 373.) Our first community property statute was passed in 1867 and is very short and inclusive. It was,

> "All property acquired after the marriage, by either husband or wife, except such property as may be acquired by gift, bequest, devise, or descent, shall be common property."

This definition of community property as applying to real estate, with certain minor additions and attempts to clarify, is in effect, our present statute. However, from a practical viewpoint, an examiner of titles is not interested in these early provisions, as prior to 1885, the wife had nothing to say about the use or disposition of the common



property. In that year the Legislature passed the act which provided that the husband could not convey or mortgage the property selected or set apart as a homestead, or used or occupied as a residence without the joining of the wife. This act was recodified in the Revised Statutes of 1887 in Section 2505, and was considerably clarified and shortened. The 1887 Statute continued in force without change until amended by the 1913 Legislature, the amendment taking effect May 5, 1913. Thereafter all deeds or encumbrances of commmity property must be signed by both husband and wife, and must be acknowledged by both. This 1913 Statute is, in effect, the law today.

We now come to the question of conveyances. From our preliminary discussion we find that prior to the year 1885, the title examiner is not interested in whether or not the wife joined in the conveyance or encumbrance, or whether or not the owner of the property, (if a male) was married or single as the husband had the absolute power of disposition of the common property. However, if the title stood in the name of a woman during this period and the husband does not join in the conveyance, we are put on our guard to determine the separate character of the property and the marital status of the owner.

After 1885 and until May 5, 1913, the question of the use of the common property becomes of importance to the examiner. For if the property were selected or set apart as a homestead or used or occupied as a residence by the husband and wife, the conveyance or encumbrance of such property must be signed and acknowledged by both the spouses.

During this period the record of the majority of the titles is silent as to the use of the property. The conveyancers at that time undoubtedly satisfied themselves, and if the property was not used as a residence by the spouses, proceeded to have the husband alone sign the deed. Today we have no knowledge of these old matters, and the custom naturally arose of taking affidavits of those familiar with the property and the parties as to their marital status and the use of the property.

I have often been asked by young examiners as to the efficacy of these affidavits. This is a hard question to answer from a technical viewpoint, but from the practical side, the answer is easy. What could you do if you did not accept them? Their value as evidence is nil, but their authenticity is upheld by the fact that for now almost thirty years, no one has questioned. As time goes on the persons living who can make such affidavits are becoming fewer and fewer and in cases now existing where no such affidavits have been secured in the past, it is in many cases impossible to secure them. In my opinion and in the opinion of many expert title examiners, the time

has now arrived when we can safely assume (in the absence of any record evidence to the contrary) that where, during this period, the man alone has signed the conveyance or encumbrance, that he was either unmarried, or, if married, that the property was not used or occupied by the spouses as a residence. The Homestead question does not bother us as these would of necessity in order to be valid, appear of record.

After May 5, 1913, the question from the title examiner's viewpoint is simple. We should assume, unless the record shows otherwise, that a person owning property is married and when the property is sold or encumbered that the spouses must join in signing and acknowledging the instrument. The presumption is, except in case of record evidence to the contrary, that the property is community. It may seem harsh, but the practical viewpoint is that it is up to the owner who wishes to sell to my client, to satisfy me that there was no community interest and hence no reason for the spouse of the record title holder to join.

Perhaps the most troublesome fact that we, as examiners, have to face is difference in use of names, and this applies to all title questions as well as to community interests. Where the parties are alive this is not hard to remedy, as it is usually easy to secure new deeds reciting the facts as to the discrepancy. If the parties are dead or cannot be found, the question becomes complex. Again we must resort to the practical side and if the discrepancy can be reconciled on the record by names and initials or use of nicknames, or diminutives, I think we should forget it and pass on. Also affidavits are used extensively for this purpose and, I believe, as a rule should be accepted. However, if the discrepancy is so great as to amount to a break in title, probably the only remedy is to resort to the courts.

As examiners and attorneys, we cannot recall what has happened in the past as to disclosure of whether or not property has a community status. However, in our hands lies the prevention of a large part of this trouble in the future. When preparing a conveyance or encumbrance, we should ascertain all of the facts in regard to the marital status of the grantors. If the record title holder is a bachelor or a spinster, insist on the instrument saying so. To merely designate the grantor as single, or unmarried, only adds to the misery of some future examiner, as under some authorities, it presupposes a previous marriage. If there is a record discrepancy as to use of names, clear it in the instrument by way of a certificate of the grantor as to the facts. If the grantor was a widow, or a widower or a divorced person at the time of acquiring the property, ascertain the facts, and also their continuance, and show these facts in the instrument.

Another thing that is being done more and more on conveyancing



is to describe the marital status of the grantee in the conveyance, and if the grantee is married, disclose the name of the spouse. This not only removes all questions, but is an aid to the future conveyancer in keeping names straight.

The first session of the Territorial Legislature provided for acknowledgments of conveyances. As we have seen before, it was not necessary for the wife to join with the husband in the conveyance of community property, and hence no provision was made for taking her acknowledgment. The only provision was in regard to conveyances of her separate property. In 1885 when the law was changed requiring the signature of the wife to conveyances and encumbrances of homesteads and community residences, it required the wife to join with the husband in the signing and acknowledgment. The law provided for a married woman's acknowledgment to be taken separate and apart from and without the hearing of her husband. In examinations we find a great many instances in which the acknowledgment does not disclose that the notary performed his task as required by the statute. These errors apparently worried the early day examiner considerably so the legislature adopted Section 2976, Revised Statutes of 1887, which provided in effect for the validation of informality and direct omission in acknowledgments on recorded instruments. In 1907 the Legislature by House Bill 19 passed the law in regard to married women's acknowledgment which we now have and the separate and apart fetish was abolished, after May 7, 1907. At the same session, the Legislature by Senate Bill 58 brought up to date Section 2976 referred to above by extending the validation to May 7, 1907. This was again extended by the Compiled Statutes to May 7, 1919.

The 1941 Legislature failed to pass a similar statute and at the next session, our Association should insist on another extension of this validation.

There are several presumptions in regard to acknowledgments of community instruments, that a practical examiner is entitled to and should indulge in. One is as to marital status. If the instrument says that the grantors are husband and wife, we may presume unless the record shows otherwise, that there is a legal marriage, and that the parties have been in this relationship during the period of ownership. Again that the parties purporting to have signed and acknowledged the instrument actually did so. Section 54-706, Idaho Code Annotated, provides that the official taking the acknowledgment shall not do so unless he knows or has satisfactory evidence that the person making the acknowledgment is the individual described in and who executed the instrument, and in First National Bank v. Glenn, 10 Idaho 224, our Supreme Court held that a notary may not testify to any fact tending to impeach his certificate of acknowledgment. Often young examiners ask this question: "How do I know that the parties signing

this instrument were actually the parties owning the property?" or, "How do I know that the woman signing the name Mary Jones to this deed was actually the spouse of John Jones?" The only answer is that you don't know, and as a general rule, never will know, but you, as a practical man, are entitled to assume that the instrument was signed and acknowledged by the right parties and that the acknowledging officer's certificate that they were the parties is correct. If this were not true, no examiner could pass a title without personally knowing each and every one of the parties in the chain of title, and personally knowing that they each executed and acknowledged the instrument. This would lead only to absurdity and confusion.

In the case of Clegg v. Eustace, 40 Ida. 651, our Supreme Court has held that a certificate of acknowledgement, complete and regular on its face, raises a presumption in favor of the truth of every fact recited therein and that the burden of proof is on the person attacking the certificate. In Kansas City Life Insurance Co. v. Harroun, 44 Idaho 643, it was held that spouses signing a mortgage of community property, and permitting false acknowledgments are estopped to dispute its verity against an innocent party.

I believe we may also, as a practical proposition, and where there is no record to show otherwise, assume that the parties appeared personally before the acknowledging officer as required by the statute.

In connection with mortgages of community property, the law and presumptions are, from a title examiner's viewpoint, the same. Leases of community property for a period of more than one year have been held by our court to be conveyances or encumbrances and hence void unless the wife joins in the signing and acknowledging of the instrument. Fargo v. Bennett, 35 Idaho 359; Burnham v. Henderson, 47 Idaho 687. Contracts of sale of community property as many of us learned to our chagrin and sorrow, are void unless signed and acknowledged by the spouses. Childs v. Reed, 34 Idaho 450; McKinney v. Merritt, 35 Idaho 600; Hart v. Turner, 39 Idaho 50; Elliot v. Craig, 45 Idaho 15. This same rule would undoubtedly apply to options and easements.

In view of Section 31-913, Idaho Code Annotated, which has been the law in this state since 1915 and which is in part as follows:

> "But he cannot sell, convey or encumber the community real property unless the wife join with him in executing and acknowledging the deed or other instrument of conveyance, by which real estate is sold, conveyed, or encumbered."

It would seem that the spouses must join in signing and acknowledging the same instrument and there is grave doubt as to whether



or not when separate instruments are signed and acknowledged, a legal conveyance has been made.

This question has never been passed upon by our Supreme Court, and the next session of the Legislature should be requested to clarify this statute.

Section 52-310, Idaho Code Annotated, of the Uniform Partnership Act relating to conveyance of co-partnership real property has never been construed by our Supreme Court and until it is, there is a difficulty in reconciling the provisions of this Section with the absolute and inclusive terms of our community property statutes. This is a subject well worthy of a paper, and discussion at one of our subsequent meetings. Perhaps by our next meeting some indignant wife may have appealed to the courts to restore her claimed community rights in real estate which her husband has conveyed under this provision of the Uniform Partnership Law.

Section 54-601, Idaho Code Annotated, provides that:

> "A conveyance of an estate in real property may be made by an instrument in writing subscribed by the party disposing of the same, or by his agent thereunto authorized by writing."

Section 54-602, Idaho Code Annotated, provides that:

> "When an attorney in fact executes an instrument transferring an estate in real property, he must subscribe the name of his principal to it and his own name as attorney in fact."

Section 44-808 provides for powers of attorney in regard to mortgages and Sections 54-806 and 54-814 provide for the recording of powers of attorney and their revocation.

The above are the sections of our code providing for attorneys in fact. There is nothing in the statutes, or in the Idaho Case law, as to whether or not spouses can jointly or severally convey community property by an attorney in fact. Any assumptions made must be based upon decisions of our courts upon related matters.

In the case of Meier & Frank Co. v. Bruce, 30 Ida. 732, our Supreme Court held:

> "The disability of married women to enter into contracts has not been removed in this state, except where the married woman contracts for her own use or benefit or in reference to the management and control or for the use and benefit of her separate property."

This quotation was cited with approval in the case of Ness v. Coffer, 42 Idaho, 78, and similar holdings have been made in other Idaho cases.

From the above, I believe it can be safely said that until our Court passes on this matter, it would be very unsafe to pass a conveyance or encumbrance on community real property signed by the wife through an attorney in fact.

Conversely, as there are no restrictions or limitations, either by common law or statute, on the power of the husband to contract, there would seem no sufficient reason why a husband can not convey his interest in community property through an attorney in fact.

From the consideration of these matters, there is also a serious doubt in my mind as to whether the spouses can legally create a joint attorney in fact to convey community property.

As a practical matter most examiners have probably passed such matters where they have stood unchallenged for a long period of time and in such instances, I believe this is the reasonable attitude to take.

I realize as well as you the limitations of such an investigation as this. I have stayed entirely within the statute and case law of our state, for the reason that there is no state that now has a community property law the same as ours. A deeper investigation on our part of the particular points would, of course, carry one into the field of statute and case law of other jurisdictions.

Doubtless some of you will not agree with my conclusions, and many will know much more than I do about these matters, but if this paper is of some aid or assistance to any member of our bar, in meeting and overcoming these questions in a practical manner, I will be satisfied.

PRES. GOFF: Thank you very much, Mr. Martin. This is a very practical subject.

F. C. SHENEBERGER: Mr. President, I would like to ask one question, whether or not the wife may convey her interest in community property to her husband?

MR. MARTIN: That is rather a hard question to answer. I don't know as I can give the right answer, but I can tell you what I think. We have a good many cases in our case law which say the husband has the right to make a gift of property to his wife, except in case it would be in fraud of his creditors. So far as I have been able to find out, we have no case which says the wife cannot convey to her husband. We have those statutes which I referred to in connection with powers of attorney, and perhaps if that is carried out to the ultimate conclusion, that might keep the wife from making a gift to her husband. However, as a practical man, I personally pass gift conveyances of



the wife to her husband, but I do think that is a matter that should be taken care of by statute, and in this past session of the legislature, the State Bar Legislation Committee presented to the legislature, and the legislature passed a bill which in so many words said it could be done, but for some reason or other, our good Governor was afraid of it or something, and he vetoed it. I think that should be brought up again in our next session of the legislature, and when passed again through the House and Senate, taken up with the Governor and explained very carefully before he acts on it.

KARL PAINE: I would like to remind our Governor that our Inheritance law contemplates either party may make a conveyance of community interest.

MR. V. R. CLEMENTS: I am sorry that Mr. Estes of Moscow is not present to give his paper, and would like to see it read at this time.

## STEPPING UP OUR PROBATE PRACTICE

**By Murray Estes**

Each attorney undoubtedly has some suggestions for stepping up or streamlining our present system of Probate practice. The defect which appears most outstanding to me is the Court of original jurisdiction in probate matters, in other words, the Probate Corut itself.

This paper will therefore tend to renew a subject which has been discussed at many previous State Bar Meetings—the abolishment of the Probate Court.

After this subject was assigned to me, I undertook to find what work had been done heretofore in connection with any previous attempts to abolish our present Probate Court system. It appears that the abolition of Probate Courts, an office provided for by our Constitution, was first sought in the form of a Constitutional Amendment proposed by the 1907 legislature. At the general election in the fall of 1908 this amendment was adopted by the voters. However, due to the fact that this amendment was improperly combined with others and because of improper procedure in submitting it to the voters, it was held by the Supreme Court in 15 Idaho to be void and no part of the constitution. Due to the defects in the submission of that amendment in 1908 we are at this time possessed of a court system which has long been considered outmoded by the legal profession of this and other states, and which was voted out of existence 33 years ago by popular consent of the state's citizens.

Starting with the year 1929 a good deal of thought and work was devoted to the subject of abolishing Probate Courts and transferring those duties to the District Courts. After several years of discussion

at bar meetings and work upon the subject by the Judicial Council, which body made reports to the Bar in the years 1930 and 1932, a request was made of the 1935 Legislature that the State Constitution be amended in such a manner that the legislature be provided with power to abolish Probate Courts and place their jurisdictional powers in the District Courts of the State. Due to the fact that no Attorneys were in the House of Representatives at that particular session of the Legislature, the proposition was looked upon with suspicion and was rejected.

Since that time, to my best knowledge, no effort has been made to bring about reconsideration of this proposition which was once adopted by the voters of the state and which has on several occasions been recommended by the Bar of the State, almost unanimously.

After seeing the amount of work and thought that has been devoted to this subject, and after reading the names of the men who have studied the problems involved, I feel that what I have to say here will be largely repetition.

In determining whether our present Court system and, particularly our Probate Courts, are adequate for the job which they purport to handle, we must not be guided by the question of whether the particular Probate Judge to whom we submit most of our Probate proceedings in our local counties is qualified for the job which he holds. In my own county the Probate Judge is a qualified Attorney. Nevertheless, the question is not one of the particular man before whom we practice but it is a question of the entire system, itself.

To start with, there are no particular qualifications required of a Probate Judge other than that he have the ability to obtain more votes than any opponent. He may be a laborer, a butcher, a barber, or, if no one else runs, a lawyer. To such a man, attorneys and clients in many counties are forced to submit all original matters in Probate Proceedings, no matter what amount of money or what technical and complicated rules of law and statutory procedure may be involved. The Probate Courts, further, have Civil jurisdiction to the amount of $500.00 and Criminal jurisdiction of Misdemeanors with the authority to pass a maximum sentence of six months in jail and a $300.00 fine.

In the early days when our State was more sparsely settled than it is now, and District Judges covered large Districts by slow modes of conveyance, there unquestionably was a necessity for some type of Clerical Judge to effect greater dispatch in disposing of Probate matters. Now, however, the District Judges usually have less counties under their jurisdiction. If there is more than one County in their jurisdiction they travel more often from the place of their residence to the County seats of the various counties. At the same time, litigation is not as prevalent now as it was in early days. Every set of figures I have been able to find on comparisons of the amount of litigated cases now and in past years show a decided decrease in this type of legal business. In many of the outlying counties it is difficult to find a time when there are enough accumulated cases to warrant the calling of a jury. Often one or two cases ready for trial must remain on the calendar for long periods of time until, in the judgment of the District Judge, there are enough actions to warrant a jury term.



At the same time it appears that probate work is on the increase. This leaves us in the inconsistent position of having our legal trained and better paid Judges holding positions where few of our legal questions are submitted. At the same time we are submitting a greater percentage of our work to an officer without Judicial qualification.

While the Probate of estates often seems routine in nature, there is no type of practice where the record is more permanent or where the chance of mistake, affecting your client and his title to property, is greater. Almost all estates involve realty, and the record made in probate will appear in an abstract until the land goes back to the Indians. Why, then, should we submit such matters to a judge who may be unqualified and, if so, does not realize or understand the permanancy of his records or the effect of his judicial acts?

In all our surrounding states, Montana, Washington, Utah, and California, the Probate jurisdiction has long ago been lodged in courts corresponding to our District Courts. These states have ceased to see any reason why Will Contests, Account Matters, and other probate litigation, often involving large sums, and Civil Actions involving amounts as high as $500.00 should first go through a dress rehearsal in the Probate Court and then suffer the added expense, litigation costs, and adverse publicity of retrial in the District Courts.

On many occasions the necessity of first trying a set of facts in the Probate Court and then retrying the same facts on appeal to the District Court has caused a delay of six months or one year in finally concluding the litigation before the Supreme Court. Such long delays are particularly common in smaller Counties where District Court terms are held irregularly or in cases where the Probate Judge, not realizing that his decision will be rendered inconsequential by an appeal de novo, consumes some period of time in deciding the action.

Often the small litigant, who is least able to stand the expense of litigation is confronted with the matter which, by virtue of the amount involved, requires him to stand the expense and embarrassment of two complete trials on matters of fact before he can reach the Supreme Court.

It may be contended that the transfer of all of the present duties of the Probate Court to the District Court, including adoption proceedings, insanity hearings, pension matters, indigent applications and juvenile delinquency investigations is beneath the dignity of the District Court or is placing too much added burden on that Court. The District Judge is yet to be elected who becomes too important to handle the general run of small as well as large business which confronts the practicing attorney. Neither is there a district judge in the State who is badly overworked or threatened with such an unhappy situation.

I am advised that in the State of Washington the Superior Courts, which correspond to our District Courts, have for many years handled the duties which are divided between the District and Probate Courts of this State. In addition, the Justice of the Peace courts in Washington are limited in jurisdiction to Civil matters involving not more than $100.00 with all civil actions involving more than that amount being filed originally in the Superior Court. The Clerk of the Superior Court is also a Court Commissioner with power to sign certain routine orders and handle some default matters which would otherwise requlre the Judge's time. It would appear that a Court system of this general nature would be even more adaptable to a State with the small population of Idaho than in the case in Washington where large centers of population exist.

Since the objections to the necessity for trials de novo in the District Court apply with equal force to Justice Courts which now have Civil jurisdiction to the extent of $300.00 and Criminal jurisdiction equal to that of the Probate Courts, and since the qualifications for the office of Justice of the Peace are much the same as those for Probate Judges, it would seem that if our Probate practice is to be stepped up through abolishment of the Probate Courts, then the time is right for a readjustment of our entire antiquated court system.

The general run of Probate and Justice Courts, as they now exist cannot be defended upon a basis of their efficiency, from a standpoint of beneficial and errorless work performed, nor for the qualifications of their judges, many of whom are laymen charged with the obligation of interpreting and enforcing laws which they do not understand. Yet in the face of this lack of qualifications for judges of our Probate and Justice Courts some attempt has been recently made to change the boundaries of our District Courts and eliminate, not our unqualified Probate Judges and Justices of the Peace, but to eliminate our District Judges who hold the only trial Court position in the State where the presiding judge is required to be learned in the law. Quite definitely the attempts at elimination of unnecessary Courts have started in the wrong place.

It is not my desire to extend the length of this paper by attempting



to cover all arguments which come to mind in connection with this problem. However, I do want to make suggestions which, may form the basis for discussion and perhaps be of some aid in a plan for reorganization of our Probate Court System. My suggestions are the following:

1. That provision be made for proper Constitutional amendment abolishing the Probate Court as a Constitutional office.

2. That probate work, that is management of estates, be placed under the original jurisdiction of our District Courts.

3. That all remaining jurisdiction now lodged in the Probate Court be transferred to our district courts together with original jurisdiction of all cases involving amounts exceeding $100.00 thereby reducing jurisdiction of our present Justice Court; or if it appears this suggestion would place too much work on our District Courts, that both the Probate Court and the Justice of the Peace Court, as they now exist, be completely abolished and be replaced by a County Court. The judge of such County Court should be paid a salary, thereby eliminating the fee basis of payment for services, and he should be required to be an attorney. Such County Court should have jurisdiction of all matters, other than estate work, now under the jurisdiction of our Probate Court, jurisdiction in all civil cases not exceeding $300.00 and in all misdemeanor cases tried in either our Justice or Probate Courts. If such a County Court were created trial de novo of cases originally filed therein should be eliminated with right of appeal on points of law only.

4. Filing fees in District Court should be sharply reduced, particularly if the District Court assumes all duties of the present Probate Court and civil jurisdiction of all amounts over $100.00.

5. Provision should be made for the Clerk of the Court to be appointed by and such office should be under the direction of the District Judge, thereby assuring occupation of that office by some person capable of performing the intricate duties required.

6. Such Clerk should be a court commissioner with power to sign routine orders and to handle default matters in the absence of the District Judge.

Nearly two years remain before the next session of our legislature. Before the meeting of our legislature, another State Bar Meeting will be held. I would recommend that a permanent Committee be appointed to study this problem and to make more concrete recommendations of this group one year from now.

It may be said that the suggestions herein made carry little resemblance to the topic "Stepping up our Probate Practice," that

the suggestions herein made will merely provide for doing the same routine matters in the same routine way in a different Court. Undoubtedly this criticism is true to some extent, but it is an indictment of the legal profession as much as a charge against our statutory probate procedure. Attorneys as a class have no desire to shorten the requirements of legal procedure or to take advantage of short-cuts if they are pointed out. Many of the ex-parte orders now signed by our Probate Courts at the request of the practicing attorney are not required by our statutory procedure. As an example, upon a petition being filed for letters of administration the statute states that "the clerk must give notice thereof by causing notices to be posted." No order directing posting of such notices is required—mere proof that such notices have been posted is sufficient. Yet through custom in many localities an order directing posting of such notices is added to the record and necessarily included in all abstracts to property affected by the Probate. The Supreme Court of the United States recently adopted new rules of federal procedure simplifying pleadings in federal courts to a point almost beyond imagination, but the practicing attorney has refused to allow his job to become simple, continuing to file in federal court the old type of pleading which starts with the creation of the earth and brings the case down to date.

For these reasons I believe that any attempt to eliminate routine steps in the probate of estates would prove fruitless. However, if the qualifications of the judge to whom we submit our probate matters are raised and the neeessity for trials de novo in probate matters is abolished by the abolition of one court to which such matters must be presented on our way to the Supreme Court, then we have accomplished a concrete improvement for the profession and for our clients.

Realizing that this is the last scheduled matter for discussion on the program, I have made every effort to eliminate verbosity in the foregoing paper.

I am sorry that I was not able to deliver this paper in person and that it was necessary for me to impose upon the time of another person for the presentation of same.

MR. CLEMENTS: I would like to suggest to the Officers of the Association, as well as the Program Committee, a committee who will take the report to our annual meeting, and give us a formal report on the subject of the advisability, feasibility, and probability of abolishment of all courts in Idaho except the District Courts and the Supreme Court. We would be taking a real step forward along with our Rule program. This question is one worthy of the consideration of the Bar prior to the next session of the legislature.

A study of this was made some ten years ago. Mr. Merrill, as I



remember, was on that committee. The report wasn't received with favor at that time, but conditions have changed considerably, and there is much to be said upon this question. I would like to see it brought up next year.

On behalf of myself and most everyone in attendance here, this has been a very remarkable program, and all the members of the Program Committee are entitled to our hearty thanks. (Applause.)

PRES. GOFF: It is all due to the very fine work of that Committee which consisted of E. B. Smith and Paul Hyatt.

Gentlemen, on your programs, you can see a number of questions we might take up, but I don't see any necessity of voting on them unless someone wishes specific action taken. Three special committees were appointed. Do these committees care to make their reports? Mr. Johannesen on the matter of Title Examination, if you have your report . . .

O. E. JOHANNESEN: Your special committee on uniformity of title examinations make the following suggestions and recommendations:

We commend the suggestions outlined in the address by Mr. Van de Steeg of Nampa, and recommend that the respective District Bar Associations of the State immediately take steps to formulate and adopt agreements among the members of their associations having for their object the lessening and simplification of requirements in the matters of affidavits, District and Probate Court records, judgments, decrees and matters of similar import, and along lines that have been established by the members of the Nampa Bar.

We recommend that a permanent committee be appointed with a view of bringing about a general understanding and agreement among the lawyers of the State as to requirements in title examinations, and similar agreements with title examiners living without the State and who are engaged in passing upon Idaho titles; that such committee investigate the possibility of bringing a number of test suit cases to obtain declaratory judgments on debatable questions of general import.

We recommend that, where possible, the State Bar cause test suits to be instituted for the purpose of obtaining declaratory judgments on questions that are now uncertain and controversial in title examinations, to the end that a more common understanding may

be had by the members of the Bar as to what should or should not be waived or required in connection with title examinations.

Respectfully,

O. A. JOHANNESEN

DANA E. BRINCK

CAREY H. NIXON

Committee.

DANA E. BRINCK: In that connection, on behalf of our institution at Spokane, Mr. van de Steeg's paper was certainly constructive, and I am sure we would like to cooperate in so far as possible and feasible to do so, in so far as they are concerned with clearing of title, and I think the probate proceedings and that sort of thing will pass muster without being in the abstract.

We would want to make a very earnest effort to cooperate to the fullest degree.

The other question that was suggested in the Committee report concerning the obtaining of declaratory judgments, no individual wants to go to the Supreme Court, unless there is a good deal of money involved. The question that Mr. Sheneberger asked Mr. Martin illustrates the type of question on which nobody knows the law, even though some of us think we do. Nobody but the Supreme Court can tell us the answer. If there was some permanent committee of the Bar that could prepare, get an agreement among attorneys on those questions and have a case framed,—not the evidence, of course, but the case—to present to the Supreme Court and get a decision, we would be very glad to participate, in so far as the Federal Land Bank is concerned. An institution like ours doesn't like to come into a State and have a lot of questions about abstracts unsettled. If we had a committee of the Bar, we could cooperate, and perhaps get other large institutions to cooperate on the expenses and burden, and it might amount to something.

PRES. GOFF: Would the assistance by the bank go as far as financially?

MR. DANA E. BRINCK: Yes, it would, as it would be to our advantage to cooperate on these matters.

FRANK MARTIN: Would that go so far as where the attorneys, or the organized Bar would agree to pass title on certain platted subdivisions, that they are acceptable?

MR. BRINCK: We would want to take the case and form our own opinion, but go along with the attorneys. Title examination is merely for the next attorney, not for the clients. Titles are mostly indefeasible, but no one of us considers that as sufficient.



PRES. GOFF: Thank you, Judge Brinck. I suggest a motion to accept the recommendation of this committee.

FRANK MARTIN: I so move.

HUGH CALDWELL: I second.

PRES. GOFF: It has been moved and seconded that the report of this committee be accepted and the active cooperation with the Bar by the Federal Land Bank be accepted.

The method of voting provided for is by local associations, the entire number of each local association, but on matters where there is no difference of opinion, I wonder if we want to take the time for that type of voting, or whether simply "aye" and "nay" voting will suffice. Unless there is a vote asked for on these questions, I am going to put them for a simple "aye" and "nay" vote.

All those in favor of approving this Committee's report signify by saying "Aye". All those opposed by "Nay"?

The motion is carried. There was another special committee appointed on Bar sponsored legislation, headed by Chairman Baum.

O. R. BAUM: There was one resolution handed the committee, which the committee wishes to call to your attention at this time:

Resolved that the President appoint a special Committee to study the question of the constitutionality of an act delegating authority to the Supreme Court to adopt a Code of Evidence to govern the admission and rejection of evidence in all the Courts of Idaho, and if constitutional to draft and cause to be enacted a bill conferring such power on the Supreme Court.

That was handed to the committee by Mr. Worthwine, and the Committee reports that they will leave it to the members of the bar. I move such resolution be adopted.

MEMBER: Second.

PRES. GOFF: All those in favor signify by saying "Aye". Opposed? The motion is carried.

There was a special committee appointed upon the matter of Appeals. Mr. Paine.

KARL PAINE: The committee you referred to has to do with recommendations made by Mr. Budge in his address. They contem-

plated the amendment of certain statutes. The committee approved these recommendations, but as those statutes may be superseded by the new rules, it is the recommendation of this committee that the matter be referred to the Supreme Court committee on Rules of Procedure. I move that our recommendation be accepted.

MEMBER: Second.

PRES. GOFF: It has been regularly moved and seconded that the changes recommended on appellate procedure be referred to the Supreme Court Committee on the new rules. All those in favor say "aye". Opposed? The motion is carried.

A. L. MERRILL: Mr. Clements made a suggestion I would like to discuss a moment. The development of good roads, modern cars, and modern means of communication, and so forth, has left the Probate and Justice Courts of little or no value. All that work could be handled very much better if there would be a reorganization of the Court system, and perhaps the amendment to the Constitution to abolish the Probate Courts, and put that work into the District Courts, and certainly the elimination of the fee system of our Justice Courts.

About twelve years ago a committee was appointed to study and ascertain the amount of work of the various courts throughout the state. The result of that study was graphed, and certainly with the amount of work the District Judges have, the work in the Probate Courts could be given to the District Courts, as it has been done in practically every other state. Of course this has been up many times, and the constitution was amended at one time. The report of that committee was criticized on the ground that it was going to centralize all the law business in certain centers.

I now move that the Bar Commissioners appoint a committee to make a further and additional study, following up the study heretofore made, upon the load upon the Courts in Idaho, and the advisability of changes in our law, with perhaps the abolition of the Justices of the Peace and Probate Courts, or some other method of handling that phase of their work, and transferring the Probate work at least to the District Courts.

BEN B. JOHNSON: Second.

PRES. GOFF: All those in favor signify by saying "Aye". Those opposed? The motion is carried.

CLARENCE M. JEFFERY: The Prosecuting Attorneys section had a short meeting. A question arose which I would like to bring before this meeting. This had to do with the exemption from taxation but perhaps a hypothetical illustration would best present it to you.



"A" and "B" are both widows. "A" purchased some property on contract and has paid $100.00 down, and has no record title to the property. She is not entitled to exemption on that property. "B" has purchased property and has given a mortgage on the property, and she has only a $100.00 equity on that property and is still entitled to the exemption. There is little uniformity in that. Both might be in the same class, both might need the same exemption to live and carry on their property.

One member of the committee made a recommendation which will take a lot of "guts" to present, but the recommendation was that we eliminate entirely all exemptions and go on the basis of the relief statutes. Anyone needing an exemption can come before the County board and make a showing entitling them to the exemptions. That is something that we should consider. We would like to have this referred to the legislative committee.

PRES. GOFF: Mr. Jeffery, I think you have a very practical suggestion, but the plan of taxation is a political one and not a matter which the Bar should determine or take definite action on. I will do this, and I feel the Bar will agree, the matter could be referred to the legislative committee, but I doubt if the Bar will want to recommend any changes on a political question.

Now we will proceed to the consideration of these questions which are presented at the bottom of your programs. I am going to read them, then if there is no demand for action, we will take no action.

Question No. 1. "Enactment defining effect of conveyances between husband and wife." The Bar has already approved this. Do you wish to take any further action?

FRANK MARTIN: I suggest it be referred to the legislative committee again.

PRES. GOFF: We will do that.

Question No. 2. "Enactments eliminating appellate procedure technicalities." That has already been referred to the Supreme Court Rules Committee.

Question No. 3. "Request to Ninth Circuit Court of Appeals for Court Rule permitting a transcript of evidence on appeal under certain conditions." That is important mainly to those who have appeals in the Federal Court. Do you care to take any action on that?

(No response.)

PRES. GOFF: Question No. 4. "Enactments relating to titles." The Committee will be appointed and cover that.

Question No. 5. "Recommendation favoring passage of American

Bar Association Bill permitting appeals from administrative Boards." What is your pleasure with reference to that one?

(No response.)

PRES. GOFF: Question No. 6. "Enactments relating to divorce laws."

FRANK MARTIN: Can't that be referred to the legislative Committee also?

PRES. GOFF: If there is no objection, we will refer that to the Legislative Committee.

WM. F. GALLOWAY: Mr. Hawley and I went to considerable effort on the matter of conveyances between husband and wife, and we feel that should be referred to a committee consisting of Gov. Chase A. Clark and Frank Martin for the purpose of drafting similar legislation. (Laughter).

GOV. CHASE A. CLARK: I suggest that we should have the ladies pass on that. (Laughter.)

PRES. GOFF: We have already referred that to the Legislative Committee. Question No. 7. "Streamlining Probate Practice." That is well covered in the paper prepared by Mr. Estes. No. 8. "Recommendations of Local Bar Associations." What about these recommendations of the local Bar Associations?

(No response.) Now the last one, No. 9. "Program and Place of Meeting—1942 Annual Bar Meeting."

BEN JOHNSON: We have had such a delightful time here at Sun Valley, and the ladies have all expressed their pleasure. I move that the next place of meeting of the Idaho State Bar be at Sun Valley. (Applause.)

MEMBER: Second.

PRES. GOFF: All those in favor say "Aye". Opposed? Unanimously carried.

On the matter of the program, we have been trying to get more practical matters before the Bar Meetings. Are there any recommendations in regard to that?

PHIL EVANS: You will remember the recommendation submitted to this convention from the Southeastern Bar Association. I would like to see that recommendation referred to the Idaho State Bar Commissioners for consideratoin.

PRES. GOFF: Yes. Are there any other recommendations?



L. E. HUFF: We had some discussion this morning concerning the proposition of advertising. We also had two very able papers on the question of divorces in Idaho. I was wondering if the incoming Bar Commissioners might not properly consider the matter of having a committee to work out something along the lines of these papers and have some definite distribution of it to the New York lawyers. This might be embarrassing, but it seems like we could get out a good pamphlet and mail them to the New York attorneys.

PRES. GOFF: Any further discussion?

Now, gentlemen, it comes time for me to sing my "SWAN SONG". I am not going to sing it. All I am going to say is that I served three years on the Bar Commission, and I refused any suggestions that I might be a candidate again. I did it for two reasons: First, it takes too much time, and secondly I think it is of real value to pass these offices around to the different lawyers. Any member who has served on this Commission and who has had the honor of serving as President is much better off for doing so, and he will be an ardent supporter of the Association thereafter.

Gentlemen, it has been a pleasure to get acquainted with you, and without this opportunity of acting as President, I would not have as fully appreciated the pleasure.

At this time I am going to ask Mr. Johannesen and Mr. Martin to act as an escort to the speaker's table for Mr. Clarence Thomas of Burley, one of your Bar Commissioners, and the incoming President.
(Mr. Thomas was escorted to Speaker's platform.)

I am handing you this gavel, and I suggest that next year you don't try to be quite so young as to go ice skating again. But I do wish to congratulate you and impress upon you the pleasure you will derive from this position. There will be rough times, to be sure, but also there is a lot of pleasure to be derived from your work.

Gentlemen, I am now through. May I present Mr. Clarence Thomas, your new President.

PRES. THOMAS: Thank you, Abe. It has been a real pleasure to work with you.

Gentlemen, I believe I will save any address I might have until next year.

Is there any further business?

PHIL EVANS: We all owe appreciation to our retiring President, who served us so faithfully, and I take pleasure at this time in moving

a vote of thanks to Mr. Goff for his cheerful and efficient service.

MEMBER: Second the motion.

PRES. THOMAS: You have heard the motion, all those in favor signify by saying "Aye". The motion is carried unanimously.

PRES. THOMAS: The meeting is adjourned.



## ATTENDANCE REGISTER

| Name | Address |
|---|---|
| Ailshie, James F. | Boise |
| Ailshie, Robert | Boise |
| Albaugh, Ralph | Idaho Falls |
| Anderson, Eugene H. | Boise |
| Baird, L. E. | Boise |
| Baker, H. A. | Rupert |
| Baum, O. R. | Pocatello |
| Benson, Frank | Boise |
| Bistline, Frank M. | Pocatello |
| Black, Roy L. | Pocatello |
| Blaine, James W. | Boise |
| Bloom, Edward | Wallace |
| Bothwell, James R. | Twin Falls |
| Boughton, E. V. | Coeur d'Alene |
| Bowler, W. B. | Boise |
| Breshears, Ralph R. | Boise |
| Brinck, Dana E. | Spokane, Wash. |
| Budge, Alfred | Boise |
| Budge, Hamer H. | Boise |
| Butler, Edward C. | Lewiston |
| Chapman, Marshall B. | Twin Falls |
| Clark, Chase A. | Boise |
| Clements, V. R. | Lewiston |
| Condie, Gibson | Hailey |
| Darling, Chas. H. | Boise |
| Davison, W. H. | Boise |
| Delana, Elbert S. | Boise |
| Dunbar, Wm. C. | Boise |
| Durham, Ray E. | Lewiston |
| Duvall, O. P. | Twin Falls |
| Eberle, J. L. | Boise |
| Elam, Laurel | Boise |
| Elder, Robert H. | Coeur d'Alene |
| Elder, Robert M. | Coeur d'Alene |
| Ennis, Paul | Boise |
| Evans, P. J. | Preston |
| Felton, Tom | Moscow |
| Fortner, H. O. | Twin Falls |
| Furchner, H. Wm. | Blackfoot |
| Galloway, Wm. F. | Boise |
| Givens, Raymond L. | Boise |
| Gillespie, Conroy | Hailey |
| Glennon, L. E. | Pocatello |
| Goff, Abe | Moscow |
| Gray, Gordon | Twin Falls |
| Griffin, Sam S. | Boise |
| Gyde, James | Wallace |
| Hall, Henry M. | Jerome |
| Hawley, James H. Jr. | Boise |
| Hawley, Jess | Boise |
| Hawley, Jess Jr. | Boise |
| Healy, Wm. E. | San Francisco, Cal. |
| Herndon, Charles | Salmon |
| Hedrick, Joseph | Hailey |
| Holden, Edwin M. | Boise |
| Holden, Wm. S. | Idaho Falls |
| Hopkins, Bert | Moscow |
| Huff, L. E. | Moscow |
| Hull, H. J. | Wallace |
| Inman, Arthur C. | Boise |
| Jackson, John | Boise |
| James, A. F. | Gooding |
| Jeppesen, V. K. | Nampa |
| Johannesen, O. A. | Idaho Falls |
| Johnson, Ben | Preston |
| Jones, Ralph H. | Pocatello |
| Jones, T. D. | Pocatello |
| Keenan, J. R. | Twin Falls |
| Kenward, John T. | Payette |
| Kerr, Robert M. Jr. | Boise |
| Kimble, Frank F. | Orofino |
| Koelsch, Chas. F. | Boise |
| Lee, Wm. S. | Coeur d'Alene |
| Lowe, Jarvis E. | Burley |
| Lowe, S. T. | Burley |
| Martin, Frank, Jr. | Boise |
| Martin, T. L. | Boise |
| McDonald, T. E. | Challis |
| McNaughton, Wm. F. | Coeur d'Alene |
| Merrill, A. A. | Idaho Falls |
| Merrill, A. L. | Pocatello |
| Moffatt, W. C. | Boise |
| Morgan, A. L. | Moscow |

| Name | Address |
|---|---|
| Murphy, James T. | Twin Falls |
| Nelson, Spencer | Boise |
| Neilson, A. H. | Burley |
| Nixon, Carey H. | Boise |
| O'Donnell, J. Morris | Moscow |
| Oros, Walter M. | Boise |
| Paine, Karl | Boise |
| Parry, R. P. | Twin Falls |
| Peterson, Ben | Pocatello |
| Peterson, Robert W. | Moscow |
| Racine, Louis | Mountain Home |
| Robertson, T. N. | Boise |
| Scatterday, Geo. H. | Caldwell |
| Schmitt, Mary | Rexburg |
| Scoggin, Chas. O. | Fairfield |
| Skalet, Herbert O. | St. Anthony |
| Sheneberger, F. C. | Twin Falls |
| Smith, E. B. | Boise |
| Smith, Mary | Rexburg |
| Snook, Fred H. | Salmon |
| Sullivan, W. E. | Boise |
| Sutphen, D. H. | Gooding |
| Swayne, Samuel F. | Orofino |
| Taylor, C. J. | Idaho Falls |
| Taylor, Everett B. | Sun Valley |
| Taylor, Fred M. | Boise |
| Thoman,; J. P. | Twin Falls |
| Thomas C. W. | Burley |
| Thompson, H. B. | Pocatello |
| Van de Steeg, George H. | Nampa |
| Wallis, Randall | Cascade |
| Weston, E. L. | Boise |
| Wilson, A. B. | Twin Falls |
| Whitney, John D. | Ketchum |
| Winstead, C. E. | Boise |
| Witty, W. H. | Pocatello |
| Worthwine, O. W. | Boise |
| Zener, Milton | Pocatello |



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