PROCEEDINGS

of the

Idaho State Bar

VOLUME XX, 1946

TWENTIETH ANNUAL MEETING

BOISE, IDAHO

July 19 and 20, 1946

PAST COMMISSIONERS

WESTERN DIVISION

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

EASTERN DIVISION

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

NORTHERN DIVISION

ROB'T. D. LEEPER, Lewiston, 1923-26.
C. H. POTTS, Coeur d'Alene, 1926-28.
WARREN TRUITT, Moscow, 1928-32.
A. L. MORGAN, Moscow, 1935-38.
JAMES F. AILSHIE, Coeur d'Alene, 1932-35.
ABE GOFF, Moscow, 1938-41.
PAUL W. HYATT, Lewiston, 1941-44.
E. T. KNUDSON, Coeur d'Alene, 1944-47.

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E. T. KNUDSON, Coeur d'Alene, (1944-47), President
E. B. SMITH, Boise, (1942-48), Vice-President
R. D. MERRILL, Pocatello, (1946-49)
SAM S. GRIFFIN, Boise, Secretary

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Ninth District—Harold T. Lee, President, Rigby; Gladys Dennis, Secretary, Idaho Falls.

Eleventh District (11th and 4th)—Frank L. Stephan, President, Twin Falls; Gordon Gray, Secretary, Twin Falls.

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TWENTIETH ANNUAL MEETING

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IDAHO STATE BAR

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COMMISSIONERS OF THE IDAHO STATE BAR

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

NOTE: Due to war conditions no meeting of the Bar was held in, and no Proceedings published for, 1945.

FRIDAY MORNING, July 19, 1946

PRES. PAUL T. PETERSON: Gentlemen of the Idaho State Bar, it is my privilege at this time to call the 20th annual convention of this association to order.

I will appoint on the Canvassing Committee: Andrew James, Gooding, Chairman, A. T. Fredricks, Boise, and Judge Glennon, Pocatello. On the Resolutions Committee I will appoint Harry Benoit, Twin Falls, Chairman, O. R. Baum, Pocatello, Judge O. A. Sutton, Weiser, J. L. Eberle, Boise, and Frank Kimble, Orofino.

The first order of business this morning is the Secretary's report.

SECRETARY GRIFFIN: Due to war conditions, no meeting of members of the Bar was held during 1945. The Board of Commissioners called a formal 1945 meeting for the purpose of complying with the statutory requirements for an election in the Western Division at which E. B. Smith was re-elected Commissioner for a three-year term.

This report will summarize Board activities for the two years since the Annual meeting in 1944.

For 1944-5 E. B. Smith was President of the Bar, Paul T. Peterson, Vice-President. For 1945-6 Paul T. Peterson was President, E. T. Knudson, Vice-President.

Ten meetings of the Board were held at either Moscow, Lewiston, Boise or Idaho Falls. With the aid of the Examining Committee, consisting of Marcus Ware, Lewiston; E. P. Barnes, Boise; and Errol Hillman, Idaho Falls, questions for five examinations for admission to practice were compiled, approved, and the examinations given, and graded. As was to be expected applications dropped radically due to the war; thus at the June, 1944 examination only 3 appeared for examination; in December, 6; in June, 1945, 2; in December, 1945, 4. The changed conditions are indicated by the appearance of 13 applicants at the June, 1946, examination.

Of the total of 33 applicants during these years, 7 were rejected prior to examination, usually for deficiency in education. Twenty-six were approved

for examination; 28 (2 repeaters) were examined, of whom there were 14 failures and 12 passed and were recommended for admission.

One examination to establish pre-legal college standing was given and one other authorized. Several applicants were permitted to take examinations out of the State and under supervision, because war conditions made it impossible for them to appear in Idaho.

A rather elaborate attempt was made by one applicant to secure changes in the Rules for Admission so as to permit him to qualify. The Board and Supreme Court agreed that to break-down the required standards was unwise from the standpoint of the public, the Courts, the Bar and even the applicants or future lawyers who would have to compete with higher standard admittees. The six months residence prior to application was, however, modified to tbree months. In practice the former longer period actually amounted to from ten months to one year before admission.

Fourteen formal complaints, in addition to many informal ones, were considered. Two remain undisposed of. In many of the others no cause of complaint appeared after investigation and in the others satisfactory adjustment and settlement were made. Consequently no disbarment hearings were had.

A Local bar made general complaint of illegal practice but was unwilling to cooperate by furnishing specific instances which could be investigated.

A lawyer submitted the question of whether he could properly deliver printed income tax information bearing his name, profession and address to recognized present clients. The Board ruled that he might do so under the specific facts and conditions submitted, but further ruled that its holding was so limited and other cases would have to be determined according to their facts.

Upon permission of Judge Clark of the United States District Court for Idaho, the Board formulated and presented proposals for changes in the Rules for Admission of Attorneys into that Court; it is understood that Judge Clark is giving the proposals his consideration.

Prior to the 1945 Legislature, Ben Delana, Boise, was appointed Chairman of a Bar Legislative Committee. He selected Committee members, largely from the Boise Bar, as being most available for service and numerous legislative proposals were considered at almost daily meetings. Favored acts were drafted and many times redrafted, presented to the Legislature and, in almost all instances, passed and approved.

Here again should be emphasized that practically no proposed acts are received from local bars nor individual lawyers in condition to be accepted and presented. Indications are that draftsmanship is hurried, and insufficiently considered in respect to future operation under varying conditions; choice and use of words is frequently bad and obscure. The Legislative Committees of the Bar have always considered the drafting of acts to be a most difficult and exacting task. Submissions of proposals to the Bar for endorsement and presentation should always be framed most carefully, usually in the form of a bill—the Legislative rules for form should be followed—a title most carefully framed, and always the Committee should he fully informed as to the need, purpose, and intention with references to present law and effect upon other law.

The Board caused to be published and distributed Mr. George Donart's Idaho Scheme of Title Registration for the information and discussion by the lawyers and local bars.

The effect of Federal tax legislation upon community property was given much attention. Mr. J. L. Eberle headed a committee on the matter, which consulted and advised with committees of other community property states, and joined in briefs in litigation affecting the matter.

Some consideration was given to Group Advertising and Group Insurance, with no definite conclusion yet reached.

The problems of the College of Law, University of Idaho, were of special concern to the Board and three conferences were held with the faculty. Along with matters of general concern, refresher courses, curricula, pre-law study of English, psychology and accounting, 3-year pre-legal study, increase in faculty, veteran's facilities, were discussed. The College and its faculty were most cooperative and the Board feels that the relationships were most friendly and helpful.

In 1941, I reported 510 licensed lawyers and judges. During the war this decreased to less than 400. As of now, there are 436 resident licensed lawyers and judges and 22 licensed non-resident lawyers; the total licensed is therefore 458.

My records, probably inaccurate, show that 83 Idaho lawyers served or are still serving in the armed services of the United States during the late war. I hope that every Idaho lawyer who so served will write me (whether he thinks I know it or not) giving the dates of his entry and discharge, branch of service, discharge rank, theater of service, decorations, so that the records of the Idaho State Bar may be complete.

A new system of accounts established by the State, governing appropriations of lawyers license fees and other funds, and expenditures, requires a change from the prior method of reporting. The fiscal biennium began July 1, 1945, and ends June 30, 1947.

July 1, 1945, balance in fund	$4,394.02
July 1, 1946, licenses paid	4,417.50
examination fees	305.00
July 1, 1946, total balance and receipts	$9,116.52

Expenditures 7-1-45—7-1-46

Personal Services (Secretary, stenographer, readers, etc.)	$2,450.00
Travel expense	766.45
Other expense	836.58
Express, Postage, Telephone and Telegraph, Printing Bar Proceedings, Office Supplies, Insurance, Nat'l Conference Bar Examiners and Subscriptions.	
Total Expense	$4,053.03
July 1, 1946, Fund Balance	$5,063.49

The following have been reported to me as deceased since the last report in 1944:

Bash L. Bennett, Rigby
William A. Brodhead, Boise
Miles F. Egbers, Coeur d'Alene
E. S. Elder, St. Maries
S. S. Gundlach, Wallace
F. A. Hagelin, Nampa
Curtis Haydon, Caldwell
I. W. Kenward, Payette
F. M. Kerby, Cascade
W. A. Ricks, Rexburg
R. B. Smith, Twin Falls
F. L. Soule, St. Anthony
Luther W. Tennyson, Boise
Lorenzo Thomas, Blackfoot
J. H. Wourms, Wallace

WM. F. GALLOWAY: I move the adoption of the Secretary's report. (The motion was seconded and carried.)

PRES: It is a pleasure to greet this first convention after the cessation of actual war and to know that we are meeting under these particular conditions. I am not going to take up any time, because we have a very good program, and we don't want to lose any opportunity to get all that is on the schedule. But as a Commissioner representing the Bar, I wish to take this opportunity of welcoming back into the Bar those members who have served in the armed forces during the last few years.

I envy the young practitioner the opportunity that he now has. I do not think that in the history of the United States there has been a finer opportunity in either the legal, political or business field than there is today, and the young lawyer is to be envied. There is no limit to which he may aspire.

The first number on our program this morning is a discussion by the Honorable Hugh A. Baker of Rupert on "Justice for Idaho Judges."

HUGH A. BAKER: Mr. President, members of the Idaho Bar and guests:

In opening the discussion of "Justice for Idaho Judges; Tenure; Compensation," I shall proceed in slightly different manner than the subject would seem to forecast.

Disinterested, impartial and capable arbiters are essential in any regulated contest but in none is the need greater than in man's contest with his neighbor affecting his property or in his controversies with the state affecting his life or his liberty. Lawyers and bar associations fail in their first and most important duty if they do not exert themselves to make it certain that the courts are manned by capable and impartial arbiters. Lawyers must see to it that their workshops are in order and efficient.

In trials before juries the permissible inquiry to ascertain the presence of bias, prejudice or a condition of mind which might affect the juror's conclusion is extensive, and generous rules are liberally interpreted to insure the decision of questions of fact by persons wholly impartial. But in the enlightenment of the year 1946 judges are required to hear and decide cases in which those responsible for their election and upon whom they must rely for re-election are interested. Is that a sound policy? Does that permit judges to become or remain disinterested and wholly impartial?

In the last primary election sixteen district judges and one Justice of the Supreme Court were actually elected. There will be no judicial ballot anywhere in Idaho in November. In only one instance was there a contest;

but one district judge could have been displaced. Seventeen men aspired to the sixteen offices of district judge and but one wanted to be a Justice of the Supreme Court. Why? Does it mean that the people of Idaho, including the bar of the state, are in all instances as satisfied with their judges as the absence of opposition might indicate or does it mean that the judiciary in Idaho is not attractive to practicing attorneys qualified to serve? We have every reason to believe that qualified men were solicited but would not permit the circulation of nominating petitions in their behalf. Again why?

In an effort to analyze the situation let us assume that the proposal were to be made to any of you by any important and influential group, organization or class—and groups, organizations and classes are now very important in our judicial elective plan—that you be a candidate for a position on the bench in Idaho with a view of making it your career. What would your reaction be?

If the proposal came unsolicited and suddenly, modesty would probably bring first some expression, not strong but an expression, of doubt as to judicial fitness and ability. In all likelihood some way could be found to remove that doubt to your satisfaction.

Your next thought would be of the honor connected with the office and the thought would be pleasant. By training and experience you have acquired a deep and abiding respect for the judiciary and an accurate understanding of its important function in our governmental system. You recognize the court as the last resort of the troubled citizen, as the place where his complaint or his defense can or should be heard fully and fairly, decided impartially and in all respects in accordance with law and justice, as the tribunal to whose judgment the defeated party should be able to submit with a confidence greater than his disappointment. You think of it as the institution which holds the scales of justice equally balanced, giving no more thought to the demands of the clamorous present than to the welfare of silent posterity. You think of the men who left enviable records because they were wise, just, honest, diligent and courageous—willing bravely to protect the weak against the strong, the minority against the majority, the individual against the mob and you are proud. But you do not want to act precipitately.

Upon reflection you would think of the same things any man would consider when offered employment.

You would first be interested in permanency of position or tenure. The man about to enter private employment would want to know that the job would be reasonably certain of continuance and conditioned only upon satisfactory service and that it offered a fair chance of advancement as ability and experience warranted. In the judiciary there is no chance of advancement.

You would realize that you would give up a business and a clientele you had been years establishing and of considerable value, that upon the termination of your incumbency you would find that your clients had formed the habit of going to others and that it would take time for you again to attain the position you enjoyed before you became a judge. You would bear in mind that in Idaho you would be obliged to ask friends throughout your district or the state at four or six year intervals to circulate a nominating petition for you and that you would be in a campaign without party or other sponsorship, responsibility or aid but would be entirely on your own without even the concerted aid of the bar. You would abhor the thought that you would be

obliged to go out and advertise your judicial qualifications about as a peddler hawks his wares and perhaps compete with an experienced, adroit and unscrupulous campaigner. You would think of the men who had been displaced notwithstanding records warranting their retention. The prospect would not be encouraging.

The next item you would consider is that of return or income. You would realize immediately that service on the bench would involve a financial sacrifice but the honor would compensate to some extent. In private employment income increases with experience and ability. On the bench the judge knows his income is limited to that fixed by the legislature. Until recently we believed that the judge was assured when elected of a definite salary for his term and that it was subject neither to increase nor to diminution during that period. That assurance is no longer his. Except as the legislature should see fit to grant blanket increases to all in the same class, the young and inexperienced as well as the mature and capable, you would have no right to bope for greater income after twenty years of service than at tbe beginning of that period. Again you would weigh the possibility that after a period of excellent service you would be obliged again to start and at the bottom. The prospect remains unattractive.

The next item you would consider would be this: When age, or the frailties incident to years or the voters' will forces retirement would you have property or income sufficient to maintain yourself and wife comfortably and decently? If you remain in private practice you have every reason to believe you will be able to do that and perhaps go to California or Arizona for a few weeks each winter. You may gradually turn the business to a younger associate with assurance of continued income. You realize that on the bench, income continues only while you hold office and that when retirement comes income stops. Consequently you feel you would at best be faced with the alternative of retiring and living upon your pre-judicial accumulations or your inheritance from your farmer father or of continuing in office after you should have retired. Again there is not much to recommend the judiciary as a career.

It is true that Judges are usually returned to office but excellent judges are sometimes defeated and all are faced constantly with the prospect of defeat despite enviable records. There is always present the chance that after some election a judge—any judge—will find himself without judicial office or clients.

That is the situation in Idaho. What's to be done about it? How can we go about it, *First*: To get and keep qualified judges; and *Second*: Replace the incompetent without at the same time imperilling the capable?

During the last decade or two these considerations have caused the questions of tenure, salary and retirement of judges to engage the serious attention of the American Bar Association and the bar associations of the States. Of these questions it would seem that tenure is perhaps of greatest importance although salaries in Idaho are at present, in spite of the increases voted by the 1945 session of the legislature, shamefully inadequate.

The plan of selecting judges by popular vote is a modern idea and is rapidly becoming discredited. Only in the United States and in Switzerland are judges elected in that manner. The Act of Settlement resulting from the Revolution of 1688 changed the rule of judicial tenure which had previously

existed in England. Theretofore judges in England had held office at the pleasure of the crown; thereafter they were appointed for life or good behavior. When the colonists came to America they brought with them a definite notion that the term of office of the judges should not be subject to the uncontrolled will of the crown. Interference with that security of tenure was a complaint made by them against the King in the Declaration of Independence in that: He

"has obstructed tbe administration of justice, by refusing his assent to laws for establishing judiciary powers" and

"'has made judges dependent on his will alone, for the tenure of their offices and the amount and payment of their salaries."

So firmly did they believe that uncertain tenure was antagonistic to the efficient administration of justice that they caused the Federal Constitution expressly to provide that Federal Judges "'shall hold their offices during good behavior." Thus the tenure of the Federal Judiciary was established and with some exceptions the Federal courts have been the embodiment of learning and integrity and the pride of our American judicial system.

Originally the colonial and state judiciaries were selected through executive or legislative appointment to serve during good behavior. Later during the Jacksonian era through the application of the Jeffersonian principles of popular election, the states began to abandon the system of selection by appointment and to adopt the system of selection by election. This shift was attributed to the appeal of the doctrine of popular sovereignty and to hostility toward the courts due to unpopular decisions.

In a few of the New England states there has been no departure from the principle of selection by appointment. The first break from the rule of appointment for life or good behavior came by the inclusion in the Ohio Constitution of 1802 a provision limiting the term of office of judges to seven years. Between that time and the beginning of the Civil War twenty-two of the thirty-four states had adopted the rule of election for short terms. Popular election and short tenures were adopted in all of the states admitted since the Civil War.

Originally and at intervals in this state judges were nominated and elected as party candidates. This system had two advantages and at least as many objections. When political parties were permitted, in pre-primary days, to choose their candidates, party interest required that they select capable candidates; and party funds and party campaigns assisted all including judicial candidates. The objections were that it made and kept judges party-conscious and other and immaterial issues frequently defeated judges, both Democrats and Republicans, who should have been re-elected.

The people of this state have expressed their determination to remove the judiciary from political influence and pressure. In 1934 they stated their idealism by writing into the constitution of this state a provision designed to make the judiciary non-partisan. To the extent that party sponsorship of able men and party responsibility for incompetents were removed and the entire load placed upon the shoulders of the individual candidates, they succeeded. The idealism involved was impelling. Party nomination and election tend to make a judge party-conscious; the non-partisan judiciary law tends to make him self-conscious.

Deprived of endorsement and aid of political organization, we should not be surprised if a candidate for judicial office would go out and attempt to get the active support of denomination, organization, clan or pressure group of some character. Then we would have politics at its worst. The Idaho non-partisan law in its operation can easily foster a condition similar to that which developed in New York a few years ago. Our system of non-partisan primary nomination and election of judges has been found unsatisfactory and has been condemned wherever tried.

Upon the members of the bar rests the positive duty of taking a greater interest in judicial primaries and elections, while we have them, and acquainting their clients and friends with the qualifications of judicial candidates. In the primary election of 1934 we had a non-partisan judiciary ballot by legislative act. In the primary election of that year there were several candidates for the office of Justice of the Supreme Court. Some were well known to the bar of Idaho as capable, experienced, honest and fearless judges; some were just well known. The result of the primary was rather startling. After the primary I said to a neighbor lady of more than average intelligence and who took more than an average interest in public affairs, that I was interested in knowing how she voted for the office of Justice of the Supreme Court. She said in answer: "Well, I did not know any of them; nothing had been said about any of them. On the ballot appeared the name of a man who had been prominent in Idaho for a long time and I voted for him." She then made this arresting statement: "I assumed all were qualified or their names would not have appeared on the ballot." She added that she then began a search for an attractive name. She found one that appealed to her and gave it her second vote. It is fair neither to the voter nor to the candidate to have elections determined by those who vote names or by those who determine judicial fitness from a picture on a telephone pole.

Prior to 1936 much valuable work had been done by a committee of the American Bar Association on the problem of judicial selection and tenure.

In 1934 a questionnaire was submitted by a special committee of the American Bar Association to 138 bar associations in 35 states. The committee summarized the result as follows:

"Lawyers in states where judges are appointed by the governor or chosen by the legislature are strongly opposed to any change in the existing system, while the profession in those jurisdictions where the judges are elected is not satisfied with present methods and wants something else."

In 1936 a special committee, called the Judicial Selection and Tenure Committee, was appointed. In January, 1937 that committee made its report to the House of Delegates resulting in the adoption of a resolution, the essential parts of which are as follows:

"WHEREAS In many states movements are under way to find acceptable substitutes for direct election of judges:

"NOW, THEREFORE, BE IT RESOLVED By the House of Delegates to the American Bar Association, that in its judgment the following plan offers the most acceptable substitute available for direct election of judges:

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

"(b) If further check upon the appointment be desired such check may be supplied by the requirement of confirmation by the State Senate or other legislative body of appointments made through the dual agency suggested.

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

This plan has become known and is generally referred to as the American Bar Association Plan. The form of ballot recommended by the committee was first suggested by Albert M. Kales in an address by him in 1914 before the Minnesota Bar Association. That part of the recommendation is referred to as the Kales Plan.

Apparently all who have given thoughtful and extensive study to the question have reached the conclusion that the best plan is a controlled appointment originally with subsequent submission to the voters of the question of retention of office without competing candidate where the appointment is not for life or good behavior. The character of the control over appointment by the executive has caused much discussion. Some seem to favor the appointment with subsequent approval of legislative body as in the Federal courts. Others, and they constitute a very heavy majority, favor the plan of limiting the appointment to one from a list approved by a nominating committee consisting of both lawyers and laymen without other office in state or political party. It is argued, and with reason, that if the appointment is made by the executive to be subsequently approved by legislative body, it will remain, as in the Federal courts, political and subject to political scheming and bargaining. The advantage of the Federal system is that the appointment is for life and, while a man must be politically strong to become a judge, he need not remain politically minded to retain his office.

Judge Bothwell will discuss, I am informed, the efforts that have been made in and the accomplishments of other states in putting the American Bar Association Plan or some modification into operation.

Men do not seek judicial office as a means to an end; ordinarily it is the end. Men seek other state office, notably Governor or Attorney General, with a view of using it as a means to obtain some other and more desirable office. The judiciary is not a stepping-stone to other position. Most men who become judges do so with the idea that they will remain permanently or at least indefinitely.

Capable judges come from the ranks of successful attorneys—those who have demonstrated their ability. They are neither young men without extensive experience behind them nor old men without active years ahead of them. They are men of vigor and vitality, capable of years of active service as attorneys or as judges. Such men are in the years of greatest income as attorneys. Service on the bench for them means more than the substitution of a judge's salary for their established income during their years of service; it means a substantial change in many ways.

While reasonable certainty of tenure appears to be necessary to attract qualified attorneys to the bench, it alone is not sufficient. The compensation

paid must make the office, with due consideration to the element of honor, attractive to fit men. Judges, like the rest of us, must provide for the support of dependents, are subjected to constant demands for contributions and should make some provision for the protection of families in case of death. The increased cost of living, the heavy taxes imposed upon income and tbe reduction of the purchasing power of the dollar have reduced the actual value of judges' salaries to a low point. Adequate salaries should be paid and provision should be made to insure a family maintenance to the judge who has served faithfully and long when his days of efficiency are gone. Retirement should not be postponed until death despite previous disability.

Assume a Justice of the Supreme Court has a wife and no other dependants, his Federal income tax will amount to approximately $850.00 per year on present salary of $6,000. The income taxes from a District Judge with but wife as dependant amount to approximately $675.00. The 1945 increase just about took care of income taxes and leaves the judges with the same net salary as when the 1907 session of the legislature increased salaries.

Judges must be paid adequate salaries or one of two things must happen: Either we shall have a less capable judiciary, a bench drawn from the mediocre members of the bar with resultant lowering of the standard of service or a bench from wealthy practitioners alone. The active lawyer of average means and without other income or estate cannot afford to be a judge.

Do we wish our judges to come only from the two classes named?

If judges had no income other than their salaries they would now be independent if they had taken up railroading instead of law as a career. They would have saved the cost of their education, would now be receiving as much if not more than their salaries and be approaching the age when they could or must retire with the certainty of comfortable retirement income.

Only Kentucky, the Dakotas and Utah pay the Justices of their Supreme Court less than paid to tbe Justices of the Supreme Court of this state even after the 1945 increase. All states except those named and Kansas and Vermont pay higher salaries. In adjoining states the salaries paid to Justices of the Supreme Court and Judges of the District Court are as follows:

State	Justice Sup. Ct.	Judge Dist. Ct.
Nevada	$7,500.00	$4,500.00 to $7,200.00
Oregon	7,500.00	5,000.00 to 6,500.00
Washington	8,500.00	6,500.00
Montana	7,500.00	4,800.00
Wyoming	7,000.00	6,500.00
Utah, as stated	5,000.00	4,000.00

All adjoining states, except Utah, pay the Justices of their Supreme Courts from $1,000.00 to $2,500.00 more per annum than paid to the Justices of the Supreme Court of this state.

Twenty-eight of the states now have effective retirement pension laws by which judges receive upon retirement either stated incomes of $2,400.00 as in Oregon and Maryland up to the full amount of the salary as in Michigan and Tennessee. In some states judges contribute to the retirement fund; in others they do not. Of the adjoining states only Utah and Montana have

no effective retirement acts. In the following adjoining states the retirement pensions are:

Wyoming	$4,000.00
Washington	One-half salary
Oregon	$2,400.00
Nevada	Two-thirds of salary

The retirement pensions of the English Judges are greater than the salaries of any of the Judges of the Federal Courts save only the Associate and Chief Justices of the Supreme Court.

It is hardly a persuasive argument that Judges who do not like the present salary scale are free to resign and return to the practice of law. It is, of course, true that no particular judge or group of judges is any more indispensable to the service than any other individual group. But the question is not merely one of finding individuals willing to serve for the salaries paid; it is a question of public policy and public service, of whether or not a salary sufficient to make the offices reasonably attractive to first class lawyers will be paid. Judges now on the bench are not so free to resign as it might seem. They have abandoned their practices in mid-life and re-establishment is not easy. So in all likelihood the present judges would continue to serve without increase in pay or without retirement. But what type of men can we expect to find on the bench when death has called those now serving if salaries without retirement remain the same? The experience of 1946 and the few preceding election years should have demonstrated to the satisfaction of everyone that capable men are not now interested in the judiciary as a career. What are we going to do when our present judges are gone?

If the state only offers its judges an income sufficient to maintain self and family, without hope of retirement pay upon completion of long and satisfactory service and asks them at four or six year intervals to risk defeat at the polls, it is and will continue to be difficult to interest capable attorneys in the judiciary as a career.

If we let judges and prospective judges know: 1. That their tenure of office will be dependent, not upon the will or whim of voters, not upon the vote getting ability of a competing candidate, but upon the performance of satisfactory service; 2, That they will be paid a fair compensation for their services; and, 3, When they have served the required number of years or have reached a fixed age with a shorter period of service, they will be permitted to retire with an assured income sufficient to maintain themselves and those dependent upon them, we can be certain that able men will occupy the benches of Idaho and we shall continue to have the quality of judicial service we all so genuinely desire.

* * * *

PRES.—The Honorable James R. Bothwell of Twin Falls will continue the discussion.

MR. BOTHWELL: This important subject calls for something more than a discussion from the floor. The paper which we have just listened to from our distinguished friend, Judge Baker of Rupert, merits our highest commendation in calling the attention of the Bar and of the public to the importance of the judiciary in this State.

The questions presented here today have been postponed and neglected

far too long and a realization of this situation comes none too soon to the attention of the Bar of this State.

When we consider the matter of the selectionn and tenure of Judges in Idaho, we are at once confronted with the provisions of our State Constitution, which provides

> "The selection of justices of the Supreme Court and District Judges shall be non-partisan. The legislature shall provide for their nomination and election but candidates for the offices of judges of the Supreme Court and District Judge, shall not be nominated nor endorsed by any political party and their names shall not appear on any political party ticket, nor be accompanied on the ballot by any political party designation."

It would seem that before any of the suggested plans for the selection of judges by the American Bar Association can he adopted in Idaho that there would need be an amendment to the Constitution. The present provision of the Constitution seems to contemplate an election as that term is generally understood. However, on the question of the nomination of candidates, it has heen suggested by the Judicial Selection and Tenure Committee that pending the adoption of necessary constitutional amendments, the nomination of candidates should be delegated to the Bar. The American Bar Association has adopted the suggestion of Charles Richards of Indianapolis. Under that plan all judges not over 70 years of age are candidates unless they renounce their intention or right to become a candidate. Other candidates are placed in nomination by petition, a Bar primary is then held and the three highest become the nominees and are voted upon at the ensuing general election. Probably our Constitution would permit the nomination of candidates in this manner.

Many attorneys have for some time interested themselves in the attitude of the voters toward the nomination of judicial candidates by the Bar. It would seem that a majority of the voters approve the plan.

Unsatisfactory as our non-partisan judicial law is, it is not without merit. The constitutional amendment of 12 years ago took the judiciary out of party politics. Political parties have not had the aid of assistance which aspirants to judicial office would be able to give to their tickets. Those in control of the major political parties in Idaho have made no effort to restore the judiciary as a political aid to their parties. Political considerations would perhaps not constitute a serious obstacle to the legislature granting the power of nomination to the Bar.

Of the sixteen district judges now serving in Idaho, all but three began their present tenure by appointment. It should be said to the credit of the Governors of this State that they have during recent years at least followed the recommendations of the Bars of the judicial districts wherein the district judges have been appointed. It may be that in some instances the attorneys were given advance notice that the appointee must come from a particular political party, but in any event, the attorneys have had a voice in the selection.

Governor Warren of California seems to be popular with the people of his State to the extent of having recently been accorded the nomination by popular vote of both of the major political parties of his State. To the Bar of California, he recently said:

> "I am extremely grateful to the State Bar for the assistance that it has given me in the past six months. You have helped me in every judicial appointment that I have made. * * * I am of the opinion that no man should aspire to the bench unless he can run the gauntlet of his own profession.
>
> "Every man who is appointed in the next four years will have to do precisely that. If he can not come through after an investigation by his own profession as being qualified for the bench, he will not be appointed to any judicial position."

MISSOURI PLAN

On the question of amending the Constitution of Idaho to permit the Missouri Plan for the selection of judges, it is thought that the Idaho State Bar may initiate the plan by enlisting the support of public and civic organizations throughout the State. This may be done by asking these various organizations to appoint a committee to act with the Idaho State Bar in presenting this question to the electorate. It has been suggested that such a committee from the laity should bring the matter to the forefront and sponsor the proposal in conjunction with the membership of the Idaho State Bar.

BAR PRIMARY

In the meanwhile until the Idaho Constitution can be amended, it has been suggested that the Bar Primary Plan proposed by Richards of Indianapolis be advanced and that the Bar ask the aid of civic and public organizations throughout the State to see that this matter be presented to the coming legislature with proper recommendations.

Now, as to the plan which could be or might be adopted in Idaho: reference has been made to the Missouri Plan by the American Bar Association, and I found nothing more directly in point than in the "Journal of the American Judicature Society" for February 1943. It was given by Mr. Wood of the Los Angeles Bar, Chairman of the American Bar Association Special Committee on Judicial Selection and Tenure, and it is directly in point. I call your attention directly to what he has said. This has been tried out and worked out by the American Bar Association, and the Missouri Plan is endorsed and recommended;

"The Missouri amendment adopted in 1940 provides that whenever a vacancy exists in the Supreme Court or in the Circuit and Probate Courts of St. Louis and Jackson County, a non-partisan, non-salaried nomination commission, composed of both layment and lawyers, shall nominate to the governor three candidates for appointment, and the governor must appoint one of these nominees. The appointee, after a period of 12 months, and each of the judges of the courts mentioned, at the expiration of his term, goes before the people upon his record and with no competing candidate. The people vote whether or not the judge shall be retained in office.

"If the vote be against retention, a new judge must be nominated and appointed and after serving the trial period must go before the people for confirmation or rejection of the appointment. The amendment specifically prohibits judges from contributing to or holding office in any political party or organization and from taking part in political campaigns.

"The amendment is applicable to the judges of the Circuit Courts of the two most populous circuits, those in which are situated St. Louis and Kansas City, and where the court house rings and political machines in the past have wielded vast power in nominating and electing judicial candidates of their own choosing. It provides that the people of the other circuits, mainly rural, may, by tbeir vote, make the amendment applicable.

"The nomination commissions are composed of lawyers elected by the bar of the state as to the supreme court, and the circuit bars as to the respective circuits, of laymen appointed by the governor and for staggered terms so that after the first appointments no governor is likely to have the opportunity to nominate more than one lay member of the commission, and of the Chief Justice.

"The commissions selected are composed of outstanding non-political men. The nominees selected by them have been outstanding."

This plan was attempted earlier than 1940 in Missouri by the bar by taking it before the legislature. The legislature refused to submit the matter to the electorate. The bar then organized, and, with the laity, took the matter up with all the public and civic organizatoins throughout the state, and finally the matter was presented to the electorate, and the Constitution of Missouri was amended.

It has been suggested that in Idaho the bar should take the initiative and enlist all of the assistance of the civic and public organizations throughout the state to place the matter before the coming legislature and that the question of a constitutional amendment be submitted to the present legislature. It is thought that such plan could be worked out in Idaho, and it certainly would be beneficial.

PRES.—We have in Idaho a law school in which all members of the bar are interested. Today we have an opportunity to hear the head of that institution. Dean Brockelbank of the College of Law of the University of Idaho.

DEAN W. J. BROCKELBANK:—Mr. President, Honorable Judges of the Supreme Court, Ladies and Gentlemen of the Bar:

I wish to thank you for the honor you have done me in asking me to speak before you. I do not appear to make a learned address on some intricate point of the law, however pleasing it might be for me to do so. I have come to give you a report on the College of Law and to tell you something of its present condition, and something of the plans for its future.

Up until the War, the law school, both in its faculty and its student body, was relatively stable. You are well acquainted witb its condition at that time. During the War, our enrollment went down to eight students, all either 4-F's or women. The faculty in the main remained the same. This continued until June, 1945. At that time, Dean Pendleton Howard resigned to accept a professorship at the University of Southern California; Professor Bert Hopkins resigned to teach in Indiana; Professor Arthur Harding had left earlier in the War to become a colonel. These changes were due, in the main, to the larger salaries that were offered from other schools. Idaho, with a rather restricted budget, was unable to meet the competition. After that, I was the only professor left. During the summer, President Dale had engaged one professor and had begun negotiations for another. Unable to find a Dean, he turned to me and asked me to take the position of acting dean and carry on in the College of Law.

The school year of 1945-46 has been a rather hectic year, but, as I look back upon it now, I think we were able to do a pretty fair job. The first thing, in September, 1945, was to assemble a faculty. Within a short time, we had a faculty of four teachers. Three of tbem were members of the Bar of Idaho, and two of them had practiced in Idaho. Besides myself, the faculty was composed of Associate Professor Weldon Schimke, who is here today, and who is teaching with us still in the school of law; Mrs. Alberta Morton Phillips, a brilliant graduate of the school, of the class of 1942; and Assistant Professor Blakely Murphy from Oklahoma.

The enrollment shot up from eight to twenty-eight.

At the end of the first semester, Mrs. Phillips left us to return to practice with her husband, but we were able to obtain the services of Mr. Robert L. Gee, former deputy prosecuting attorney from Denver, Colorado. In February, 1946, we had an increase in the student enrollment from twenty-eight to fifty-three.

One of the problems confronting the law school was to plan a curriculum which would synchonize with the needs of the large number of veterans wbo had different amounts of previous law training all the way from one semester to five semesters. This was no easy task, because, with a limited teaching force, we could not offer an unlimited number of courses. At the same time, the curriculum seriously needed overhauling. The course in taxation had not been taught for years, although every practicing lawyer knows that from a third to a half of his time is taken up with tax problems. There had been, in recent years, a large increase in the number of administrative agencies, and until 1945 we had never had a course in administrative law. The faculty of law decided that we should offer some new courses to meet these needs. Accordingly, the course in taxation was revived, and courses in administrative law and trade regulations were offered. Since these new courses were now being given for the first time in the history of the school, they could be elected by any veteran, no matter what degree of legal training he had had before. At the same time, the new courses were highly desirable for the practice of law in the post-war world.

At the end of the school year, our student body was approximately ninety percent veteran. Many of these students wished to continue and get to the bar as rapidly as possible. Therefore, we were able to organize a summer session. Summer schools in law had never been given before in Idaho. We are now at about the middle of the summer session, and I believe I can say it has been quite a success. Of the thirty-six students in the summer session, thirty-four are veterans. They are all anxious to speed the day when they can enter the practice.

At the end of the school year, we lost Professor Robert L. Gee to the University of Denver—again because we were unable to pay him the salary that is indicated by this competitive world. He has been replaced by Assistant Professor George B. Fraser, Jr. Mr. Fraser was formerly with the Veterans' Administration at Boise. He holds the degrees of Bachelor of Arts from Dartmouth, the degree of Bachelor of Laws from Harvard, and the degree of Master of Laws from George Washington University.

Such, in the main, is the history of what has been done. It has been a year of considerable change, but I believe the situation is in hand. Now, what of the future? You were all reasonably well acquainted with the former dean, Pendleton Howard. I am sure you are wondering, who is this man who is now the acting dean, and what he is going to do with our College of Law? I wish to say a few words about the various questions that I am sure occur to you.

First of all, I wish to ask your cooperation in helping the faculty of law to deal with the problems that are most vital in the State of Idaho. I do not take the attitude that a professor of law knows any more about the law than anyone else. He is simply a human being with all of the faults that come from human frailties. He probably knows how to find the law. He has had training in school, usually a period of years of practice, and some graduate study, and can tell the students, who wish to learn, something of what they will meet in the practice. I wish to ask you, therefore, if you have an idea about what should be taught or how it should be taught, to write me a letter explaining your position. I wish also to ask that when you are involved in an especially interesting case that you will write me explaining something of the case. I also wish that you would be good enough to forward to me from time to time your especially good briefs. These are very useful materials, and are helpful to us in the teaching of law. My point of view is not to impose either law, or ideas about the law, upon the Bar but rather to ask the Bar to help the faculty of law to solve the practical problems that come before it.

It is commonly said that there is a distinct difference between *theory and practice;* that is true to a certain extent, but I am one who believes that if a theory will not work in the world in which we live, it is bad theory and is useless. And therefore I should like to deal only in theories that will work.

I find among the so-called "professors of Law" the theory men, that they often object to the word "craftsman." They have an idea sometimes that there is something wrong with the school that has as its primary purpose the formation of craftsmen. But, I am willing to assert that the first and primary purpose of the College of Law should be to create able craftsmen in Idaho law. We need good craftsmen and, moreover, we need to be proud of them. At the same time, I think it is necessary that we take care to use the word "craftsman" in a very broad sense. Sometimes lawyers remain in a groove that has become familiar to them in school, and in practice. Not all of them are alert to the fact that we are living in a fast-changing America. Our own economy is changing, and now, whether we wish it or not, we are being closely tied up with a new world economy. We cannot sit by and not take into account the development in economics, in labor relations, in world trade, public events, huge governmental expenditures, collective marketing, and social security. We must, therefore, include within our idea of a skilled craftsman a man who has an intimate acquaintance with all of these subjects. I, therefore, say that our first purpose is to form a good craftsman in a broad sense. He must be capable of becoming a good lawyer.

We should also keep in mind that a certain number of our students will later become judges, and they must have a broad background, not only with the technical rules of law, but a baggage of information about the world in which they live, which will allow them to see questions in their proper perspective.

We must also remember that not a few of our students will be elected to

the legislatures of the State of Idaho and perhaps to the Congress of the United States. It is a legitimate ideal, therefore, that in at least a secondary way we should not forget the public roles which many of our students may be called upon to fulfill in the course of their lives.

And, finally, we should not forget that the training for the law is also a training for good citizenship. We must not be content with training only narrow-minded technicians, illiterate craftsmen, but citizens who are able to see every question that may come before the tribunal of human discussion and deal with it in such a way as to render justice to all.

As a law teacher, I have only one small suggestion to make to the members of this Bar, and that is to increase the availability of the best books, both to the bench and the bar. A while ago I visited the library of the Supreme Court at Pocatello, and I have a rather intimate acquaintance with the library at the State Capitol. I have noticed that the collections of reported cases at both places are very complete, but the collections of law reviews are rather scanty. I suggest that the number of law reviews be extended, and that when full sets of law reviews cannot be obtained, the libraries should consider the feasibility of purchasing various sets of "readings". There is, at the present time, a good set of readings on contracts, put out by the Association of American Law Schools; a second volume is coming out soon. There is a volume of readings on domestic relations now being compiled. There is a four-volume set of readings on constitutional law. There is a splendid book of readings on personal property---and so I might continue. I make the suggestion here, simply for what is worth, that these volumes of readings compiled, for the most part, from the law reviews, represent the best thinking of our profession and should be made widely available.

Now I wish to discuss the question of whether we should have in the College of Law only teachers who are practicing, or who have practiced, law. I should like to make my position perfectly clear on this point. The catalog of the University of Idaho states: "The members of the teaching staff do not practice law, but give their entire time to instruction and research. Their practice of the law, which gives them an appreciation of the law in operation, has preceded their teaching." This about expresses my sentiments. I believe that it is not wise to have teachers on the faculty of law engaged in the practice at the same time that they are teaching. The reasons are simply that no man can stand the physical strain of doing these two jobs. He is bound to neglect one or the other, and, after an experience of fifteen years of observing the teaching process in several law schools in this country, I am sure I am right in saying that in most cases it is the teaching that suffers.

At the same time, I am perfectly clear that it is desirable to have teachers who have practiced law in the past, and that is our aim at the University, I believe each of our professors, ideally, should have practiced for a period of from five to ten years. This gives him a proper appreciation of the problems of the practicing lawyer.

You are perhaps wondering what I think about the relations between the law school and Bar. Let me say at once that I do not believe in what is called the "diploma privilege." By that is meant that when a man receives his LL. B. degree, he has ipso facto a right to practice in the state. I know that some arguments may be made for the diploma privilege; that, if the law teachers, who are officers of the state, are fit to hold their jobs at all, they

are fit to determine when a student becomes competent to practice law. However, in practice, I believe it is extremely desirable to have a double check on our students. When a student has spent three years in close contact with his professors, it sometimes happens that personal relations are such that it is difficult to gauge his ability accurately. It is therefore desirable that each student try a bar examination which has been written by men he does not know, and the answers to which will be read also by men he does not know. This procedure has an excellent effect upon the learning process through his three years at the College of Law. For one thing, he knows he must remember what he learns in contracts and keep it alive for his course in sales and creditors' rights. He must remember what he has learned in constitutional law and keep it alive for his course in administrative law, and so on. This makes him a much more completely rounded man at the end of his three-year course. I believe it would be wrong were I to turn over a set of our examination papers to the Bar Commissioners or for them to turn over a set of their examinations to me. It is desirahle that we have two independent bodies working independently as a double check on the future lawyers of Idaho.

About two years ago, I took the Bar examination at Boise, and I would like to say that I believe there is nothing wrong with it (that of course may be because I passed it). It appeared to me to be well balanced, to take a large view of the law, to include some questions on federal practice and procedure, to have been prepared by men who are actively practicing law and who are seriously concerned with the problems in a workaday world, not only in Idaho, but in the larger unit of the United States. That is exactly as it should be, and so long as the Bar examination is as broad and as carefully planned as the one I took, I think there is no fear for the future members of the Bar of Idaho.

Some of you may ask: "What are you doing for the veterans? Do you have any refresher courses at the University of Idaho?" Our answer has been that we welcome the veteran student, whether his course in law has been partly completed, or whether he is already admitted to the Bar and wishes a refresher course. The number of students and lawyers in Idaho does not warrant our giving special refresher courses, hut we take the few cases that have come to us and give them specially tailor-made treatment. This consists usually in having them attend some of our regular courses, and at the same time go through a procedure of supervised reading in our law library. I believe that we can deal with each case as it comes to us, in this manner. We have had very few applicants for instruction other than those whose training has been only partially completed. Practically all of our veterans are of the latter class. From the experience of teaching forty-seven veterans during the last semester, it is my belief that the veteran is a better student than the normal student before the War. He is more mature, and he is very serious. He presents no problem of discipline; he is always a gentleman. There are, of course, a few exceptions where veterans have, due to their experience in battle, become either physically or mentally ill, and, of course, we have had in that connection some special problems, but they have not been numerous.

Another problem that arises: What should we do, if anything, about law institutes? I have been very anxious to get at that question, but during the past year haven't had time to give it proper attention. One of the difficulties in Idaho is that we are a long distance apart, and it is difficult for our teachers to attend institutes all over the state. However, there is no reason

why institutes should not be held in all of our major cities and, when it is possible, that one of our teachers should appear and speak at them. I do not wish to imply that our law school teachers are the only persons who can speak at an institute. Quite the contrary. I believe that most institutes should be conducted by practicing lawyers for practicing lawyers. I believe, at the same time, that professors should attend, because it is there, most of all, that they are almost certain to learn. In regard to any institutes which the Bar would like to hold during the coming year, the law faculty will do all in its power to cooperate. We desire to help when we can, and, above all, we want the chance to learn when we can.

I am anxious that you continue to present to me your suggestions. One suggestion which a member of this Bar made to me a short time ago was that we should have a course in brief-making. Many of the students, upon entering an office as junior practicing lawyers, do not have the ability to write good briefs. I believe the suggestion is a good one, and accordingly we are going to have a course in brief-making next year. This is in addition to our regular course in legal bibliography and how to find the law.

Another suggestion that has come to me from a member of the Bar at Idaho is that we should offer a course in labor law. There is more need for labor law in this post-war world than there was years ago, and we have decided that that is a good suggestion and we shall offer a course in labor law next fall.

There is another matter about which I have been quite uncertain. I have discussed it with some members of the Bar but have not made up my mind on it yet. It is this: Should we require more pre-law training for our students? The thinning of the ranks in the law school during the war has created a scarcity of lawyers, and at the present time I believe we do not have too many lawyers in Idaho, or perhaps anywhere else in the country. But the gaps are being rapidly filled up, and the day will soon come when there will again be too many lawyers, and the question arises, would it not be better to prevent so many men from coming to the bar rather than opening the gates so that every one may become a lawyer and, after he has entered the practice, find only disappointment? A disappointed lawyer is one who is often just smart enough to make trouble for everybody. And besides, after he has become sour he may begin to violate ethical standards.

There are, perhaps, two ways out of this difficulty. One is to establish a quota of the number of persons to enter the bar each year. I believe that method has not been used anywhere. Is it not a wiser policy to reduce the number of persons coming to the bar by raising the standards. Of course, standards may be raised by making examinations at the College of Law and the Bar examinations more difficult. However, a person who has done average work over a period of three years is entitled to some consideration and if, at the end, we are going to flunk him out, why shouldn't we say to him, "You had better not come in in the first place; you are only wasting your time." If we are going to do it that way, perhaps a good suggestion is to require three years of college training before a student enters the law school, instead of the two years that we now require.

Let me make it clear that whatever change might be made in this respect should not apply, in my opinion, to veterans. The veterans have already lost from two to four years fighting the battles of democracy, and should not be delayed in entering their chosen profession. We have already had enough

experience with them to know that they will be well able to defend their position. It will be rare indeed that a veteran, if he is anything like the ones we are getting at Moscow today, will not make just as good a lawyer as those with longer pre-law training. I am speaking, therefore, only of the student who may come to the law school in future years, and who has had no war experience. If he is required to pass three years in college before entrance to the law school, he is a little bit more mature, and a little better informed, and, inevitably, there will be a smaller number of them.

I have no ready answer to the problem I have put; I have merely asked questions. We of the faculty of the law school have discussed the question somewhat, but before making any decision I should like very much to have your advice. Will you, therefore, write me your thoughts on this question?

In closing I wish to voice my conviction that the practicing lawyer and the law school teacher are working at a common task. Both are striving for the ultimate goal of justice among men. Both share this high ideal with the Bench. We, all, are working at the job of creating a better society, one in which the rights of the poor and the weak are as fully vindicated as those of the rich and the strong. We all are striving to make a practical application of that noble sentiment expressed in the pledge of allegiance to the flag *"liberty and justice for all."* It is my fervent wish that in the pursuit of such a high calling, the lawyer and law teacher may never work at cross purposes, but rather that we may long enjoy the fruits of a close cooperation.

PRES: Thank you, Dean Brockelbank.

While we have the opportunity, on behalf of the Commission and the Bar Association, we wish to acknowledge our appreciation to Judge Clark of the United States District Court and Mr. Bryan and the Court's assistants for making these quarters available for our meetings and the many courtesies they have extended.

Whereupon the meeting adjourned until 1:30 P. M.

PRES: Gentlemen, we are extremely fortunate in having the opportunity of hearing this afternoon the head of one of the largest law firms in the State of Washington. His firm is counsel for the Washington Title Company. Aside from being a lawyer, he is interested in many of the business enterprises of that state. It gives me great pleasure to introduce to the Idaho State Bar Mr. Ernest L. Skeel of Seattle, Washington, who will speak on "Title Insurance."

ERNEST L. SKEEL: Thank you, Mr. President and members of the Idaho Bar. I wish to extend to you greetings from the members of the Bar of the State of Washington.

It is a privilege to attend the annual meeting of the Idaho State Bar and to participate in the symposium on land title systems. In the United States, we are firmly committed to the private ownership of land and its wide distribution.

Title service is an indispensable step in land transactions and therefore becomes public service. Any system of evidencing and certifying titles, to be worthy of consideration, must meet the exacting tests of public service.

A board definition of title is, "The aggregation of rights under which

one or more people may own, possess or enjoy property or specific, described interests therein."

One may be in possession, but he may not be the owner. Likewise, one may be the owner, but not in possession. Title consists of a bundle of rights. A single individual may not own all of these rights.

"A" may own a farm; give an easement across it to his neighbor; grant another the privilege of mining beneath the surface; give a lease of a part of the surface for the construction of a building or a landing field for airplanes; give possession of a portion under an unrecorded deed, option, lease or other right, of which a purchaser is bound to take notice. So there are many separate title rights involved in this property.

I know of one case in a metropolitan city, and it is not uncommon, where one company owns the fee of a down town property: It has a mortgage upon it. It gave a 99-year lease. The lessee built a 12-story building and then subleased the right to extend the building upward an additional 10 stories. The lessee and sublessee each had a mortgage upon their respective interests. Then there were individual leases upon the garage in the basement, the stores on the ground floor, and the offices on the upper floors. There were various unrecorded rights, evidenced by possession, on portions of the building. In addition to the individuals who have some interest, large or small, the Government may have an interest in the shape of liens for federal income and estate taxes. The State may have an interest by way of liens for inheritance, sales, business, occupation, gasoline and franchise taxes. Then there is the aggregation of social security claims for unemployment compensation, old age pension, sick benefits, and the like, which may impose still additional liens. Finally, there are a host of rights that may arise without record notice, such as claims arising under the police power of the government and rights under bankruptcy proceedings not of record in the county.

The fact is that land ownership is not the simple thing it was in colonial days. As Professor Gage says in his book, "Land Title Assuring Agencies in the United States,"

> "If society wishes to incumber land with myriad rights in order to utilize it effectively, it must be willing to endure the inconveniences which the morass of rules governing these rights creates in all land dealings."

However, the population interested in buying land and investing in land securities is not willing, if it can be helped, to put up with inconveniences. It wants title service that will be expeditious and safe.

To save time in this discussion, I will not give specific citations proving or illustrating the points I endeavor to make. For those who are interested in further study, however, many pertinent citations will be found and the legal, economic and social implications of the problem are discussed in three principal authorities. One is the work entitled, "Land Title Assuring Agencies in the United States," by Daniel D. Gage, Jr., Ph. D., published in 1937. The word "assuring" is used in that work in a broad sense, as it will be in this talk, to mean any agency or means of proving or evidencing title. Second, the work entitled, "Registration of Title to Land in the State of New York," by Professor Richard R. Powell, Dwight Professor of Law at Columbia University and author of a number of textbooks on real property. This work

was published by the New York Law Society in 1938. Third, two lengthy articles entitled, "Title Insurance Risks of which the public records give no notice," by T. W. Hayward of the California Bar, found in Volume 1, Southern California Law Review, page 422, and Volume 2 of the same, page 139.

In 1640 the Massachusetts Colony passed an act, in part as follows:

> "For avoyding all fraudulent conveyances . . . it is ordered that after the end of this month no mortgage, bargaine, sale or grant hereafter to be made of any howses, lands, rents or hereditaments shall bee of force against any other person except the grantor and his heirs, unless the same be recorded as is hereafter expressed."

Under the American recording system initiated by this act, it was long believed that reliance upon the record title would give security in land transactions. However, there is another form of notice than that of the constructive notice of the public records, and that is the actual notice of possession. Furthermore, the idea that the public records show everything relating to the title of land no longer holds true, in view of the expanding powers of federal, state and municipal governments. The result is that no purchaser can today rely exclusively upon the records nor upon abstracts prepared from the records nor upon opinions based thereon, no matter how good.

In early days, land transactions were handled without any intermediary conveyancer or attorney. As the country became settled, transactions were handled through a conveyancer, who was a lawyer who specialized in land matters and who would give an opinion of title based upon the record and his knowledge of the facts.

When the records became more voluminous, these conveyancers would prepare abstracts, but an abstract gave no assurance of title. It was simply a transcript of the record evidence. It required a title lawyer to examine the evidence and interpret it. Thus developed the abstract-opinion method, with which you here are very familiar.

In Seattle, this method was practically universal in 1910. It fell into some disfavor because of too voluminous abstracts, new examinations for each successive transaction, no protection as to facts not in the records, and the fact that liability for errors, either in the abstract or the opinion, was soon barred by the statute of limitations. The majority of lawyers felt that the fees obtainable did not justify the work performed nor the risk involved in the examination of abstracts. After 35 years of title insurance experience, I think the opinion would be almost unanimous that from the lawyer's viewpoint it was a substantial convenience and improvement. The lawyer still fills his proper place in supervising legal phases of real estate transactions and eventually passes upon the scope of the protection and the validity of the exceptions, if any, contained in the title insurance policy.

In Seattle, as I said, the abstract-opinion method lost favor, and the first title insurance was written in 1911. Here are the actual statistics on the subject:

COMPARISON OF ABSTRACT AND TITLE INSURANCE ORDERS
1910 to 1945, inc.

Year	Percentages of Orders	
	Insurance	Abstracts
1910	.00	100.00
1911	.05	99.95
1913	17.62	82.38
1917	30.72	69.28
1922	64.10	35.90
1926	83.12	16.88
1931	89.05	10.95
1936	92.52	7.48
1941	99.99	.01
1945	99.99	.01

An interim development was the effort to adapt the Torrens plan of land title registration to our American recording system. Many people believed that by its use a transaction in real property would become as simple and inexpensive as the purchase of an article of personal property.

The basic reason for the failure of the Torrens plan in the United States is that it does not fit into the system of recording transactions in land titles. We have created a body of law which does not speak the language of the Torrens system and is inconsistent with it.

Common complaints against this system of land registration are:

1. That no original certificate is good unless based upon an expensive judicial proceeding, with due and proper notice to all parties having any interest in the land.

2. Fraud in the securing of the certificate invalidates it, because a fraudulent judgment is a void judgment.

3. It does not give protection against claims of parties in possession and other off-record risks, as is done by advanced forms of title policies.

4. It is not constitutional in this country to combine the functions of an administrative and a judicial officer. Hence the decisions of an administrative officer, in writing memorials or extensions upon the certificate, are merely prima facie correct, and not conclusive.

5. After two or three transactions under a Torrens certificate, the certificate becomes as complicated as an abstract and requires a lawyer to interpret it.

6. There has uniformly been difficulty or even failure to collect from the guaranty fund loss or damage by those injured by reason of an incorrect certificate. The reason for this, strangely enough, is that the officers in charge of the Torrens system consider it their first duty to protect the fund and the state. Hence, they will pass no title unless they are certain in their opinion it is right, whereas, in title insurance the abstract examiner will frequently waive minor defects that are known not to affect title to the property.

7. Delays incident to registration and continuance of registration make the system inapplicable to modern commercial trends. Now, of course, time is

money, and when a seller is ready to sell and the buyer is ready to buy, they wish to conclude the transaction as soon as possible. But the delay and the expense involved in the Torerns plan is quite a handicap.

In Washington, the Torrens statute was enacted in 1907. No new titles have been registered since 1929 and many of the titles originally registered have been withdrawn. In King Connty, where Seattle is situated and which contains real property of the value of $800,000,000, the total amount of the guaranty fund is $668.29. The lack of success of bona fide claimants who have been injured by false or fraudulent Torrens certificate registrations in obtaining reimbursement is a shameful page in American history. Even where the funds attained some proportions, the administrative officers have felt it their duty to protect and preserve the fund, rather than to reimburse parties who relied on the certificates for their loss.

In 1938 Professor Powell was retained by the New York Law Society to investigate the Torrens system of land title registration, particularly as it concerned New York. In his report he states that he began his survey "with a strong predisposition favorable to title registration." However, this predisposition was changed by the accumulation of facts resulting from his investigation. His conclusions were that under voluntary registration there would be no substantial increase in title registrations; that the enactment of a law making registration compulsory was not justified because title registration would not operate better than recordation, and finally, I quote verbatim,

> "It would be to the public interest to enact forthwith a law putting an end to further registrations of title in the State of New York and permitting persons who heretofore registered their titles (if they so desire) to record their certificates of title and thenceforth to have their properties governed by the system of recordation instead of the system of registration."

The celebrated case of Watson v. Muirhead, 7 Penn. St. Rep. 161, inspired the origin of title insurance. The facts were that a valuable property in Philadelphia was in process of being sold. Pursuant to the custom of the day, an abstract was prepared and the conveyancer handling the transaction employed eminent counsel who gave an opinion that the title was valid. Unfortunately, the opinion proved erroneous, and a large loss resulted. Suit was then brought against the abstracter and the conveyancer to recover the amount of the loss. They were relieved of liability upon the ground that they had employed eminent counsel, who had given a written opinion in favor of the title, and that to hold them responsible would deter all prudent and responsible men from entering into such a vocation. This, of course, settled the question of the abstracter's liability to his advantage, but it brought forcibly to the attention of the public the inherent weakness of the then existing system. Professor Daniel D. Gage, in his work above mentioned, says, "The fancied security in a system which was founded in colonial days was upset overnight."

This decision and the resulting lack of confidence influenced a group of conveyancers to pool their resources and establish the Real Estate Title Insurance Company, which was the first concern in the United States to issue a guaranty of title with a special indemnity clause, which has now come to be known as title insurance. The company advertised, "This company

insures the purchasers of real estate and mortgages against loss from defective title, liens and incumbrances." Similar companies were organized in other large cities, but title insurance grew rather slowly until after the First World War. By 1920 there were approximately 92 companies rendering title insurance service in some 77 cities in 33 states in the Union. In 1930 approximately 263 companies in 35 states were issuing title policies. Title insurance is thus firmly established and in many states, as in Washington, covers rural counties as well as the large urban centers.

Title insurance represents the opinion of an insuring company as to the validity and marketability of the title to a piece of land, which opinion is backed by a guaranty to make that opinion good by paying any loss or damage up to the policy limit that may be incurred, in the event its opinion should prove erroneous.

A title insurance or indemnity policy affords one protection to the purchaser which will be readily apparent. One who is employed to prepare an abstract or to examine titles is generally liable only for negligence in failing to exercise due skill and care. Furthermore, any cause of action accrues from the date of the delivery of the abstract or the giving of the opinion, and this liability is soon barred by the statute of limitations. In the case of title insurance, there is a specific contract of indemnity. Liability is founded not upon negligence or want of care, but upon an affirmative contract commitment that it will be responsible for loss or damage arising from any defect in the title. The cause of action on policies of title insurance does not accrue until discovery of the error or loss resulting from a defect insured against. Thus a policy may have been issued 20 years ago and its indemnity would be applicable today as against any loss now discovered or accruing.

In a broad sense, title insurance policies indemnify against any defects in the title or liens upon the subject property. If upon examination specific defects are found in the title, the company will issue a title report showing these defects. The seller can then have the defects remedied or the purchaser can take the property subject to specific exceptions covering these particular defects. As a practical matter, title insurance companies are able to undertake the risk of waiving a large number of relatively minor defects so that transactions in land handling are in fact speeded up by the use of title insurance. Furthermore, the title insurance company in its investigation frequently discovers facts and circumstances which put it in a position of safeguarding property owners and clearing and stabilizing titles. I once made an address before the American Title Association in which I cited some 21 specific instances of considerable importance in which titles were stabilized through the use of title insurance.

Title insurance is not an easy business. There are substantial risks that are incurred in its operation. Time, of course, gives to any title insurance company an experienced personnel. Title plants become seasoned with use and even errors intrinsic in the public records are discovered and corrected in the title insurance plant. Also, time develops larger financial responsibility on the part of the insuring company. Thus, in the company with which I am identified in Washington we started with a small initial capital but now we have resources of more than $2,000,000 and also maintain substantial guaranties with the State and a large cash insurance loss reserve.

The risks are generally of four kinds: First, there is the risk of loss

through errors intrinsic in the public records themselves. For instance, there may be a mistake in indexing or an instrument is erroneously copied. Second, there is the risk of loss through error by the title company itself in taking off these records and by reason of this an erroneous opinion might be given. Third, there is the risk of loss through different legal interpretations of the facts disclosed by the record. Fourth, and most important, there are the risks of loss because of events entirely outside of the record by which the title might be defeated, impaired or limited.

Risks of the first three classes can be actuarially provided for with considerable definiteness. It is in the fourth class that the principal risk to the insurer, and a vital protection to the insured, occurs. For instance, fraud in the chain of title may render a deed or other instrument either void or voidable. An instrument that is void confers no right in the grantee, but nevertheless a bona fide purchaser for a valuable consideration without notice will not be affected. But suppose that where fraud existed there was an element of possession that would in law give the purchaser actual notice or put him upon inquiry. In that case, the transaction is vitiated entirely. Even in cases where fraudulent transactions may not be set aside as to bona fide purchasers because they qualify as such as to good faith, consideration and lack of notice, yet the title is nevertheless frequently attacked on the ground of fraud. It then becomes the duty of the insurer to defend the title in the hands of the bona fide purchaser against the taint of fraud in the antecedent history. This is done by the company at its own expense and it frequently finds it to its interest to employ the attorney of the party whose rights it seeks to defend, because of his familiarity with the transaction.

A risk against which the record gives no protection is that of forgery. A forged instrument is void and ineffective for any purpose. Its recording creates no rights, even in favor of an innocent purchaser. Shortly after I began the practice of law, a client of mine was negotiating for the purchase of some unplatted acreage within the city limits of Seattle. Certain incidents in the conversation with the seller aroused my suspicions, so before going further I called at the office of the local title insurance company, which examined its records and found that the seller had just recently received a deed purporting to come from the owner in a distant state. They sent a wire to this former owner, innocently phrased, asking if this particular property was for sale. Notwithstanding my suspicion, I was surprised to see the answering telegram that the party still owned the property and was anxious to sell it, and of course it developed that the deed bearing his purported signature was forged. The forger was arrested, prosecuted and convicted and my client was saved the expenditure of time and money on a platting enterprise that would have proved unavailing.

The aftermath of this story is interesting: After serving time in the state penitentiary, the convict came back to Seattle and again engaged in a small curbstone real estate business. He had a transaction which required title insurance and he went to the company to leave an order for a policy. The clerk who had participated in the discovery of the early forgery had now, twelve years later, became the manager. Notwithstanding that the dealer had grown a beard, the manager recognized him. After the man had gone out, the manager examined the order and made an investigation precisely similar to the one twelve years before. He found that our friend was back at his old trick of forging deeds. He was again prosecuted and convicted

and this time, when he got out of the penitentiary, he took to forging checks rather than title deeds, evidently thinking banks were easier victims than title insurance companies, but he was again caught and ended his days in the penitentiary.

It has been the experience of the company which I represent that an epidemic of forgeries occurs during every period of real estate depression, but care, investigation and specialized experience and knowledge of local title history eliminates some of the hazard. The purchaser or mortgagee relying upon a title insurance policy is protected, of course, against the hazards and expense arising out of claims of forgery.

Another risk not discoverable from the records is that relating to the identity of persons. Prima facie, identity of persons is presumed from identity of name. But upon proof that a person bearing a similar name appears in the chain of title, being not the real party in interest, the whole chain of record title must fall.

Another risk is want of legal delivery of instruments in the chain of title. A deed, of course, is not effective until there has been a delivery, actual or constructive. A deed never shows upon its face that there has been a legal delivery. In the event delivery is questioned, parol evidence must settle the question. If in fact there has been no legal delivery through lack of intention, fraud, or otherwise, then the title fails. Cases involving lack of delivery might be multiplied beyond all reasonable limits. For instance, a deed to be recorded after the death of the grantor may by fraud be delivered prematurely, or a deed may be delivered conditionally and the condition never fulfilled, but the deed delivered anyhow. A deed may be delivered by fraud, contrary to the intention of the owner, or by mistake. While the courts are careful to protect a bona fide purchaser for value without notice, the facts establishing such status must be proven before he can enjoy the protection of the recording act.

Again, suppose an intending purchaser relies only upon the record title and does not look into possession or follow up suspicious circumstances that might develop the fact that delivery was made contrary to the owner's intention. Such a purchaser may lose his title because he is not in law an innocent purchaser in good faith for valuable consideration without notice. A number of cases of this type have been collected in the article by Mr. Haymond in the Southern California Law Review, previously cited.

It will readily occur to you that complications may arise between two conflicting grantees or a grantee and a mortgagee from a common grantor, where the time element is the determining factor in the litigation. That is, the time when the respective deeds or mortgages actually were delivered or recorded.

Deeds or other instruments made by minors are voidable and may be disaffirmed against subsequent parties to the record upon the infant becoming of age. No protection whatever is afforded to a purchaser by the record. Even though it appears that John Smith is the owner and a deed is accepted from John Smith, if John Smith is in fact a minor and disaffirms the transaction there is a loss to subsequent purchasers for value. Deeds of insane persons or persons wanting in mental capacity may also be set aside.

In some states, notably on the Pacific Coast, members of certain alien races, principally Asiatic, are under a disability to own real property. The

name upon the records frequently gives no indication as to whether the grantor was an alien of a class incapable of holding title. Public records do not disclose disabilities of this character, but the title insurance company insures against any invalid transaction of this kind occurring any place in the chain of title.

Litigation frequently arises out of questions as to the existence of the marriage relation or the point of time when it is entered into. The fact or time of marriage frequently affects titles. There has rarely been any attempt to make any effective record of the fact of marriage as a condition precedent to dealing with real properties. Recitals in deeds that parties are single or married or are hnsband and wife are merely self-serving and not conclusive. When attacked, the fact and time of marriage is something to be proven in open court by competent evidence.

A conveyance from the husband alone, in a community property state, will afford no protection to the purchaser. How many titles have you examined where you had to rely upon personal knowledge or affidavits, which in themselves are self-serving, in accepting a conveyance of real property? What about divorces in other counties or states, where the parties own property in your county? These are risks tbat a title insurer assumes.

On Monday of this week, just before coming over here, a case was brought in to me bearing the following facts which appeared to me to be true. A man by the name of Cooper and his supposed wife had conveyed the property a couple of years ago, and it had passed through two intervening transactions. Suit was now brought by Mrs. Florence Cooper claiming that she is the wife of John Cooper, and she never signed or joined in the deed for the conveyance of that property and therefore claimed that the deed was invalid, and she still owned her community interest in the property.

Upon investigation, the title company told me that our friend, Mr. Cooper, had been living there with a lady assumed to be his wife and that a lady actually did sign the deed and represented herself as Mrs. Cooper, so the deed is perfect upon its face. Actually, of course, if the real Mrs. Cooper never signed the deed, tbe title is bad.

If any of you can suggest a good defense to that, you can earn a good fee by telling me how to do it. As a practical matter, what we will do is this: We will find if the facts are true. If the facts are true, we will pay Mrs. Cooper what she is entitled to and will make the title good in the hands of the present purchaser. If we can't make a deal with Mrs. Cooper—but of course we can, because we will pay any price within reason—but if we can't, we will reimburse the holders of the policy of insurance for the full amount.

Neither wills nor probate proceedings are in themselves conclusive with respect to heirship. Thus, where title derives through a testator who failed to name a child or children or where a testator named all his children at the time of the will, but neglected to provide for a subsequently born child, it is the law in most states that the will will be revoked as to such unmentioned child, or the testator will be considered to have died intestate as to such an heir. Of course, a bona fide purchaser takes no rights as against such an heir, and titles have been frequently set aside even after a number of intervening conveyances.

Judgments appearing regular have later been held void for fraud in obtaining service of process or for other lack of jurisdiction. An attack upon a judgment for having been procured by fraud is a direct attack, since the establishment of the fraud shows that no judgment has been rendered. Judgments thus set aside impose a risk to a title owner. Similarly, in certain cases, one in my own state, mortgages which have been insured have been declared invalid in part because of usury not appearing in the record. It is well settled that the court will look into the acts of the parties at the time of the execution of the contract and subsequently to determine whether there is usury.

Title insurance protects an insured from loss arising through liens that may be in existence when the policy is issued, even though not of record at the date of the policy. The right of lien may be an inchoate right, such as the right of mechanics' liens between the date of commencement of the contract or labor or the furnishing of materials and the filing of the notice of lien. By the statutes of many states, the lien relates back to the time of beginning the work or furnishing the material.

I must emphasize again that title risks of which the public records give no notice fall within two classes, those resulting from faults intrinsic in the record and those that have their origin entirely without the public records and result from the creation of a new title or a new right, independent of and superior to the right as shown by the public records, this notwithstanding that such record title may be perfect within itself.

In the second class are rights resulting from or arising out of actual possession; or notice given by acts of occupation or of the physical aspects of the property. Among these potential rights may be listed adverse possession, which may ripen into a title, or possession under an unrecorded deed, contract of purchase, lease, option, or parol contract for an easement. Also, visible and existing easements, canals, ditches, pipe lines and pole lines are in themselves notice to a purchaser that rights exist in a third party which may not be shown of record. The existence of streams, lakes and rivers raises a question whether land is riparian or nonriparian, with the attendant rights thereof, and whether new lands are accretions or alluvial or otherwise. Obviously the public record settles nothing regarding ownership of lands of this character. It depends upon public law and upon the existence of facts not upon the record.

Either by state statute or by city ordinance a number of police powers are exercised, limiting the use of property and providing penalties, liens and forfeiture for violation. Familiar instances of this are violations of prohibition laws, use of premises for gambling or other immoral or illegal purposes, violations of zoning or set-back ordinances or building and line restrictions. Now, the point is that violations may have occurred just antecedent to a transfer of property. The purchaser may be entirely innocent and pay a good consideration, only to find that he is forced to defend his title, which was perfect from the standpoint of the public records, against the claim of the Government for forfeiture because of an illegal use made of the property by a former owner. The fact of present or past violations appears upon no public record.

Another group of risks, of course, results from the exercise of special taxing powers by federal, state or municipal governments. Under the abstract system in Seattle, it was common to search for general taxes and

special assessments and make a report thereof. However, such a search nowadays, if limited to the official records, even of the taxing authorities, would be insufficient, for the reason that frequently there are taxes or imposts imposed which are almost in the nature of penalties arising out of matters occurring many years before and which survived, even though a number of intervening grants had been made. A familiar illustration of that is the case of Kennedy Estate, 188 Wash. 84, 161 Pac. (2d) 998, where some 10 or 12 years after the death of an owner a lien was imposed, on some property he left, for inheritance tax purposes, even though said property was sold at probate sale after public notice and which sale was in all respects due and regular and according to statute. It was simply held in that case that the state's right of lien against specific property continued and that a judicial sale for probate purposes to pay expenses of administration was of no effect against it. The third or fourth innocent purchaser had to pay and of course was promptly reimbursed by the title insurance company. The injustice of this case, incidentally, led to an amendment of the law which relieved property sold in probate, to pay debts or expenses of administration, from the lien of inheritance taxes and transferred that lien to the proceeds.

It is elementary that adverse possession of real property for the statutory period creates a new title. One who relies upon the public records, but is not informed of actual facts of possession, past and present, may not discover impairments or limitations of the rights of the record owner. The title acquired by adverse possession will prevail against every conceivable attack, even against a bona fide purchaser from one holding title of record. A title to land or an easement upon or over it or a right in it acquired by adverse possession, once acquired, is a new, absolute, complete and paramount title, all other titles, liens, incumbrances and interests being thereby rendered void.

No title is safe unless the claimed rights of those holding some form of possession are investigated and ascertained. In speaking of adverse possession, we generally think of possession of the entire property. However, a purchaser is equally charged with notice of rights of existing easements reduced to use or possession, such as canals, ditches, rights of way, pipe lines and pole lines, notwithstanding there is no public record of them. For example, grading and construction of a railroad across a piece of land has frequently been commenced under an unrecorded deed for a right of way. A mortgage or deed taken or recorded subsequent to the commencement of construction work, in reliance upon the record title, is subject to the rights of the railroad company.

Many of these risks are commonly know to those dealing with real property and in the early stages of the development of a community may be safely assumed by a purchaser because of his own knowledge or means of obtaining knowledge. But under modern conditions of real estate ownership and financing, involving great complexity of interests and financing on a national scale, there is necessity for an assurance of title that will protect against these risks. Many of those dealing with real property have been lulled into a false sense of security by too great reliance upon recording and registration laws.

To obtain even a record title, the evidence of the public records is not enough. To that must be added whatever of constitutions, laws and statutes the courts will recognize without proof of them. Thus courts having jurisdiction to try titles to real estate will take judicial notice of the Constitution of

the United States and of the state and federal laws and statutes in so far as they affect title to real estate. These things constitute a part of the public records and must be read into every title. On the other hand, the statutes of sister states, the proceedings and ordinances of corporate bodies, public or quasi-public, of municipalities and other governmental agencies having police or taxing powers, are not recognized by the courts without proof, even though the right of possession and enjoyment of real estate may be affected or restricted thereby. These things are not a part of the public records. Nor will the courts take judicial notice of the regulations created for the purpose of regulating private corporations or corporations engaged in the administration of public utilities. The significance of this, therefore, is that some records are public records, others are not, in the sense that the courts will not take judicial notice of them.

In certain cases, it has been held that the enactment of zoning ordinances does not affect the title to real property, yet it is also held by the courts that the passage of zoning ordinances materially affects the rights of the owners of property. Regulations may pare down and whittle away the rights of an owner in the enjoyment of the property and still not divest the title itself. However, it manifestly reduces the right to the possession and enjoyment. Modern business concerns investing in real estate and real estate securities do not accept the restricted definition of title as meaning ownership only, but insist that they must know whatever affects any interest or right in or enjoyment of real property.

Now, you say, those statutes are known to us, and we can find out about those ordinances by investigation. That is perfectly true, but you cannot find out whether or not there has been a breach of that ordinance by the owner from whom you are buying the property, which breach may have been such as to risk the forfeiture of the property, which, under our laws and the expanding powers of our government, may be invoked later even against bona fide purchasers for value. I pass entirely a number of illustrations of the police power and of the taxing power which brings into question items of this kind. I also pass the question of the foct that the Courts having jurisdiction to try titles, of course, rely upon the record title in part in deciding a case, but they also take judicial notice of the Constitution, federal and state governments and the statutes of the state, but they do not take judicial notice of ordinances of a city nor of the regulations of an administrative body created under the federal or state governments, which, in many instances familiar to you, have and do affect title to real property.

It has been held, in the case of zoning ordinances ,that they do not affect the title to real property. And while the courts adhere to that rule, they also adhere to the rule that zoning ordinances limit the right of enjoyment in property. In other words, your title is good, but your right of enjoyment may not be good, which is quite a difference.

Under the amended Bankruptcy Act of 1938, 11 U. S. C. A. 44, there is no protection to purchasers in counties other than the one where the bankruptcy was brought, unless a certified copy of the decree of adjudication or other appropriate notice has been recorded in the recording office of the county where the real property is situated. Title insurance, of course, protects against this contingency. For instance, if someone went bankrupt in another county or another state but owned land in Boise, that bankrupt could come here and sell his property and give a good title, according to the record, un-

less the trustee in bankruptcy had filed in this county the proper papers prescribed by the federal act.

However, we found one thoroughly honest bankrupt. A man from an eastern state came to the office of the title insurance company and said he was arranging to sell certain property and ordered a policy of title insurance. We examined the title and found that this party was the record owner and we were prepared to issue a purchaser's policy. However, when he looked at our title report and saw where we had stated that he was the owner and that we would insure the title under his ownership, he said, to our embarrassment, "Hell, this is wrong! I'm not the owner. I am in bankruptcy and I came here to help the trustee sell this property." Needless to say, our face was red.

I have endeavored to give you a general outline of the history of title insurance, what legal protection it affords, and particularly to point out some of the variety of circumstances under which reliance upon the record alone is inadequate and fails to give protection. I regret that time does not permit me to illustrate these various points with specific illustrations and citations of cases which have actually arisen.

PRES.: Thank you, Mr. Skeel. We are not through with the subject of titles and abstracts, but we are going to change the subject matter for a moment.

I understand that Mr. Willis C. Moffatt is not able to attend the session this afternoon and that Mr. Herman Welker is going to read a paper that he has prepared. Mr. Welker.

MR. WELKER: Many troublesome matters confront the lawyer after he has decided to draft a bill for the legislature, because of the Constitutional provision relating to the unity of the subject matter and title of the bill. Article 3, Section 6 of the Constitution of Idaho provides:

> Sec. 6—"Unity of Subject and Title—Every act shall embrace the one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title."

The difficulties encountered, by reason of the provisions of this section of the Constitution, is adequately demonstrated by the fact that the original bar association bill, Chapter 211 of the 1923 Session Laws, was held unconstitutional largely because the Supreme Court found the title to be insufficient. It is assumed that such enactment was drafted by the bar generally and leading members thereof, yet the Supreme Court held rather vehemently, that the title did not describe the act, (Jackson v. Gallet, 39 Idaho 382, 228 Pac. 1068).

Although many Idaho cases construe this section of the Constitution, no uniform test can be obtained from them as to what must be embraced in the title to make it sufficient.

In Idaho it was early held that specific legislation may be had under a general title, but general legislation cannot be enacted under a specific title, unless such title be made comprehensive enough to cover such legislation. (Gerding v. Bd. of County Commissioners, 13 Idaho 444, 90 Pac. 357). But it has also been held that a special law cannot be amended by a general law

without specific reference in the title and body of the bill. (Bagley v. Gilbert, 122 P (2d) 230; Hoffer v. Lewiston, 59 Ida. 538, 85 P 2d 238).

Thus, when applying the provision it is difficult to arrive at any conclusion except that if the Court is sympathetic to the statute involved, it may find that the title is sufficient; on the other hand, if the Court is unsympathetic, it may easily find that the title is insufficient, unless the title is so specific that every provision of the bill is included therein.

This situation may be discerned in many Idaho cases. I particularly call attention to In re Crane, 27 Idaho 671, in which an enactment was attacked for reasons among others of the insufficiency of the title. This was a prohibition act, embodied in Chapter 11 of the Session Laws of 1915. It required nearly six full pages of printing in the Session Laws and 25 sections, yet the title to the act is embraced in 8 lines. In holding this title sufficient the Court states "necessarily the title of an act must be brief. The subject of a title is to give a general statement of the subject matter, and such a general statement will be sufficient to include all provisions of the act having a reasonable connection with the subject matter mentioned and a reasonable tendency to accomplish the purpose of the act. The object of the title is not to state the reason for the passage of the act, or to give an index of its contents, but to give a general statement of the subject matter of the law."

The Court then states that due to the fact that the Legislaure had for many years been considering the matter of the liquor question, there could not possibly have been any misrepresentation of the title. The act actually provided several provisions, criminal in nature, which are not found in the title, nor can they by reference said to have been referred to in the title, other than that they applied generally to the enforcement of liquor laws.

On the other hand, in Jackson v. Gallet, supra, the Court said that because the title of the act did not provide specifically for an appropriation of the moneys collected from attorneys licenses and the moneys were provided to be used for bar association business, the title was insufficient. That is indicated by Justice McCarthy's dissent in which he states "no one could reasonably infer that the purpose of imposing a license fee upon the profession was merely to raise revenue rather than to defray the expenses of the organization and regulations called for by the title."

This section of the Constitution, as worded, permits the Court to exercise any discretion which it desires in making its test. A review of the Idaho cases will indicate that there have been a variety of tests made; in fact, if a lawyer relies simply on one case where the title was held sufficient he is on dangerous ground because he can look a very little farther and find another case almost identical where the title was held insufficient. The Supreme Court has ruled that the title of an act need not be an index thereof (Barton v. Alexander, 27 Idaho 286, 148 P 471), but on the other hand, it has generally held that the title is not sufficient if it merely sets forth that the act relates to a general subject matter such as a certain operation of banks or banking (Federal Reserve Bank v. Citizens Bank & Trust, 23 P. 2d 735), but that the title must indicate all of the pertinent and material things provided in the bill. (Johnson v. Dufendorff, 57 P. 2nd 1071).

Many states have the same or similar provision in their Constitutions, and many of them have had the same difficulty experienced in Idaho. Outside cases can be of little assistance. Some of the Courts have stated the test

of sufficiency is whether the title would put the legislature and public on inquiry, but that test has never been adopted in Idaho.

It has become the practice of lawyers drafting bills for the Legislature to recite virtually all of the provisions of the bill in the title. Some bills submitted have a title almost as long as the act. While the Supreme Court has stated that the title need not be an index, I would suggest, that for clarity as well as for ease in draftsmanship, it might be preferable to draft the title in the nature of an index. That is the practice in various states. Such a title may read something like this: "An act relating to, ————," stating the general purpose, and then thereunder would be tabulated sections 1, 2, 3, 4, in the nature of an index. This manner of drafting bills appears in the various titles set out in Federal Reserve Bank v. Citizens National Bank & Trust Co., supra, indicating how the uniform bill was entitled in Illinois, Kentucky and Missouri. That case also indicates the difficulty encountered in this task of legislative draftsmanship in that the act which the Supreme Court of Idaho held to be unconstitutional in part, as not being included within the title, was drafted in Idaho in the same manner as in Nebraska, Oregon, New York and Wisconsin.

The only suggestion that I can make in this regard is that a uniform system of draftsmanship of the title be considered by a Committee of the Bar Association and made a part of the rules of both houses of the Legislature, which, I think, if within the provisions of the Constitution, would be supported by the Courts. It is quite likely that the index method would be within the Constitutional provisions, be much clearer to the Legislature, and more convenient to the draftsman.

This provision of the section of the Constitution provides that there be unity of subject matter, likewise has caused a great deal of trouble. As to what constitutes unity of subject matter cannot be easily ascertained from the reported cases. That again depends largely upon the particular Court's opinion. There seems to be no particular test upon this matter.

Most of the states which have such a Constitutional provision also have the express provision permitting the Legislature to adopt an entire revision of all the laws which when adopted has the same force and effect as any Session Law, and this is further modified in some States by permitting the Legislature to adopt or recodify all of the law on a single title, such as, for instance, the recodification and reenactment of the Criminal Code. In Idaho, in order to recodify the statute, in such a manner, it is necessary that a bill be introduced and passed by the Legislature for every specific amendment, except those which can be tied together under the Constitution, and that is a dangerous guess. It is the practice of most attorneys, from my observation, to present several bills, rather than attempt to provide an individual bill covering all of the conditions which may arise.

The next session of the Legislature may be requested to provide for a codification of the Idaho Statutes, inasmuch as the Supreme Court has now left the way open for that procedure. Recodification is an erroneous word. It should be merely a reprinting, because neither the codifier, nor the Legislature can change or modify any of the enactments which have heretofore been passed. Many states have recodified their laws and by enactment of the Legislature adopted the codification. In doing this, the law is re-written in view of the construction placed upon it by the Court; statutes in conflict are re-written and the matter is generally given an over-hauling, but such procedure is impossible under our present Constitution.

It would be my suggestion that the Bar Association study this situation, and while undoubtedly a Constitutional provision cannot be adopted in time to assist in any present recodification, such might be adopted, so that at a future time the errors, omissions and inaccuracies of some of the sections of the statutes which we all know exist, can be cured in bulk by the Legislature and the law brought into proper order.

While it may not be germane, I suggest to the Bar Association the necessity of having some officer or commission, properly compensated, whose duty it is to draft legislation and do legislative research. At the 1945 session of the Legislature a bill was passed by both Houses providing for a legislative counsel, which enactment was vetoed by the Governor, presumably upon Constitutional grounds. The purpose of that bill was to provide a full time attorney who would perform research on legislative matters and draft bills at the request of the Judges, officers of the State and of the Legislature. The Attorney General has not had the time nor the facilities to take care of such matters, and the attorneys generally have only been able to draft those bills which were for the benefit of or in which a client was particularly interested. Yet in the everyday experience of the Courts and attorneys occasions arise when it appears a statute is in error and should be amended, or where a statute appears to be ambiguous and does not set forth the intention of the legislature. It would be the purpose of such an officer to prepare such bills and have them ready for the Legislature. In a 60 day session of the Legislature as provided by our Constitution it is not possible to have all matters taken care of that everyone has thought about. On many occasions, although the Courts, the attorneys, and various officers of the State, have noticed errors, they have not the time to prepare the bills to correct such errors. The Legislative counsel system has worked for many years in California to considerable advantage to the State.

Another system along the same line is the Code Commission idea or legislative research bureau, which is used in Kansas and Wisconsin, respectively. It is the duties of those commissions, as it is of the legislative counsel, to draft bills, and make research on matters pertinent to legislative problems. It is my opinion that the legislature is too often required to pass bills without adequate information, and too often bills are drafted hurriedly without proper research, which afterward are found to be in conflict with other sections of the statute or with Constitutional provisions, all of which could have been cured at the original drafting, had more time been allowed.

While I have touched upon only a few of the many problems involved in drafting legislative bills, I know that any member of this Bar Association could add others; particularly those attorneys who have spent a great deal of time as members of the Legislative Committee of the Bar Association, in an effort to correct some of our existing statutes. It seems to me that it is the duty of the Bar Association to do all things necessary to make our Government modern and efficient, and that one of the primary subjects for consideration ought to be the matter of legislation. Many provisions pertaining to legislative procedure are archaic and outdated, and should be amended so that a more efficient legislative process could be adopted.

PRES: Thank you, Mr. Welker, and we will see that Mr. Moffatt is properly thanked for this very fine paper he has prepared.

We will now get back to our title matter. We have, at this time, the opportunity of hearing from Theodore J. Turner of Pocatello who has been in the abstract business for a long time.

MR. TURNER; Honorable President, Members of The Idaho State Bar, Ladies and Gentlemen:

It is with some misgivings and temerity that I find myself facing your distinguished organization composed of men learned in the laws of the land, trained and skilled in the art of public address and of convincing judges and juries and in addressing large deliberative bodies. Many of you are shrewd, capable and successful politicians of long and varied experience. I need not tell you these are not the qualifications essential to one of my profession, that of an abstracter of titles to real property. Most of you have more or less frequent contacts with my profession, individually, and so it would be very difficult for me to mislead you as to our character. What you want from us is service; service as and when you want it: yea, even demand it, not excuses or alibis or speeches.

Your Program Committee has assigned to me the defense of Mr. and Mrs. Abstracter of Titles and their offspring at this general session of your honorable body, sitting as a court at the moment to determine whether or not there is any particular reason for their survival. When I recall the loss of sleep, foregone vacations and lack of rest that playing the part of these worthy characters has cost me in bygone times, my plea in their behalf may be loud and lusty, but not so convincing as I might wish it.

I know you will appreciate it if I am brief, and I shall endeavor to merit your appreciation. Being "one of them things," an abstracter of titles and principal owner and operating manager of a hard-to-care-for and grow "plant," my effort in their behalf may be deemed to be thus influenced.

A case must be made by considering the public interest and benefits—otherwise, there is none. My mentioned interests give information and my experience and investigations give reasons for this statement. Conclusions not proven by or based upon facts can not weigh with you. Therefore, I come as one of the sometimes user of title service in carrying forward and closing an occasional deal in "dirt." All of the family I am asked to defend are expected to render perfect service. As president of the Idaho Title Association, I have an obligation to all those engaged in such work or service in our state and to those who have investments in title plants. You of the profession here met together, need not be told what an abstract of title is, or should be.

However, as a foundation for what I may here say, a title abstract is history,—history made by condensing and showing vital and necessary parts of instruments dealing with the past life of some certain described real property gathered from the records in the recording office of the county in which the property is situate. You know history (a recounting of the deeds of yesterday) is something not to be changed. What is of record is fixed as to the history of the title to the property covered. In order to determine the status of a title, the records in the recording office relating to the title under consideration must be examined, checked, and considered exactly as they are.

The law, under our form of government, can not take from one an interest in lands and vest it in another except by following a course of procedure established by law and custom.

I doubt if you gentlemen have a clear conception of the mechanics and costs entering into the building and maintenance of an efficient, dependable and useable title plant. I shall not bore you with such details, but I want to call your attention to one phase that is extremely difficult: that of properly indexing all documents and information relating to the history of a chain of title.

In the county of Bannock, with a population of approximately 42,000 people, it might surprise you to know that beginning with March 13, 1903, the date on which documents were first given instrument numbers, down to July 15, 1946, there have been filed in the office of the County Recorder of such county 247,084 instruments or documents. All of these must be checked by one competent and skilled in that line of work and determination fixed as to the real property to which each relates, and then each must be indexed so that it may be readily found when required in the making up of a title history (an abstract of title). There also must be checked and properly indexed other instruments and documents not bearing a recorder's number such as probate proceedings, in guardianships, insanity hearings, et cetera, certain proceedings and matters in justice courts, and before boards of county commissioners.

Even in the well-organized and efficiently run office of an attorney-at-law, involving only the matters passing through that particular office, I find that the proper filing of correspondence, the office files such as copies of court matters, et cetera, is quite a problem, and much time is consumed in looking for old files when unexpectedly they are needed and are then hard to find. Your file clerk or stenographer then often comes in for criticism. Imagine, then, the headaches and problems in an abstract office. In the building and rebuilding of title plants, I have seen where a Government patent, one of the simplest documents to index, and certified copies thereof, have been recorded three different times yet never appeared upon the indices in the county recorders' office. I have also frequently seen the parties to a document reversed and improperly indexed. Of course, in a general grantor-grantee index or name index, as we refer to it, no attention is paid to overlaps and hiatuses in descriptions or, in fact, descriptions at all. All of these matters have to be taken into consideration in the building and maintaining of an abstract plant.

So much for the mechanics involved. I have never found many attorneys that care to engage in or follow our, oft considered menial, profession so this phase of our work probably does not interest you.

What the proponents of the system of registering titles purpose doing, as I understand the plan, would provide just another way of perpetuating title histories—nothing less; nothing more. The change would be to issue state guaranteed certificates of title to real properties to petitioning owners by proceeding in a way, manner and form provided by legislative act. The state guaranteed certificates of title would then be registered or recorded in an office to be created. Such state guaranteed certificates could be given only after presentation of a certain owner's complete chain of title to some court designated or established for the purpose. Thereafter, any thus registered and certified piece or parcel of real property could be passed and encumbered by filing in the office stated the original certificate and guarantoe of title to be indexed by note of endorsement on original certificate thus presented by the owner, and on the duplicate thereof permanently held in the files of

said office. As ownerships divide or merge, become smaller or greater in area, the authorized officer issues a new certificate or certificates dividing or combining as may be necessary, cancelling the order; stating on the original or originals and the duplicate or duplicates the number or numbers of the new certificates issued in lieu thereof. As I have thus briefly outlined steps to be required and taken for this certificate way, there has surely come to your minds like steps for like results now provided by our present plan of instrument record and tax assessment. You can but agree. The proposal, then, just adds up to a way and method for accomplishing the same end, and will not end or eliminate disputed or controversial points or questions. If I understand the talked of plan of the proponents of the purposed legislation, it would involve our State in the title business. It would not repeal or change a single law in our already overcrowded volumes, nor would it change opinions or human nature. Of this, however, I am very certain. It would impair the credit of our State for the questionable benefit of a special group, namely, the owners of and dealers in real estate. It would further complicate land titles and add to our tax burdens.

Here let me digress a little. It may be that you gentlemen believe in socialization. I do not. Assuming that you do, and that government ownership and government control of all business and the professions is the solution of our problems and a panacea for our ills, many of which, I think, are more imaginery than real. Let us then go all the way and socialize the practice of law and medicine and all other pursuits in the various walks of life. Let this socialization be complete; let everything be socialized. Do you think such a program could be made to work successfully in our country. I doubt it, and this doubt is so strong that it amounts to a conviction. If this complete socialization plan should be adopted, I can imagiue hearing those who are now proposing what amounts to a socialization of the title business vigorously moving and asking that something else be tried. The history of the title to any piece or parcel of real estate is a thing which has been developed and evolved by the several owners of the same through a series of years, and legislation will not and can not change it.

This plan of certifying and guaranteeing titles can not be made a must and be applied to all titles now or at a fixed time in the future. Our courts, or ones created for the purpose, could not determine and decree all titles immediately. Such procedure would require years. Therefore, our present way of recording titles would have to continue almost indefinitely, and we would have two offices or departments functioning for the same purpose. This is the way the matter has worked out and proven itself in other states. It is not just a theory of mine.

At this point, I call attention to the ignorance of property owners with respect to title chains and the necessity of recording instruments affecting the title in the order of their natural sequence. Here are two instances which have recently come to my attention. Instance one,—The property had been sold under contract and the abstract of title and deeds conveying to the purchaser the property sold, along with a quitclaim deed from the purchaser back to the vendor, placed in escrow. Upon payment of the amount due under the contract, the documents which had been placed in escrow, were surrendered and delivered to the purchaser. The purchaser filed for record the deed to him and subsequently the quitclaim deed conveying the property back to the vendor. Instance two,—The quitclaim deed back to the original vendor was recorded ahead of the deed from the vendor to the vendee. In

instance one, the wife of the original vendor had died and there had been no probate proceedings in her estate. The attorney who examined this title advised an action to quiet the same, and to have the proceedings in such action shown in the abstract. In the other instance, instance two, both the vendor and his wife were still living at the time the involvement was discovered. The trouble was cured by obtaining a second deed from the vendor to the vendee. The two instances here recited are called to your attention for the purpose of illustrating the mistakes in judgment and mistakes caused by ignorance in conveyancing and recording instruments making up chains of title.

Abstractors and title insurance companies do not involve chains of title. They merely set out and include in the abstract summaries or abstracts of the instruments forming the chain. In recent years, a custom has sprung up of having title men secure explanatory or curative documents which are recorded and when so recorded become items which make up the title chain.

From thirty years' experience in the business of compiling title abstracts and reading the opinions of attorneys examining and passing upon the same, I am forced to the conclusion that after his examination and approval or disapproval of the title is complete, many examining attorneys look over the chain as a whole with a view to determining what some other attorney might have to say concerning some of the items forming the chain. This general inspection to determine what another lawyer might say concerning the title is induced by fear, which is the most disquieting of all human experiences.

This double system of recording instruments forming title chains must result in double expense. In addition to this double expense, confusion of the worst character will also result. A person having in his possession an instrument or document affecting the title to his lands, in most instances, is in a state of confusion as to what he should do in order to make his title chain a complete matter of record. In his dilemma, he usually does not go to an attorney or title man, but asks a friend what he should do in the matter. The advice he receives is, in many instances, worth what it costs, nothing, and is erroneous. He goes to the county recorder or recorder of deeds, when he should go to the official who is charged with the duty of registering and guaranteeing titles, or vice versa, goes to the register when he should go to the county recorder.

I have recently visited the office of the Chicago Title and Trust Company, one of the big title insurance companies of this nation, and had the privilege of extended conversations with two of the active vice presidents. It may be of interest to you to know that while Cook County, Illinois, is one of the communities in the United States which use the Torrens or registration system, comparatively few avail themselves of this system, but on July 3rd of this year the Chicago Title and Trust Company issued its policy number 3,106,883. During the life of this title company, the use of title abstracts has dwindled. The Chicago Title and Trust Company is authorized to do so, and compiles and issues title abstracts. The number of titles registered in Cook County under the Torrens system can not be determined, but it is a fact that the laws of Illinois make no provision for the removal or taking out of the Torrens system a title once registered.

I recommend to you gentlemen the reading of the pamphlet written by Professor Richard R. Powell of Columbia University entitled "Registration of the Title to Land in the State of New York." When Dr. Powell began

the research which enabled him to write this pamphlet, he was prejudiced in favor of the registration system.

In communities where two systems of preserving the record of land titles are in vogue, those "hard-headed boys" with whom all must reckon when needing cash for a title turn demand the locally-used evidence and proof of title before closing a loan. If two systems for preserving the record of title chains are in vogue in a community, the cost of satisfying the demands with respect to the title to lands offered as security become appalling.

In 1941, my wife, who is associated with me and has actively worked in the title business, in plant construction, plant maintenance and compiling and certifying title abstracts since 1919, and I visited every county and county seat and every office engaged in title work in the state of Idaho. Our trip involved the traveling of more than twenty-five hundred miles within our state. This trip was made for the sole purpose of trying to find out what is wrong with the abstract business in the state of Idaho and what could be done to better it. We found very great diversity of conditions and circumstances under which abstract plants must be built and maintained and abstracts compiled and certified. In the North, real estate, outside of the cities and towns, consists very largely of timber lands and mines and mining claims. In the South, real estate, outside of cities and towns, consists almost wholly of agricultural lands and the water rights appurtenant thereto. Plants in the North and the South parts of the state differ greatly, and must be built to meet the needs of the localities. We also discovered that charges for title work varied greatly. We further discovered that while the demands upon abstract and title companies for service are much greater in some counties than others, in all counties the patrons of the abstracter demand service regardless of how little the abstracter is able to make over and above the cost of maintaining the plant, rendered so because in some counties the abstracter has but little call for his services. At a meeting of abstracters held some years ago, the question was asked: Who of you rely primarily and solely upon your income as an abstracter for a livelihood. But one person answered in the affirmative.

I have just made an exhaustive investigation with a view to adopting a better system for building and maintaining abstract plants and finding equipment to facilitate the same. The plant of which I am the operating manager is forced to employ much help which spends hours in the most tedious and exacting labor, such as copying, proof reading, indexing, et cetera. The investigation which we have made was for the double purpose of lightening the burdens of our help and of being able to hold the charges which we make for our services at their present level or even making a reduction. Neither of these ends can be accomplished without some improvement in our system and an investment of five or six thousand dollars in equipment, a portion of which investment has already been made. The big item of cost in turning out abstracts is not in the stationery used in the record books or in the abstracts themselves. The major cost of an abstract is found in the building and maintenance of the plant. Since my efforts in my years of activity will probably be directed to and in carrying on the title business, I am devoting much of my time which I should use for rest and recreation in endeavornig to improve our present system of building abstract plants and compiling abstracts along with the development and improving of a title insurance organization which, with others, I have recently established.

In closing, then, permit me to ask: Would it not be better for all of us: attorneys, abstracters, and title insurance firms, to expend our energies in bettering what we already have rather than in tearing down and discarding that which we possess and in the setting up of something which has not proven satisfactory where it has been tried.

PRES: Thank you, Mr. Turner.

The next subject, "Combination of State Registration and Abstracts," is to be taken by the Honorable George Donart of Weiser.

GEORGE DONART: Mr. President and members of the bar: I am very glad to be here with you this afternoon and to discuss a matter that in my opinion has been pretty generally misunderstood. I have enjoyed both of the previous addresses. Strange to say, I agree with about 80% of what each of those gentlemen had to say.

My subject does not involve title insurance except in so far as it may be a substitute, under conditions such as they exist in this state, for the abstracting system that we now have. In connection with that statement, I might say that I feel that my position in the past has been generally misunderstood. I had that rather forcefully brought to my attention even before this afternoon.

As a good many of you know, during the last few months I was traveling around over this state trying to make a good impression. I would occasionally meet an abstractor, and on being introduced to him, he would say, "Oh, yes, we know about you. You are the abstractors' friend!" Well, after I heard that several times, I came across a man that was a little more frank. He said, "I think I'll vote for you to get you out of the state." I thought I had a means of approach at that time, so I told him that if he would listen to me for five minutes without his blood pressure getting too high, I thought I could convince him that I could convince him that I am the abstractors' friend. Strange to say, he listened to me, and when I left, he said, "I believe you have got something." He was an abstractor in a small county.

Strange as it may seem to you, the views I have been promulgating on this subject for the past six or seven years were largely given to me by our local abstractor, and they were all concurred in by him.

I want to say at the outset that I do not believe, in a state like Idaho, there is any satisfactory substitute for the abstractor. A good set of abstracting books is about the best asset any county seat can have. Any lawyer practicing law in a town the size of Weiser or Payette or Caldwell goes over to the abstract office and gets some information off those books practically every day of his life, and it would take him two or three times as long to get that information if he had to go out to the court house after them.

I have tried to discuss this matter with abstractors at different legislative sessions, but as I previously stated, you can talk to one of them about two or three minutes, and his blood pressure gets so high that he isn't paying any attention to what I say from then on.

What I have in mind is not a substitute for an abstract system. It is a supplement to the abstracting system, which, instead of putting abstractors out of business—and incidentally taking that business out of the law office—will enable the abstractors to stay in business.

I presume that most of you examine titles. Some of you like the work and some of you don't. I will say that by actual count, in the last two and a half years, I have examined more than 500 titles. That is at the rate of about 200 a year. I don't particularly like the work, but it is something that every lawyer in a small town has got to do and will keep on doing. My suggestion for keeping the abstracting system and keeping it so that they can stay in business has to do with the shortening of some of these abnormally long abstracts. When I started practice in Weiser 30 years ago, an abstract of 50 or 60 pages was considered quite a document. An abstract in the same community now with 300 pages does not begin to attract the attention that an abstract of 50 or 60 pages did at that time.

Now, if the lengthening of abstracts has increased that much in 30 years, think what it is going to be in the next 30 years. In order to examine any title and to examine it in such a way that you can give positive assurance to your client, you have necessarily to go back to the government patent, where an abstract starts. You have to check everything that happened to that title from that time down to the day it is brought into your office or the date of the last certificate. We all know that these abstracts are getting too long, and something will have to be done about it.

Every suggestion I have heard has been along the line of overlooking things that are antiquated. For instance, if something occurred 30 years ago, that might be disregarded. All of those suggestions have to do with the lessening of the stability of the title. But after all, the purpose of examination is not to simplify the examination but to give assurance to the titleholder.

In our district we have been following a practice which has grown up in late years—and I understand you are following it over here—that if you have a probate decree, a decree of foreclosure or something of that kind that is around 30 years old, you may disregard it. I believe in some counties they say 26, and I suppose that is 5 years plus 21. I was doing that. About six months ago an abstract was brought into my office, and there was a decree of foreclosure absolutely regular on its face. There was nothing about the decree as abstracted that would attract any attention to any irregularity that might exist in it. But in that abstract there were also shown the proceedings. I thought I would look them over, and if there were any defects, I would merely point out the defects but call attention to the fact that in this instance 38 years had elapsed. I thought that would cure any reasonable defect. I found that one of the owners of that property was confined in the insane asylum at Blackfoot at the time the foreclosure was instituted, that there was no service of summons on that defendant. The court, on application by the attorney for the plaintiff, hit upon the novel procedure of appointing a guardian ad litem at the time he filed the complaint and designated that guardian ad litem as the person upon whom the service of the summons would be made. The guardian ad litem was served. He filed a demurrer and then defaulted. I think most of you will agree that that would have been ineffective even though there had been service on the insane person. Well, I thought 38 years had certainly cured that. I wrote to the Superintendent of the asylum to find out if that woman had been discharged or if not when she died, feeling that if she had been dead long enough, I could safely say the title was sufficient on account of the statute of limitations. To my surprise I got a letter back from the Superintendent saying that that woman, after 38 years of confinement in that institution, was still enjoying good

health. There was a title I would have passed and a title that could be defeated. This merely illustrates the proposition that if you begin to leave out the proceedings upon which a decree is based, with the idea of shortening the abstract, you are just taking from the abstract that much stability from the title. You are taking something for granted that you don't know anything about.

We have got to have some definite place to start an abstract beyond which nothing which happened can affect the title. As it stands now, that is merely the government patent.

Substitutes have been suggested for the abstracting system. One of them is title insurance, and the other is the Torrens system. I don't believe in the Torrens system under any condition. I don't believe it is anything you can rely on safely here in the State of Idaho. And as to title insurance, I will have a little more to say on it later.

This is why I say the Torrens system won't work here, although it apparently has met with some success in Canada and New Zealand. It is true that we could take an ordinary clerk of the district court or county auditor, and they could make notations on a Torrens certificate that would be satisfactory as far as they applied to mortgages and mortgage releases. They could probably make the notations in so far as they applied to deeds—direct deeds to the property. But where the title is transferred by a sheriff's deed on foreclosure, where the title is transferred by a decree of distribution in the probate court or by an executor's or administrator's sale, I don't believe that we have three recorders in the state who are competent to examine those proceedings and say whether the title has actually been correctly transferred to the distributee or to the purchaser under judicial sale. So if we had the Torrens system, every time a transaction of that nature occurred, we would still have to go back and check those proceedings in the court house. We wouldn't have them on any documents before us, and furthermore, I think the Torrens system is a little too complicated for the patience of the American people.

In regard to title insurance as a substitute for abstracting, I think each has its own field as pointed out to you here today. Title insurance goes farther than abstracting does. It insures against things that an abstractor's opinion doesn't insure, but it is a more expensive system than the ordinary abstracting system unless an abstract is too voluminous, and even then, in most instances, it would still be more expensive.

I believe we should keep the abstracting system. Then if someone wants protection against these other things that could happen, things that are not disclosed by the record—you might go further and let the purchaser, if he wants that additional assurance, get a certificate of title insurance. But I don't think that it is something that the ordinary vendor of land, particularly where the consideration is not too great, should be called upon to furnish.

I have observed the title insurance system in the State of Oregon. If you are furnished an abstract of title with 100 pages in it, and two or three months later you sell that property, your abstract is only going to cost you the amount of one or two entries. The cost will certainly be less than $10.00. A client of mine who is a banker near Salem, Oregon, was talking to me the other day, and it was just one of numerous complaints of that kind that I have heard, and he told me he bought a piece of property in Marion County,

Oregon, where the fee for title insurance was over $100.00. He turned around and sold that property within a month and paid exactly the same price for a new certificate that the man had paid a month before without any additional liability on the part of the man that issued that title insurance. He had already fully insured that title, hut the man had merely sold it, and he was issuing insurance to another man.

I think title insurance in a large city like Seattle, Portland or San Francisco, where you can build up a corporation with unlimited assets, would probably be all right and probably be more satisfactory than the abstract system. But we haven't more than two or three cities or counties in the State of Idaho large enough to support a real title insurance company. So if a person in a county the size of Washington or Payette or Adams wants title insurance, he must first get an abstract and send it to the company that writes title insurance. They will insure his title, and they hold that abstract there as long as that certificate is outstanding. And speaking from experience, when a man accepts one of those certificates of title insurance in one of these counties and turns around a few years later to sell bis property, he is likely to find that that particular company is no longer in business in that vicinity and won't write him a certificate of title insurance. If he wants to get one somewhere else and wants to get his abstract back in order to get that second certificate, he has got to release the company that wrote the first certificate from liability in order to get his abstract returned.

So, as I view the relative merits of those two systems, I think the title insurance system is possibly better in places the size of Seattle or Portland, but in what we call the "cow counties," and that is what most of the counties of this state are, title insurance is not a satisfactory substitute for abstracts. But neither is the present system where the abstracts are getting so voluminous that they are an undue hurden on the cost of transferring property.

In 1938 I examined a title to property in Adams County where the abstract contained 1400 pages. It was the Mesa Orchard. A company that had foreclosed a mortgage on that orchard had planned to sell it out in 20 and 40 acre tracts at very attractive prices. But they discovered that their abstract of title was going to cost them from half to one third of what they were getting for that property. That abstract couldn't have been shortened more than 200 or 300 pages on any average 40 acres tract in the whole area.

That is when I began thinking that there ought to be some way to shorten these abstracts, and the notion I hit upon was that we would go back, as nearly as we could, to the source of our title. The source of our title is either from the government of the United States or the State of Idaho depending upon whether it is section 16 and 36 or whether it isn't. And the thought occurred to me was that if a state corporation or agency could be formed which would guarantee these titles, you would have more stability back of your guarantee than you have back of a certificate of title insurance by a company organized under the laws of the State of Idaho as they now exist. My idea of having a state agency instead of a private one was that the former would be perpetual. It wouldn't be going out of business or going broke. Of course, we would have to amend the constitution to do that. It could be started by an appropriation or by having a surety company underwrite the certificate that the State of Idaho would issue.

My notion would be to have that kind of an organization set up. For registering that title, the state would charge a substantial fee so that people

wouldn't be registering titles just out of curiosity to find out if they had a title that the state would register. An examiner should be appointed, in my opinion, by the Justices of the Supreme Court. Those men know the lawyers of the state and would know which of them could safely examine titles to the extent that the State of Idaho could back their opinion with its guarantee. If a man had property on which the abstract was becoming unduly voluminous, and he wanted to register that title, he could send to that officer the abstract of title. The officer would examine that abstract. If the title was clear, he would recommend that the state issue a certificate that the title was clear, or that it was clear except for the lien of certain mortgages—like a mortgage to the Federal Land Bank of Spokane and the Federal Housing Administration or something of that kind. The state would guarantee that that was the state of that title, and from then on, when that man ransferred his property, his abstract would start with that certificate. The next time it was transferred, it would not be necessary to have it re-registered. It probably wouldn't be necessary to re-register it again for 25 years, or until the title again became so voluminous that the cost of an abstract would be a burden disproportionate to the value of the property.

In two of the counties close to Weiser, the abstract company has changed hands in the last 8 or 10 years, and entirely different companies are issuing abstracts today than issued them 10 years ago. These companies did not merely change names, they are reorganized companies. The statute of limitations has run against some of those old companies. They afford you no protection. To constitute protection to which a purchaser is entitled, that abstract must be entirely recertified by the present company, and you pay for that recertification according to what the manager of that company decides to charge you. In some instances they do it for 25c a sheet. In other instances they charge you the same price they charge for a new abstract. And there is generally just one abstract company in the county, and there is nothing you can do about it. I am not criticizing the abstractor if he charges the same price as for a new abstract, because it is probably just as much work for him to check over his predecessor's work as it is to make a new abstract.

Not long ago I was criticized for that requirement on an abstract sent to me from Payette County. I insisted, however, that it be recertified. When it was recertified, it came back with nine additional entries in it that had not shown on the former abstract and which required some quit claim deeds to straighten out.

Those are the things I have had in mind. I don't care whether it would be the State of Idaho or some other organization, if it could be perpetual and you knew that it was solvent. You must have some assurance from that certificate so that you could forget everything that happened prior to that time.

It is my position that that wouldn't put abstractors out of business. Perhaps one abstract in ten would get sufficiently voluminous so that the owner would send it in to have the property registered and a state certificate issued. But even in those cases you start abstracting again. The abstractor has got just as much to do from then on as he would have from an abstract that was brought to him certified by him down to that date. For instance, if you took into an abstract office an abstract certified down to the 1st day of January 1946 and told him to continue it, he would only have the instruments to put on from that day on. If you took him a certificate guaranteeing that title as of that day, he would put on the same number of instruments. This isn't put-

ting the abstractor out of business. In my opinion it is a means of keeping the abstractor in business and keeping in every one of these counties a set of abstract books that are available to the general public. It is also my opinion that unless something like that is done, title insurance is going to put the abstractor out of business. In counties where the county seat is 5,000 people or less, it will be title insurance or a method of shortening these abstracts.

Now, the plan I suggest would not be compulsory to anyone. It will not create any new business in the office of the county recorder. To file one of these certificates sent over by the State of Idaho would be no more of a job than filing the ordinary warranty deed. It would not be a case of thereafter entering transfers on that certificate. That certificate would begin and end with its issuance and recording.

Here is another place where that is advantageous. A man buys 160 acres of land. He gives an abstract of title to that property. It may be a big abstract. I was thinking of the land on the Weiser flats. There are probably 3,000 acres there in what was once known as the Butterfield Tract. Any of the abstracts on that tract run around 275 to 300 pages, and they cost about that many dollars. A man buys 160 acres of that and decides to sell 10 acres of it. He turns over his abstract, or he buys an abstract clear back to the government patent on that 10 acres, and it costs him a pretty good portion of the price he gets for his 10 acres.

And here is another thing that I have noticed along that line that makes for instability. I have examined abstracts to tracts of land there adjacent to Weiser where the abstract was compiled, part of it 25 years ago, and on up to date, and it shows a marketable title. When the man would go to sell part of that land and order an entirely new abstract and go back to the abstractor's office for it, the abstractor would go to the court house, and he would find some of the files in the probate court that materially affected that title were missing. So the new abstract compiled for the same property wouldn't show a complete title to the land. So there is another advantage of the registration.

The same thing would be true of a person who started a subdivision. He could register his title to the entire sub-division. Then, as he sold off the lots, the abstract would begin with that register. For a few years that wouldn't be much of an abstract, but it doesn't take very much time to put sheets of paper on an abstract. I have noticed abstracts where the government patent was issued in 1916, and frequently some of those abstracts have 50 or 60 pages by now. There would still be just as much for the abstractor to do as there is now. It would just present a possibility of eliminating a lot of unnecessary abstracting and a lot of unnecessary title examination.

I don't think that plan is perfect. It isn't, as has been previously stated, a plan that has been tried in other states and discarded. I think my friend Mr. Turner thought I was going to talk about the Torrens system when he talked like that. I am not surprised at his viewpoints, because in the legislative sessions, every time I tried to talk about this method and talk it over with the abstractors, they immediately began to jabber about a Torrens system, that it was no good, and they wouldn't even listen to me when I told them I agreed with them that the Torrens system is not good, but I wasn't talking about the Torrens system.

This idea may not be worth anything to anybody. But it is my idea,

and maybe a germ of a better idea that one of you can develop so that we can have a system that will save and perpetuate the abstracting system at a cost that isn't prohibitive to the property owner.

PRES: Thank you, Mr. Donart. We have, as a guest speaker this afternoon, a man from another profession who is going to speak on a subject that we are all interested in if for no other reason than because of its prophetic nature. Dr. Richard D. Simonton of Boise is going to talk to us at this time on socialized medicine.

DR. RICHARD D. SIMONTON: Thank you, Mr. Chairman, and members of the bar. Your program chairman asked me some time ago if I would speak on socialized medicine. I accepted with reluctance to get up in front of a group of so apt speakers here, but I did take it upon myself to enlarge a little upon the slightly constricting subject of socialized medicine.

I wanted to discuss with you Senate Bill 1606 which provides for a national health program, commonly known as the Murray-Wagner-Inglewood Bill. This bill is composed of two principal parts. The first part, Title 1, is largely unobjectionable. In it the government sets up a plan which will provide grants and aids to medical education and for scientific research. In the past we have had most of our scientific endowments from contributions. In the last 16 years income taxes and a few more things have so reduced our endowment funds and the source of our endowment funds that our medical schools and scientific bodies really are in a bad way. It is a shame that we have to depend upon our federal government rather than depending upon the traditional responsibilities of money making individuals to carry this on, but that is what it has come to. The grants are necessary, and if they are administered equally and without too much central control, they are acceptable.

It is likewise proposed to extend the public health service through grants and aids to the states for indigents and their local needs. There is nothing particularly objectionable to that part of the bill.

There is a third section which proposes the building of small hospitals, decentralized and associated with medical centers so that our patients won't have to travel 60 or 75 miles to a hospital, and when they do, it is fairly well equipped and built. There is no objection to that part of the bill. The American Medical Association, as a group, has highly endorsed that.

All three of these are covered by individual bills in Congress at the present time. They do not have quite as close control centrally, and we feel that the individual bills would cover these particular needs much more adequately than they would be covered in this Bill No. 1606.

The last particular function of Title 1 of this bill is to provide cash indemnity for patients during periods of illness. We look upon that with a certain amount of questioning as to it benefiting the patient. We have found, in numerous cases, that the patient will be sick a great deal longer and be sicker as long as cash benefits are derived from such a disability.

Title 2 is by far the most important portion of this bill in which all of you, as well as 110,000,000 of our 150,000,000 people, should be vitally interested. Primarily it provides for a setup to establish compulsory health insurance. The compulsion is through tax collection which would have a very highly centralized control with a presidential appointee at its head. The

functions of this portion of the Title, the compulsory health insurance, would largely be under the control of one man, the Surgeon-General of the United States, who is a political appointee.

This is one thing we don't like about it. The Social Security Board would exercise a certain amount of control over the expenditures and finances. There is a medical advisory board—and this is somewhat of a laugh—consisting of 16 or 19 men of the profession and of other recognized interested parties, labor, general public and so forth. The advisory board, which can sit and offer suggestions but has no means whatsoever to insist on their suggestions being carried out, cannot change the policy of the Surgeon-General or the Social Security Board. In other words, it is just more or less of a pseudo-board that sits there and has its name on the door.

This type of procedure would necessitate and bring into being a bureau that would exceed all the other bureaus we have. It likewise places in the hands of the Surgeon-General the means to qualify not only the medical men and surgeons but the dentists, nurses and the hospitals that would qualify under this particular bill.

It goes on to the point of designating who would be general practitioners, who would be specialists and who would be consultants. It likewise sets pay and salaries, designates types of medicines to be used and the facilities to be used. It is an overall regulatory bill which, at the present time, contains only 17 different clauses, but if it is compared to some of our European insurance plans which have functioned for some period of time, that will grow enormously.

There likewise will be a marked restrictive element between the doctor and the patient. You individuals have probablye heard numerous times that one of the main objections of the American Medical Association and its associated members have put up is that it will disrupt the patient-doctor relationship. The patient-doctor relationship is a very confidential thing. I think that unquestionably you gentlemen reach it not infrequently in a client-lawyer relationship. It is a type of thing that will not stand interference with good results. There is to he an individual imposed between the doctor and the patient known as a medical administrator, and on any procedure other than anything minor, he is presumably to be consulted and passes judgment.

With this interposition, there is bound to be a marked restriction on the initiative and responsibility of private practitioners, the specialists and consultants, and likewise, it would be impossible for the patient or parents of the patient to choose their consultants. They will be designated, if the need seems justifiable to the medical administrator.

At the present time the bill contains only 17 different clauses. These things grow as shown by the German plan of compulsory health insurance. Before the war it contained the small numher of 3,300 individual sections. It is quite impossible to allow these things to go on. They reach complexities that just cannot be handled in a neat and simple plan.

This compulsory health insurance would cover medical care, dental care, hospitalization and nursing care for approximately 110,000,000 of our people. Let's call them the Social Security draftees. They likewise are under a compulsory system. They have no choice of whether or not they would like to be in the Social Security System.

That, briefly, is the setup of Title 2 that we so highly object to. We feel that the centralized control, the interference and designation of specialists, consultants and general practitioners is such an enormous job that no single man, or any group, can efficiently administer it. With all the restrictions and regulations, it would take away a great deal of your initiative that you find in your practicing physicians at the present time.

Now, here are a few of the reasons that the A. M. A. opposes this legislation other than those mentioned that are evident from Title 2. In the first place, the need for this type of medical care has not been firmly established, and what has been established has been more on an emotional basis than on logic or documented facts. Our social planners have been the ones that have largely deplored the despicable state of the public health and the medical neglect that has existed, or presumed to have existed, in the United States. They maintain that the reason for this lack of public health and medical care is primarily the functional barrier which exists between a sick man and the doctor. They have not given any significance to the fact that in the past 40 years—more so in the past 20 years—the mortality and morbidity rates of the United States are among the lowest in the world and are constantly going down. Life expectancy has been steadily on the increase. It has shown no signs of stopping at a given level. The American death rate for diptheria, which is a truly preventable disease by the use of serums or vaccination, is a true medical index in regard to the type of medical care that any community or any country is getting, and in the United States it is approximately one half of prewar Britain and the pre-war German rate, and both of those countries squirm under the benefits and the benevolent care of compulsory health insurance. They have had a steady increase in diptheria death rate.

During November of this last year, when President Truman demanded and called for this type of legislation, he used as one of his most pertinent points to illustrate the deplorable state of the health of the union the rejections of the Selective Service System. Roughly, he said there were 5,000,000 rejects out of approximately 17,000,000 draftees. True, they were rejected, but I would like to break those figures down for you to show you how figures are so frequently used to propagandize the general public and to show you wherein the true crux of the matter lies.

Of the total rejected, rather than 5,000,000, there were 4,217,000, Of these there were 444,000, almost half a million, who had manifest defects. They were born armless, legless or had an arm torn off in an accident, totally blind or deaf mutes. How much could medical care rectify those injuries? When an arm is off, we can't sew it back on. It takes an act of God to put an arm back when it is once off. You can do it with the tip of a finger, if you are lucky, but you can't do it with an arm or leg. There were 1,820,000 rejected because of mental deficiencies. They were morons and misfits. They were born without the mental facilities to adjust themselves and maintain decent standards of living or decent association in adult life. Does anyone conceive that is not a problem of eugenics, primarily, rather than a problem of medical care? If we followed Hitler's Germany, possibly in 20 years we could eradicate that. They were rather severe in the treatment of misfits, idiots and imbeciles over there, and under Hitler's regime of complete dictatorship, they took care of that. We haven't come to that point, but there is very little the medical profession can do to improve a deficient brain. Of this group, 700,000 failed to reach educational requirements. Now,

the educational requirements to get into the Army and Navy is the fourth grade, and we have had a state controlled system of education in the United States for a great number of years. How does it happen that we have such a large number that missed having their educational requirements?

There were 320,000 rejected because of skeletal defects, short legs, club-foot, withered arms, twisted vertebrae and so forth, which likewise do not fall under adequate care. They are that way, and you can't correct them so that they would be acceptable to the Army. However, they are individuals who can get along so far as health is concerned. They have very little illness. They are not out a great deal. They can adjust themselves to our present mode of life and make their own way in life and frequently are financially independent.

Now, that makes up a little over 2,250,000 of these 5,000,000 rejectees in which medical care could give no help whatsoever. So half of Mr. Truman's statement is purely propaganda.

Of the remainder, 280,000 were rejected for syphilis. The care for syphilis has been a public health function. Our state statutes and federal statutes have been full of it for years. Yet under their particular system, they still have over a quarter of a million rejectees.

220,000 were rejected for hernia. 160,000 were rejected because of eyes. Those are correctible conditions within limits. When we needed our manpower badly, the Army accepted hernia and syphilis and men with bad eyes—just so they weren't so bad that if he lost his glasses he couldn't find his way around in this room.

Now, there is left 1,500,000 for whom medical care could have done some good. They were about one-third of the five million as against seventeen million accepted. In other words, frequently we are subjected to propaganda which looks terribly bad, but when it is truly broken down into the correct figures, it isn't so bad at all.

I think that covers the first reason that it is largely an emotional outlook-rather than a need based on logic and documented facts. Even if the need existed, there is no experience to indicate that public health insurance would benefit public health, although there is some reason to believe that it would lower public health standards. The latter is true in both Germany and Britain which had compulsory health insurance for a sufficient number of years to establish statistics reliably.

Dr. Nathan Saney has written in his book, and is quite a desciple of compulsory health insurance, "Contrary to all predictions, the most drastic thing about vital statistics in the compulsory health insurance is the steadily and fairly rapid increase in the number of days that the average person is sick annually and is of continually increasing duration. Such illness in the United States per individual per year amounts to seven and nine days. It is fourteen to sixteen days in Great Britain and Germany." We feel safe in concluding, then, under compulspry health insurance, the amount of sickness is not reduced, and if it is not reduced, then certainly the public compulsory health insurance cannot have a great deal of benefit.

I was reading the other day that the recent national health bill that Britain is passing, is socializing all doctors and presumably is assuming

to make them servants of the state, but in doing so is removing vaccination which is one of the prime methods we have in public health to stop many of our communicable diseases and to stop many of our diseases which carry a high mortality in childhood. That is going backwards rather than aiding the general health. It is taking away one of the principal means we have had to combat certain diseases, and is allowing those diseases to have more or less a free hand.

The third reason we object to this Title 2 is the fact that its costs are purely and totally unpredictable. No one has a fair idea of what this program costs. It has been estimated that the cost would vary between $20.00 to $80.00 per person a year. If we take the average of that, say $40.00 a year, and multiply it by 100,000,000 people, we will have a preliminary cost of $4,000,000,000. Experience elsewhere indicates that the administrative costs of compulsory health insurance is great. There have been approximately 1 administrative employee for every 100 insured persons. Now, if we are going to insure 150,000,000 people, that means we will add approximately 1,500,000 employees to the federal government for the purpose of administering this compulsory health insurance alone. If we assume that the average salary of this government employee is $2,000 a year, our first cost for administration, before anything else is touched, will he $3,000,000,000. That is exclusive of medicine, hospitals, nursing, dental or medical care. It makes one stop and wonder where the rest is coming from and how far it will reach.

The promulgators of the bill, or anyone else, have not attempted to state the cost. They want to avoid it.

I think it would be reasonable to say that if you assumed that the doctors would work on a basic salary of $5,000. a year, that would add another billion to it. Nurses care, medical care, X-rays and that sort of thing would add another billion. And you can just go on up. It depends upon what you want to buy.

Another factor that has been misunderstood is that medical care is not the sole factor in good health as the social planners thought and have so propagandized. They have used medical care and health as if they were synonyms and interchangeable. In truth, medical care is only a small part of the public health program. Health consists largely of not being sick, and medical care consists largely of attempting to cure and alleviate diseases. They are entirely different terms and mean different things. Confusion in these terms resulted in the fact that the health legislation proposed from time to time by social planners has largely emphasized the financial cost of medical care programs, whereas, in reality, health depends on many other things—the hygiene of the patient, sanitation, working conditions, adequate diet, housing and clothing, and one of the most important things that is frequently overlooked, patent medicine control. People in moderate ill health will frequently dose themselves with highly touted patent medicines and allow a simple condition to become a serious condition before they seek medical aid.

The social planners maintain that a periodic health examination, say once in a year or once very six months, will keep a patient well. We can't quite agree with that, because three to four weeks after a periodic health examination a man can catch lobar pneumonia after exposure just as easily as without it. There are lots of things a periodic examination will not pick up.

Those are the main reasons for objecting to this legislation. I hope that I have made myself somewhat clear to you on that part of it.

We would like to offer certain constructive plans of our own. Voluntary health insurance plans are much more in keeping with the American tradition of allowing responsibility and initiative to fall upon the individual. They must be built slowly, of course, through a trial and error method, continuing the good and eliminating the bad. Voluntary health plans are now in operation in 38 or 40 of our present 48 states, and they are apparently doing quite a good job, and they are growing rapidly. They are under a decentralized medical society control, and, as I mentioned before, are more in keeping with our traditional emphasis on individual responsibility, prudence and thrift.

In our voluntary health plans, our endeavor is to keep our overhead at a minimum. In our various states, the overhead for running the plan is kept between 7% and 10%. That is a fairly low overhead. As I pointed out, in the federal health program, it is estimated that probably 50% would go for administration. We find that our voluntary plans will not support salesmen to sell the policies. They won't support other expenditures that attempt to build up these plans rapidly and make them mushroom. They grow by word of mouth of the individuals who have heen with tbe plan or tbrough the various organizations and groups that join these plans, so our collection expenses and promotional expenses are nil. And it is only through that method that we can keep our voluntary health plans at a low level which will be attractive not only to individuals and married couples but to families.

You might like to know what these voluntary plans cost. For a single individual for complete coverage, as complete a coverage as is to be given under the proposed health insurance program, the amount is between $2.75 and $3.50 a month. Complete coverage for a family of five amounts to between $6.50 and $10.00 a month depending upon the locality, the newness of the voluntary group and the amount of backing they have to avoid any emergency that might break them.

Most of the doctors are in favor of a voluntary health plan, whereas they bitterly oppose any government control of medicine. Some of these voluntary health plans have been so successful that the farm security administration has found it to their advantage to join these plans for the medical care of their agricultural indigents or subindigents, because tbey have found that better medical care was given, a wider selection of doctors was prescribed and a lower cost for overall subscription.

In our estimation, these voluntary medical health plans will supply the medical care needs and the health needs of the United States without undue expense and will give the best medical care without the loss of responsibility, initiative and the patient-doctor relationship which bas existed so long and to such a benefit. These have raised our American standards of health to among the highest level in the world.

PRES.: Thank you Dr. Simonton.

I understand that the Canvassing Committee is ready to report. As you know, a Commissioner is being elected this year from the Eastern Division. The Chairman will make his report.

ANDREW F. JAMES: Mr. President, Mr. R. D. Merrill is the new Commissioner for the Eastern Division of the Idaho State Bar.

PRES.: Your Commissioner from the Eastern Division for the next three years is Mr. R. D. Merrill of Pocatello, Idaho.

We have one more speaker this afternoon. She is Miss Mary Schmitt who is to speak on Socialized Law.

MISS MARY E. SCHMITT: Undoubtedly all of us who have been watching the trend toward socialized medicine have wondered a time or two whether socialized law will be next.

During the past several years we have been hearing more and more complaints that administrative agencies are taking over all the legal practice, and it is true, of course, that they have been taking over. As a matter of fact (a few weeks ago) it had gotten to the place where if a question arose involving the rules of the O. P. A. rent control division, for example, we found ourselves calling on the phone the only person who knew the answers —the girl at the local O. P. A. office.

Most lawyers are against socialized law. Their reasons may be somewhat selfish and prejudiced, but they are also unimportant for the reason that it will not be the lawyers (except as we take warning and start planning now) who decide whether or not we shall have socialized law; rather it will be Johnnie Public who in his constitution was granted the "equal protection of tbe laws" who will decide whether or not he is getting it, and if not, whether the blessing of socialized law shall be added.

There have apparently always been complaints regarding the world's legal systems. There is an abundance of literature, contemporary and not so contemporary, which finds fault with them. For example, take the book "Justice and the Poor" by Reginald Smith, or the book, "Look at the Law" by Percival E. Jackson, a member of the New York bar, which I have not yet read. The titles of the chapters of the latter book are as follows:

There is Too Much Law. The Law is Uncertain. The Law is Too Rigid. The Law is Too Technical. The Law is Hypocritical. The Law is Too Slow. Tbe Law is Too Expensive. Lawyers are Dishonest. Judges are Corrupt. Witnesses are Liars.

Without admitting that the author is correct, we can all think of examples which might prove his statements. The author should have added "Lawyers Cut Fees." Surely there must arise amazement, suspicion, and distrust in the mind of the man who shops around a bit and discovers that a divorce costing in one office $150 can be obtained through another office for only $75 or that one office charges statutory rates for the probate of an estate while another office will do it for half that amount.

In this country we have many men and women who have by their own efforts worked themselves from states of comparative poverty to conditions of affluence, who have changed their status from that of an unknown immigrant to personages of power and influence in their communities, and who, having had nothing but hardships in their youth are now able to turn over to their children substantial chunks of this world's goods. Those who have had such success will very likely talk about and uphold free enterprise. But what of the man who has tried just as hard but who through ill fortune—

a physical handicap,accident, long illness, periods of unemployment, or even perhaps an extravagant wife, has never been able to get himself over the margin into easy living. He is the one who tends to have a grudge against our institutions—our legal set-up for example.

So too the man who has on an occasion or two consulted an attorney and who has perhaps been on the winning side of a lawsuit or who has been saved by a lawyer's advice from signing a vicious contract will very likely feel that the legal system is not bad at all; and the man who lost a property right or suffered a loss because he was too poor to hire an attorney or did not know how to go about getting one will say that something should be done about the law. There are, of course, those who, having a good cause for legal action, are afraid of litigation or who, because of ignorance and fear never know that they had a good cause of action and that the law would have protected their personal or property right. A friend of mine who is a very intelligent woman told me not very long ago that until just recently she did not realize that you ever went to a lawyer except when you were in trouble, and that the idea of such a thing as preventive law had never occurred to her. There are also those who know their rights but who do not have the wherewithall with which to pay court costs, attorney's fees, witnesses' expenses, the cost of bonds or collecting evidence. They either make no attempt to assert their legal rights or become discouraged from doing so very quickly after being sent by one lawyer to another and then another.

An effort has, of course, always been made to meet this situation and to make provision for the man who doesn't have the money. There are, on the one hand, the statutory provisions providing for the appointment of counsel by the court, and on the other hand, the provision in the oath which the lawyer takes on his admission to the bar that "I will never reject, for any consideration personal to myself, the cause of the defenseless or oppressed." The first provision is largely only for the man who has been taken into court on a criminal charge or at least presupposes litigation, and the second operates no further than the conscience or generosity of the attorney take him or the time which his business allows. I do not underrate the way in which lawyers have always responded to the client's need and the obligation of his oath. I know there is and has always been much free work on the part of those who practice law, but in times like these lawyers are busy and they also need something on which to live.

Forms of legal aid have been in existence for many years—provision was made for poor litigants by the laws of the Roman Empire; by the English law for 800 years; in Scotland since 1424, and in Spain during the time of Ferdinand and Isabella. The first legal aid society in this country was started in 1876 in New York City by a group of Germans, having as it purpose service to German immigrants. The Monthly Labor Review for June, 1943 (page 1158) gives the follow statistics:

In 1941 there were 143 legal aid societies in the United States, which were segregated as follows:

32 independant legal aid societies; 16 public or private social agencies; 8 bar association committees with offices and paid staffs; 4 public bureaus; 51 volunteer committees; 8 law school clinics; 18 public defenders; 6 voluntary defenders.

These clinics during that year (1941) handled 295,000 cases, collecting for

their clients $339,000.00, the gross cost of operation being $698,000.00, and the fees and commissions being $36,800.00, or about 1/13 of the cost of operation.

Many of you will recall reading an article entitled "The Legal Five and Dime" which was published in The Reader's Digest several years ago (March, 1943, page 11). Philadelphia was the scene of this legal aid activity, which was called "The Neighborhood Law Office." Records kept by the office indicated that 82% of the people who came to the six such offices operated in Philadelphia had never consulted a lawyer before, and that only 2% of the cases handled got into court. The society operated upon the theory that rates should be reasonable, that the client should know what the fee would be, and that the service should be kept on a human, neighborly basis.

Sweden has a form of socialized law. The most complete statement I found stated only that "Publicly supported Swedish institutions offer not only lawyers for court work but mediation, explanations, advice, draftsmanship and assistance in the various branches of notarial business. Also with respect to litigation a healthy competitive device was created by carrying over (from an earlier inadequate assignment system) provisions permitting appointment for poor litigants of legal representatives not connected with the public legal aid bureaus. A litigant himself is allowed within reasonable limits to choose his representative, who receives suitable remuneration from the public treasury. This competition has elevated the standards of regular legal aid lawyers and lessened popular hesitancy to accept their services." (Encylopaedia of the Social Sciences, Vol. 9, Legal Aid, page 323)

The Waldorf-Astoria Hotel in New York City has an employer provided legal aid bureau, which was started when it was discovered that employees were losing efficiency because of legal difficulties. The hotel put its lawyer into an office in the hotel, no fee was charged employees for consultation, and a small fee was charged when papers needed to be drafted. The cost to the hotel bas been $1.00 per employee, and after five years' operation it was considered one of the most valuable services in the hotel's personnel program. (Reader's Digest, April, 1942, p. 68)

The criticism of these societies is that there are too few; that they are available only to those who live in the larger cities; that such clinics are hampered by the lack of funds; and that they operate independently of each other (although in 1923 the "National Association of Legal Aid Organizations" was organized in this country.)

PRES.: Thank you, Miss Schmitt.

SATURDAY MORNING, JULY 20, 1946

PRES.: The first number on our program this morning is "A Workable Judicial Council, Pre-trial Jury Education" by the Honorable Charles E. Winstead, District Judge of the Third Judicial District.

JUDGE WINSTEAD: Mr. President, ladies and gentlemen of the State Bar:

At first blush the topic assigned to me appears to comprise two distinct and unrelated subjects. However, more careful consideration and more careful analysis will show that they constitute two most essential phases of any

concerted action to improve our subjective and adjective law and law enforcement.

The improvement of the administration of justice is a continuous process. The operations and needs of the judicial system must be constantly surveyed, tested, and improved if we are to keep pace with changing condition —and also to maintain in the public mind proper respect for law and order.

We owe many of our rights, our liberties, and our freedoms to England and the English common law; but there is one thing in the United States we have not inherited from England, and that is the respect and consideration the rank and file of the English public have had for law and order. The so-called rugged individualism of the average American presents problems in law enforcement.

Following World War I our noble experiment in national prohibition, coming along with the moral let-down which seems to accompany each major war, brought the bootlegger, the highjacker, and other racketeers, with all their ramifications. Then came World War II with the black market, the war allotment racket, and other evils. Whenever any considerable portion of the public acquires a taste of lawlessness, whatever the form may be, the poison spreads in the community in much the same way that a rotten apple affects the barrel or bin in which it happens to fall.

The normal growth and progress of the nation also brings its full quota of legal problems. We are living in a rapidly changing world. Many of us here present have seen transportation revolutionized; the horse and buggy, the pack outfit, and the freighter have given way to the automobile, the truck, the bus, the diesel-driven Streamliner, and the airplane. The field of communications has also changed with airmail and the radio. These changes have made obsolete laws, bureaus, and administrative offices, and have brought with them the necessity for new rules, new laws, new procedures, and new methods of law enforcement.

Each biennium the legislature meets and grinds out a mass of laws without a coherent plan or system, without trained help in the drafting of bills, and often without thought or consideration of the effect of such bills upon other laws or upon our state government. We have no legislative reference library, no trained legislative counsel, no safeguards against poorly drawn and impractical legislation.

Once on the books, an act may remain to plague the bench and bar for generations after its purpose has been served. Our codes accumulate without revision, wasting paper and office space, of advantage only to the printer. Witness the numerous statutes, for instance, covering tolls, toll houses, toll roads, and that classic section (§17-3201, sub. 5, I. C. A.) which makes it a felony and disqualifies from holding office in this state

"Each officer of this state, or any county, city, town or district of this state, and every other person charged with the receipt, safekeeping, transfer or disbursement of public funds who either: * * *

"5. Changes or converts any portion thereof from coin into currency, or from currency into coin or other currency, without authority of law."

The framers of our state constitution had in mind the necessity of some concerted effort to meet the purpose we have in mind. Article V, Sec. 25 of the Idaho Constitution reads as follows:

> "Sec. 25. Defects in laws to be reported by judges.—The judges of the district courts shall, on or before the first day of July in each year, report in writing to the justices of the Supreme Court, such defects or omissions in the laws as their knowledge and experience may suggest, and the justices of the Supreme Court shall, on or before the first day of December of each year, report in writing to the governor, to be by him transmitted to the legislature, together with his message, such defects and omissions in the constitution and laws as they may find to exist."

However, this provision has proven entirely inadequate to meet the situation. There are many defective statutes which never come to the attention of the courts in litigation. I may be in error, but I do not recall that any reports made by any Supreme Court ever were transmitted as such by any governor with his message at the opening of any of the eighteen regular sessions of the state legislature which have convened since I began to practice law in Idaho. You all know as lawyers that to get the attention of any legislature, an abstract criticism must be accompanied by a concrete bill to provide the proposed change. Unless a defect in the law or constitution has some political significance, the average governor is not particularly interested. The average governor is not a lawyer or interested in general statutes; he has other things to occupy his time and attention.

Up until the formation of our Integrated Bar in 1923, improvements in both our subjective and adjective law came in a haphazard way from some interested individual citizen. In this connection, the comment of the Massachusetts Judicature Commission made to the Massachusetts Legislature in reference to legislation to establish a Judicial Council, is apropos:

> "It is not a good business arrangement for the Commonwealth to leave the study of the judicial system and the formulation of suggestions for its development almost entirely to the casual interest and initiation of individuals. The interest of the people for whose benefit the courts exist, calls for some central clearing house for information and ideas, which will focus attention upon the existing system and encourage changes for its improvement. Some central body is needed for the continuous study of questions relating to the court."

I am not going to retrace the efforts of the Integrated Bar in Idaho to form a Judicial Council. Suffice it to say that in 1929 a committee of the State Bar known as a Judicial Council was appointed, consisting of Justices Budge and Wm. E. Lee of the Supreme Court, Judges Brinck, Adair, and McNaughton of the District Courts, and Frank Martin, James R. Bothwell, James Harris, A. L. Merrill, and Eugene A. Cox, attorneys. This committee and its successors functioned for several years without action on the part of the legislature to establish a statutory Judicial Council. The legislature, however, during this time did pass certain legislation which would make possible a workable Council if the Supreme Court would exercise its powers. No Judicial Council can be effective without the wholehearted support and co-operation of the Supreme Court.

In 1923 the legislature in Chapter 11, Session Laws, 1923 (now Chapter 3, Ttitle 1, I. C. A.) provided for appointment of Commissioners for the Supreme Court from the district judges of the state. The act placed no limit on the number of judges to be so appointed, nor on the time those appointed should

serve. The only limit was that the appointment should hold only for the term in office of the judge appointed. Under this law all that is required to effect appointment is the order of the Court. The duties of Commissioners "under such rules and regulations as the Court may adopt" are to "assist the Supreme Court in the performance of its duties, and the disposition of cases" then or thereafter pending and undetermined. Such Commissioners, by the act, shall be allowed actual and necessary expenses of travel and sustenance to be paid out of the Treasury of the State of Idaho in the same manner "as are similar expenses of the Justices of the Supreme Court, but out of the appropriation made for such purposes for District Judges."

In 1939 the state legislature amended §3-411, I. C. A. (Chap. 48, Session Laws, 1939) covering the Bar Commission Act so as to provide that the Board might pay from the Bar Commission Fund actual necessary expenses of the members of the Board and persons acting under the direction of the Board, connected with the performance of the objects, powers, or duties of the Bar Commission.

In 1941 the legislature in Chapter 90, Session Laws, 1941, recognized the power of the Supreme Court to make rules governing procedure in all the courts of Idaho. The Supreme Court appointed a Rules Committee, of which J. L. Eberle was named chairman. In the fall of that year this committee filed its report with the Supreme Court, after calling for suggestions from members of the bar.

Since 1941 when the proposed rules were submitted to the Supreme Court for consideration, there has been no action taken by that court in the exercise of its rule-making power. The committee of the State Bar known as the Judicial Council has been inactive. No meeting of the District Judges of the state has ever been called pursuant to the action of the 1937 annual meeting of the State Bar, to consider rules or other judicial problems.

We are now faced with probable legislative action authorizing a new code, at the next session of the legislature. By the time the next legislature has convened, it will he fifteen years since the last compilation of the statutes of Idaho, and 38 years since tbe 1909 Code Revision.

Before any legislative action is taken authorizing a compilation or revision of the Idaho statutes, the people of the state and the members of the bar are entitled to know what the Supreme Court intends to do with its rule-making power. If this power is to be exercised, then the statutes covering court procedure should be eliminated from the Code.

Several reasons have been urged for failure of the Supreme Court to take any formal action, notably,

1. "The rules submitted were not acceptable to the bar;" and
2. "There is no money available to print the rules."

If the rules submitted were not satisfactory to the bar, the provisions of our Code in point should be adopted as a starting point for rules in Idaho, and then changes can be made on court order without the necessity of legislative action.

If the Code is reduced in size by eliminating the rules, certainly there can be no objection from the legislature, upon proper showing, to provide the Supreme Court with a sufficient appropriation to print the rules. The

objection of the practitioner is to a duplication of expense through a useless part of the Code, and then the purchase of a set of rules in conflict therewith.

Even without special legislative action, I am of the opinion that a workable Judicial Council is possible and available, if the Supreme Court desires it. The Commissioners for the Supreme Court Act permits the Supreme Court to call in District Judges to assist it in the performance of its recognized duties (Chapter 3, Title 1, I. C. A.) and the expense of such District Judges performing duties for the Supreme Court are payable out of appropriations made for the District Courts. At the close of the last biennium there was an unexpended and unencumbered balance in the District Courts appropriation of $9,000.00. Section 3-411, I. C. A., as amended by Chap. 48, Session Laws, 1939, permits the Board of Bar Commissioners to pay the expenses of the lay members of the Judicial Council while so functioning.

The Supreme Court, co-operating with the Bar Commission, can furnish a workable Judicial Council until such time as the legislature may be sold on the idea of a permanent statutory Judicial Council; so lack of a specific appropriation by the legislature for the purpose is not a justifiable excuse, in my opinion, under present statutes and current appropriations, for a failure to have a Judicial Council.

There is no apparent reason why the legislature should not co-operate in the matter of a Judicial Council. In the set-up provision can be made for a permanent Secretary on a salary, who in addition to his duties with the Council shall maintain under the Council a legislative reference library and also act as legislative counsel. The Council can further act as a permanent law revision commission, so that its services and accomplishments can benefit the bar, the courts, and the legislature.

I now desire to consider the second phase of my topic, namely, "Pre-Trial Jury Education."

For several years I have been of the opinion that the bench and bar of Idaho have long neglected a most important duty to the men and women who compose our jury, through failing to provide proper instructions for such jurors as to their duties and responsibilities in the administration of justice, before the trial begins.

A large percentage of the average jury panel consists of jurors who have never been in court before or who have possibly performed jury service once or twice in a lifetime,—perhaps in another jurisdiction. These enter upon their duties, if selected, bewildered, ignorant of court procedure, and without any conception of what they are supposed to do. Under our present practice the first instructions they receive with regard to their duties come after the evidence has been submitted, and practically at the close of the case.

This is a weakness which has long been prevalent in trial courts of the nation, both State and Federal. Some of the courts in New York State some years ago issued a booklet called "Primary Instruction to Jurors." The work was not followed through, for the pamphlet was not in print when I wrote to the County Clerk of New York County in February, 1944. I then traced a similar publication entitled "Information for Trial Jurors" to the Court of Common Pleas of Cuyhoga County, Ohio, of which Cleveland is the county seat. This latter bears the indorsement of the Cleveland Bar Association and the Cuyhoga Bar Association, and acknowledges credit to the Courts

of New York State. Going further, I found a set of "Instructions to the Jurors of the Wayne Circuit" at Detroit, Michigan, and later a "Handbook for Petit Jurors Serving in the District Courts of the United States" published by authorization of the Judicial Conference of Senior Circuit Judges, under date of September 1, 1943.

In my opinion the Cleveland pamphlet is the most practical and capable of adoption in this state.

I have made a preliminary draft of a booklet, following the style of the Cleveland pamphlet, which I am contemplating submitting to the trial jurors in this district at the time they are served with jury summons.

This I will submit to the Commissioners of the State Bar and also to the Third District Bar Association for criticism and suggestions before printing. Copies of the draft have been mimeographed, and are available on the Secretary's desk for consideration. Your comments and suggestions will be appreciated.

This pamphlet furnishes some concrete illustrations of what I think should be done in the Courts of the state, I have opened with an introduction to the jury panel and have given what is customarily done in the larger cities of the nation. When each new juryman comes in, in most of the larger cities, a Judge is assigned to meet the incoming juror to give him general instructions as to his duty in Court.

In our state there are counties where juries have not been used for several years, and the matter of jury service is rather spasmodic. I believe that the juror, to intelligently consider a case, must have some idea of what a trial consists of. I have first taken up civil cases, and then I have taken questions and answers of importance to the jurors, then an explanation of the difference between criminal and civil trials and then follows a conclusion with regard to the duties of the jurors.

In the general instructions I have gone into what a law suit consists of, the duties of the trial judge, challenges, reaching a verdict, procedure in the trial, duties of counsel for the respective parties and the duties of the jurors.

At the end of page 7 there is distinguished the difference between civil cases where three-fourths of the jurors may reach an agreement and criminal cases where there must be an unanimous finding of the jury. I bad in mind felony cases only. Misdemeanor cases, of course, require only five-sixths of the jurors for a verdict, and that is a matter of special instructions. We have very few criminal trials on misdemeanors.

In the questions and answers, I have attempted to follow the questions which are very important to the jurors so they may understand just what they are supposed to do.

I think the pamphlet pretty well covers the fundamental things which a juror should know in undertaking a trial of a case.

On page 15 I take up the matter of criminal cases. On the following pages I have taken up questions that have been of particular interest in criminal trials.

In my experience of almost 16 years on the district bench, I presume that 90 per cent of the requests for further instructions coming from the jury

room, after they have retired, have been on matters which are of no consequence or of no business to the jurors.

These booklets which I have received from Wayne County and Detroit, Michigan, and from Cleveland are in pocket form as is the handbook for petit jurors issued by the Senior Circuit Judges of the United States Courts.

Harlan Stone, late Chief Justice of the Supreme Court of the United States, gives a very wholehearted endorsement to the general idea that the intelligent juror is a benefit to the litigants on both sides and that new jurors should receive special instructions, and the juror who has not served for several years or at odd times should be given the same instructions in order that tbe jurors may understand their functions in a court of justice.

PRES.: Thank you, Judge Winstead. We are honored at this convention in having with us a member of the Board of Governors of the Oregon State Bar and his good wife, and we want to give him an opportunity to say a few words, if he would like. I am very glad to introduce the Honorable Mr. Goodenough of Salem, Oregon.

MR. GOODENOUGH: Mr. President, I dropped in here purely as an interested spectator. I had no intention of making an appearance on the program or of receiving any recognition from your body. I understood there was going to be some discussion of statutory revision, and in Oregon we are very much interested in that subject. That accounts largely for my coming here. I have had some little experience with statutes in Oregon, and we are contemplating doing something different with them, and I thought I might learn something further by attending this session. The entire program has been most enjoyable, and I appreciate being allowed to sit with you and listen to these discussions. If I learn nothing of statutory revision or code revision, at least I have learned something of titles and judicial councils and that sort of thing, and I appreciate being here.

PRES.: The next speaker on this morning's program is going to take for his topic "Community Property Problems" and in that connection the Weiner Case. The speaker has gone into this matter very thoroughly. I am very glad to present the Honorable Weldon Schimke of Moscow.

MR. SCHIMKE: On October 21, 1942, we were hanging onto Guadalcanal by our fingernails; we had a toe-hold in southern New Quinea; Berlin reported house to house fighting in Stalingrad; Rommel's African drive had slowed to a halt at El Alamein, and our own landings in North Africa were more than two weeks in the future. Captain Eddie Rickenbacher had just been reported missing, and in the White House, President Roosevelt put his signature to a bill which included in the gross value of all estates subject to inheritance or transfer tax the following property:

> "(2) Community interests. To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the

decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition."

This last statute, now 26 USCA No. 811 (e) (2), was not the least of the many acts of violence committed on that day. At the same time other provisions, substantially identical in wording were passed—811 (d) (5) relating to transfers of community property in contemplation of death, 811 (g) (4) relating to the taxation of life insurance, the premiums of which are paid from community funds, and 1000 (d), relating to gift taxes on community property.

The implications of this new addition to the Revenue Act were not lost upon the bar of the community property States. The first case in which the constitutionality of this statute was challenged was Flournoy V. Wiener, 321 US 253, 88 L ed 708, 64 S Ct 548, decided in 1944. Here the state law of Louisiana provided that the state would collect a tax equivalent to 80 per cent of the amount of the Federal tax, measured, under this statute, by the entire community estate. Upon the appeal, the Attorney General of Louisiana, of course, was required to represent his own tax collector. He found himself opposed by the Attorneys General of every other community property state, including our own Bert Miller. Nineteen briefs were filed by amici curiae, including two from Idaho—by Ariel L. Crowley and Paul Hyatt. The United States Supreme Court, confronted with an organized and vocal opposition, found a way to avoid deciding the principal issue, and dismissed the case upon a problem of appeal and error. Three justices dissented, objecting to this manner of attempting to by-pass the constitutional question.

However, the Wiener estate in due course was assessed for Federal inheritance taxes, and the question arose a second time in a manner which precluded an abortive attempt at solution. In the Federal District Court for the Eastern District of Louisiana, the statute above referred to was held unconstitutional. Wiener v. Fernandez, 60 F Supp 169 (DC Louisiana 1945). The U. S. Attorney General took a direct appeal to the Supreme Court of the United States whereon December 10, 1945, Fernandez v. Wiener was decided. (325 US ....., 66 S Ct 178, 90 L ed 147).

The opinion itself states the issues involved as follows:
"The principal questions for decision are (1) whether the power asserted by the statute, to tax the entire community interest, is within the taxing power of the United States; (2) whether the tax infringes the due process clause of the Fifth Amendment; (3) whether the taxing statute contravenes the command of Articles I, Sec. 8 of the Constitution that "Excises shall be uniform throughout the United States"; (4) whether the tax so far as it is measured by the surviving wife's share of the community property, is a direct tax, invalid because not apportioned as required by Article I, Sec. 8 of the Constitution; and (5) whether the tax invades the powers reserved to the states by the Tenth Amendment . . . Hence it is said that the statute infringes due process by adding to the concededly valid tax on the decedent's half share a further tax measured by the one-half interest of the surviving spouse. Further, it is urged in support of the due process contention, that the statute arbitrarily and capriciously invents different rules of taxation whose alternative application is

governed by a single consideration, namely, which will yield the greater tax; and that the statute creates a presumption contrary to state law, and having no rational basis in fact, that the entire community is owned or economically attributable to the spouse first to die. It is also argued that even if Congress could validly impose the tax where, as here, the husband is first to die, there is no basis for the tax where the wife dies first, and that since the statute purports to apply in either case, and is not separable, it cannot be validly applied in this."

The Court examines at some length the community property law of Louisiana, and the purpose and legislative history of the tax statute as revealed by the Congressional Committee reports. The stated purpose is to eliminate any tax differential operating in favor of the community property States, and to subject community interests to substantially the same death taxes already applicable to other joint interests. The interpretation of the statute was not in issue—the only question was whether or not the statute was constitutional.

The opinion defines the appropriate subject to which the Congressional power to tax may attach as "the creation, exercise, acquisition, or relinquishment of any power or legal privilege which is incident to the ownership of property" and again as "a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property . . . The power to tax the whole necessarily embraces the power to tax any of its incidents or the use or enjoyment of them." The court then suggests that a change in the possession of property affords an incident to which the taxing power may attach, and likens this to the feudal "relief" paid by an heir to his overlord upon the estate's being delivered into his possession.

The court refers to a "shift in economic interest" occasioned by death, and comments on the "power of the legislature to fasten on that shift as the occasion for a tax." The taxing power is identified not only with title, but also with a change regarding the use, possession and enjoyment of the property, and this constitutes a "definite accession to the property rights" of the survivor and hence is a legitimate exercise of the taxing power.

It is pointed out that a like tax affecting tenancies by the entirety h: been upheld in Tyler v. United States, 281 US 497, 50 S Ct 356, 74 L ed 991, 69 ALR 758 (1930), and also as to joint tenancies in United States v. Jacob and Dimock v. Corwin (companion cases), 306 US 363, 59 S Ct 551, 83 L ed 763 (1939).

The court cites authority for the proposition that the tax does not offend due process even although the property interests arose before the statute was passed, provided, of course, that the shift in use and enjoyment, occasioned by death, arose after the passage of the statute.

The court does not adopt the theory that the government must show any net increment of value to the surviving spouse. It is sufficient if there is any gross right accruing to the survivor that did not exist before, even if that right is more than counter-balanced by accompanying disadvantages. And these are the rights which, the court states, a surviving husband obtains:

1. He may cause the community estate to be physically partitioned, which he could not do before, as a matter of right.
2. He may give away the community property, or at least his share of it.
3. We might add that he can convey his undivided interest without the signature of his wife.

The surviving wife will have all of these rights, plus management and control. And the court observes that there are psychological restrictions on the management of the property of husband and wife which are removed by the death of one.

The court concludes that this represents an excise, and not a direct tax, and hence need not be apportioned. The court answers the argument that the statute makes the entire community estate attributable to the spouse first to die by reference to the argument that it is not simply the estate which is taxed, or the property itself, but a mere shifting of economic interest, or of some of the incidents of property. Upon the issue of uniformity, the court observes that the only uniformity customarily required in tax statutes is geographical uniformity.

It is observed further that the tax is constitutional even although it failed to reach a number of partnership and other casual arrangements, resulting from contract, which might produce results similar to community property statutes. And the court observes further that the Tenth Amendment is inapplicable, and that the inclusion of community life insurance is valid.

Justice Douglas wrote a special concurring opinion.

The opinion cites a great many cases, and my first step in preparation was to read those cases. Although we may not like it, justice compels us to admit it is a powerful and well written opinion, and that it does not dodge the issues presented. The court has given its answer to the question, and this answer is in keeping with the trend of tax decisions. In only one place is it perhaps weak—in the interpretation placed upon Moffitt v. Kelly, 218 US 400, 54 L ed 1086, 21 S Ct 79, 30 LRA (NS) 1179 (1910), but the point is a collateral one only. That case actually rests upon the peculiar doctrine existing in California at the time, not upon community property theory generally.

It should be noted that at the same time, the court decided the case of United States v. Rompel, 325 US ....., 66 S Ct 191, 90 L ed 163 (Dec. 10, 1945) which essentially is a companion case, differing only in that it arose in Texas rather than Louisiana. The Rompel case adds nothing significant to the result of the Wiener case.

There it is, gentlemen—not exactly a happy picture from our point of view, but it represents the situation with which we are confronted. And rather than give ourselves over to lamentations and despair, the practical question is: "What are we going to do about it?"

The first possibility that might suggest itself is an effort to secure a re-examination of the case itself. We might inquire whether there are constitutional issues inherent in the statute which have not been passed upon in the Wiener case. I feel that a fair reading of the opinion will disclose that all constitutional questions have been answered. We may not agree with the answer, but the Court has spoken. The only issue I can see which was not

raised in the case grows out of the ethical implications involved in Justice Frankfurter's failure to disqualify himself, despite his obvious identification with the plaintiff, Mr. Wiener.

Or some may feel that this decision represents merely the opinion of the present Supreme Court, and that a change in the political atmosphere in Washington, plus a few good appointments to the bench would, in the course of time, solve the problem. It is difficult to offer any substantial hope to this point of view. It will be noted that in the pre-Roosevelt era, the Justices favoring a liberal interpretation of the taxing power in close cases were almost invariably Justices Holmes, Brandeis and Stone.

Schlesinger v. Wisconsin, 270 US 230, 70 L ed 557, 36 S Ct 260, 43 ALR 1224 (1926)

Untermyer v. Anderson, 276 US 440, 72 L ed 645, 48 S Ct 353 (1928)

Tyler v. United States, 281 US 497, 74 L ed 991, 50 S Ct 365, 69 ALR 758 (1930)

Coolidge v. Long, 282 US 582, 75 L ed 562, 51 S Ct 306 (1931)

Hoeper v. State Tax Commission, 283 US 206, 76 L ed 248, 52 S Ct 1210, 78 ALR 346.

However, it is apparent from a reading both of the opinion in the Wiener case, and of the committee report to which it refers, that the real purpose of this legislation was to subject community property to the same tax burden, substantially, as that already borne by joint estates and estates by the entirety. And provisions taxing such estates were included in the first of the current series of Federal estate tax statutes, dating from 1916:

Phillips v. Dime Trust & Safe Deposit Co., 284 US 160, 76 L ed 220, 52 S Ct 46 (1930)

Gwinn v. Commissioner of Internal Revenue, 287 US 224, 77 L ed 270, 53 S Ct 157 (1932).

A copy of the text of the provision of the 1916 act affecting joint interests may be found in Tyler v. United States, supra.

The validity of this provision taxing joint estates and estates by the entirety was first sustained by the Supreme Court in the case of Tyler v. United States, supra. This represents the case in which the slides were very definitely greased to permit the full taxation of any and all property interests shared by two or more persons. At the time this opinion was written, the New Deal was only a gleam in Jim Farley's eye, and Mr. Farley himself was busy re-electing Roosevelt as Governor of New York. Further, the opinion in the Tyler case was written by Justice Sutherland, an appointee of President Harding, hardly one of the starry-eyed liberals of the bench. Further, as will be considered later, the Wiener case is consistent with the general trend of the decisions in tax cases for 20 years. In short, candor compels us to relinquish the hope that time or political circumstance will bring about any significant modification of the result in the Wiener case.

We might be disposed to ask next: "Is there something obviously wrong with the Wiener case—a mistake likely to lead sooner or later to a reversal?" If we look at the case from the point of view of community property law, the result looks wholly arbitrary. We have the situation wherein a tax upon

one person is measured by the property belonging to another, a practice held unconstitutional in Hoeper v. Tax Commission, 284 US 206, 76 L ed 248, 52 S Ct 120, 78 ALR 346 (1931). It is apparent that the property approach to the case yields only a result which is very slippery, and uncertain, with ultimate reversal not unlikely.

But perhaps another approach can be found in what the courts refer to as the "purposes and policy of taxation."

Watson v. State Comptroller, 254 US 122, 65 L ed 170, 41 S Ct 43 (1920)

Stebbins v. Riley, 268 US 137, 69 L ed 884, 45 S Ct 424, 44 ALR 1454 (1925).

It has been stated that many interests besides conventional ownership may be subject to taxation,

Curry v. McCanless, 307 US 357, 59 S Ct 900, 83 L ed 1339 123 ALR 162 (1939)

and that taxation is concerned not so much with refinements of title as it is with actual benefits derived.

Corliss v. Bowers, 281 US 376, 74 L ed 916, 50 S Ct 336 (1930)

Vanderbilt v. Hidman, 196 US 480, 49 L ed 563, 25 S Ct 331 (1905)

Property is the sum of all rights and powers incident to ownership,

Bromley v. McCaughn, 280 US 124, 74 L ed 226, 50 S Ct 46 (1929)

Nashville, Chicago & St. L. Ry. Co. v. Wallace, 288 US 249, 77 L ed 731, 53 S Ct 345, 87 ALR 1191 (1933)

and the exercise of a single power over property incidental to ownership, or any particular use, may be subject to tax.

Bromeley v. McCaughn, supra

Henneford v. Silas Mason Co. 300 US 577, 582, 81 L ed 814, 57 S Ct 524 (1937).

Typically it is the right to use property generally that is taxed,

Henneford v. Silas Mason Co., supra

Hylton v. United States, 3 Dallas 171, 1 L ed 556 (1796)

Billings v. United States, 232 US 261, 58 L ed 596, 34 S Ct 421 (1914)

but sometimes a specific use may be taxed, as a tax upon the storage of gasoline.

Nashville, Chicago & St. L. Ry. v. Wallace, supra.

When inheritance and related taxes are involved tax liability in most cases that reach the courts today, rests upon possession, control and enjoyment of the property subject to the tax, irrespective of ownership.

Corliss v. Bowers, supra

Helvering v. Clifford, 309 US 331, 84 L ed 788, 791, 60 S Ct 544 (1940)

Coolidge v. Long, 282 US 582, 75 L ed 562, 51 S Ct 306 (1931, dissent of Justice Roberts)

Reinecke v. Northern Trust Co. 278 US 339, 73 L ed 410, 49 S Ct 123, 66 ALR 397 (1929)

Vanderbilt v. Eidman, 196 US 480, 49 L ed 563, 25 S Ct 331 (1905)

Tyler v. United States, 281 US 497, 74 L ed 991, 50 S Ct 365, 69 ALR 758 (1930)

Death is sometimes referred to as the "generating source" of accessions to the property rights of the survivor.

Tyler v. United States, supra.

Typical cases illustrative of this approach are the cases which hold that a tax may arise from the exercise of a power of appointment:

Chanler v. Kelsey, 205 US 466, 51 L ed 882, 27 S Ct 550 (1906)

Graves v. Schmidlapp, 315 US 657, 86 L ed 1097, 62 S Ct 870, 141 ALR 948

Rogers v. Commissioner of Internal Revenue, 320 US 410, 88 L ed 134, 64 S Ct 172 (1943)

even although in this last case the recipient would have taken more property had the power of appointment not been exercised. The non-exercise of such a power amounts to a control, the lapse of which by death amounts to a transfer of an interest subject to tax:

Saltonstall v. Saltonstall, 276 US 260, 72 L ed 565, 48 S Ct 225 (1928)

A man who gave a coupon upon a negotiable coupon bond before its maturity found that he still had to pay income tax upon the coupon when it matured, because the power to dispose of income is the equivalent of ownership.

Helvering v. Horst, 311 US 112, 61 S Ct 144, 85 L ed 75 (1940)

And, of course, the reservation of the right to change the beneficiary of a life insurance policy results in the policy's being regarded as the property of the insured, for tax purposes, no matter who may be the beneficiary.

Chase National Bank v. United States, 278 US 327, 73 L ed 405, 49 S Ct 126, 63 ALR 388 (1929)

It is often said that what is taxed is the "shifting of economic interest."

Reinecke v. Northern Trust Co., supra

Saltonstall v. Saltonstall, supra

United States v. Jacobs, 306 US 363, 83 L ed 763, 59 S Ct 551 (1939)

Chase Nat. Bank v. United States, supra

Burnett v. Guggenheim, 288 US 280, 77 L ed 748, 53 S Ct 369 (1933)

In no type of case is the Supreme Court more disposed to overlook technical property interests than in a case wherein the question involved is whether or not title rests in one member or another of the same family. In such a case the family relationship is itself a more significant economic reality than the technical state of the title.

Burnet v. Wells, 289 US 670, 53 S Ct 761, 77 L ed 1439 (1933)

Helvering v. Horst, 311 US 112, 61 S Ct 144, 85 L ed 75 (1940)

And this is particularly true where the problem is whether or not husband or wife is the owner. The recognizable tendency is to treat the family as an economic unit for tax purposes.

Hoeper v. Tax Commission, 284 US 206, 76 L ed 248, 52 S Ct 120, 78 ALR 346 (1931) In dissent by Justice Holmes.

Helvering v. Clifford, 309 US 331, 84 L ed 788, 60 S Ct 544 (1940)
Fox v. Rothensies, 115 F2d 42 (CCA Pennsylvania)

To which catalogue we must now add Fernandez v. Wiener itself.

Perhaps the best summary in one place of the extent to which the courts have deserted property law, have cut titles into small pieces, and are prepared to tax those pieces, one by one if Congress should so direct, is found in the opinion of Justice Cardozo in Burnet v. Wells, supra, which plays variations on practically every theme which has been suggested. See also Chase National Bank v. U. S. supra.

Physics teaches us that this table, seemingly so solid, actually is composed of a swarm of atoms buzzing about, and that these atoms might conceivably, under certain circumstances, be split, and blow us all so far that we would never worry about taxation again. The courts have been doing the same thing with the concept of property, and, it might be added, with the same risk of disastrous explosion. The tendency in the opinions is to resolve the property concept into its constituent elements, without regard to the title situation as a whole.

If the title situation is largely immaterial, then the local property law which governs that title situation is also beside the point. Perhaps the best short summary of the situation is contained in the following language from Burnet v. Harmel, 287 US 103, 53 S Ct 74, 77 L ed 199 (1932):

> "The exertion of that power (the power to tax) is not subject to state control. It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nationwide scheme of taxation . . . State law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law."

In that case, cash received on an oil and gas lease was held taxable as income, not capital gain, despite the fact that Texas law regarded such a lease as the sale of oil and gas in place.

Under varying tax statutes, the courts have held the local law inapplicable in cases presenting the following problems:

Does a trust create a vested or a future interest?

United States v. Pelzer, 312 US 399, 85 L ed 913, 61 S Ct 659 (1941)

Is property taken under a power of appointment attributable to the donor or donee of the power of appointment?

Rogers v. Commissioner, 320 US, 88 L ed 134, 64 S Ct 172 (1943)

Is ownership of income from a revocable trust in the trust beneficiaries where the donor may revoke the trust?

Corliss v. Bowers, 281 US 376, 74 L ed 916, 50 S Ct 336 (1930)

Is the ownership of US war bonds governed by local community property law or by the redemption provisions of treasury regulations issued pursuant to Federal statute?

Succession of Tanner (Louisiana 1946) 24 So2d 642.

In other cases, local property law has been held to be controlling:
Is a given trust revocable?

Helvering v. Stuart, 317 US 154, 161, 87 L ed 154, 63 S Ct 140 (1942)
Is an assignment of trust income valid?

Blair v. Commissioner, 300 US 5, 81 L ed 465, 57 S Ct 330 (1937)
Does the wife have a present vested interest in community income?

Poe v. Seaborn, 282 US 101, 75 L ed 239, 51 S Ct 58 (1930 Wash.)

U. S. v. Robbins, 269 US 315, 70 L ed 285, 46 S Ct 148 (1926 Cal.)

It must be emphasized that local property law may or may not be applicable, depending upon whether or not Congress wishes it to be. The issue rests upon the interpretation of the act of Congress under consideration.

Burnet v. Harmel, supra

Paul, Selected Studies in Federal Taxation (1938) pp. 1-52.

It appears reasonable to assume, in construing the revenue act under consideration in Fernandez v. Wiener, that local property law will, subject to some possible exceptions to be discussed hereinafter, govern the problem of whether or not a given piece of property is community or separate property; but that is about the only issue which it will determine.

The result has been that in so many cases, tax cases particularly, the aggrieved taxpayers have been before the Supreme Court with an intricate and beautiful theory, postulated upon property law, only to find that the court dismisses the whole contention as being largely immaterial. One of the best cases of this type is Tyler v. United States, 281 US 497, 74 L ed 991, 50 S. Ct 365, 69 ALR 758 (1930).

Why is it that the Supreme Court has so largely deserted local property law in passing upon tax questions. Is it the result of a sort of judicial schizophrenia, despite the oft repeated assurance that taxation is a practical matter?

Tyler v. United States, supra

Rogers v. Commissioner, 320 US 410, 88 L ed 134, 64 S Ct 172 (1934, dissenting opinion)

By no means. There are several practical considerations that have brought this result about. The first are two provisions in the United States Constitution itself. Article I, Section 8, Clause 1 provides: "The Congress shall have power to lay and collect Taxes, Duties, Imposts and Excises to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." Article I, Section 9, Clause 4 provides: "No Capitation, or other direct Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

In other words, any direct taxes levied by the government must be

apportioned in accordance with population, and indirect taxes need not be apportioned, but must be uniform throughout the United States. With the single exception of the income tax, which of course today rests upon its own constitutional amendment (the 16th) the Federal Government has never attempted to levy a tax admitted to be a direct tax. Such a tax would involve an impractical amount of administrative detail, and it would bear with cruel weight upon those least able to pay—the states with large populations but comparatively little wealth.

Consequently, the financial fabric of our Federal goverment requires that taxes be construed as indirect taxes, and they have been so construed. The Supreme Court was called upon to face this problem as early as 1796, in Hylton v. United Staets, 3 Dallas 171, 1 L ed 556. Congress had here levied a tax on carriages. The defendant refused to pay, saying that it was a direct tax, and void because not apportioned in accordance with population. The court construed the tax to be one upon the *use* of carriages, hence not a direct tax on the carriage, but rather an excise, and valid if it applied equally to all carriages throughout the United States.

Inheritance taxes may constitutionally be levied upon either the transmission or the receipt of property.

Knowlton v. Moore, 178 US 41, 44 L ed 969, 20 S Ct 747 (1899)

Stebbins v. Riley, 268 US 137, 69 L ed 884, 45 S Ct 424, 44 ALR 1454 (1925)

but they are always levied upon the succession, or the transmission of some right or interest, rather than upon the estate or property itself.

Magoun v. Illinois Trust & Savings Bank, 170 US 283, 18 S Ct 594, 42 L ed 1037 (1898)

Tyler v. United States, supra

Chase Nat. Bank v. U. S., 278 US 327, 73 L ed 405, 49 S Ct 126, 63 ALR 388 (1929)

U. S. Trust Co. of N. Y. v. Helvering, 307 US 57, 59 S Ct 692, 83 L ed 1104 (1939)

Coolidge v. Long, 282 US 582, 75 L ed 562, 51 S Ct 306 (1931—in dissent of Justice Roberts).

This makes tax problems seem curiously like a discussion of metaphysics. It is always the intangible that gets taxed, and the tangible property is employed only as a measure of the tax. In the practical effect, this approach to the problem tends to isolate the state of the title from the arena of actual controversy, particularly when the constitutional power to levy the tax is in issue.

But the ultimate problem has its roots in a source far earlier and fundamental even than our own Constitution. Because the bar of Idaho has not, until recently, been constantly confronted with tax problems, we have not been fully aware of the effecy of tax policy. We are prone to believe that every man wants a safe and secure title to his property. Experience does not bear this out. What every man wants is the safe use and enjoyment of his property, but when the tax collector comes around, he feels that some one else should own it. Many reluctant taxpayers want a private Yehudi, a Little Man Who Wasn't There to hold titles to their properties upon such occasions.

The ancient equivalent of our modern taxes was the feudal dues payable as an incident of land tenure. If, for example, a property owner died leaving a minor son as his heir, the overlord of the decedent could collect all the income from the estate during the minority of the heir, could extract a further levy for the giving of his consent to the marriage of the heir, and was entitled to further payment when the heir attained his majority and his estate was delivered to him. But new property devices were created to evade these extractions. The canny decedent, instead of waiting for the inevitable, would transfer all his lands and tenements to his good friends A, B and C, as joint tenants, to the end of the longest life, for the use and benefit of his heir. The collective longevity of A, B and C is a sufficient guarantee against their sudden death, and even in event all should die, those dues arising from the existence of a minor heir could be collected. And the expression of a use is still an adequate protection to the minor heir of the decedent, because the chancellor would protect that use. To the overlord now so tragically cheated of bis expectations, and to the common law judge and lawyer who looked upon chancery as new-fangled nonsense, it appears as if the title situation had remained the same, but that by some species of black magic, the juice had been squeezed out of the still-existing legal title, so that it becomes inert and useless. In one sense of the word that is true. However, today we would be more likely to say that a new body of property law bad arisen, which profoundly modified the incidents of the existing structure, and which existed side by side with the older system, and was enforced in an independent system of courts.

This situation became acute as the church took title to more and more land. The church never died, it never left a minor heir, it never married, and it never sold the land to a paying tenant. A mighty demand for reform went up, to replenish the depleted exchequers of the impoverished nobility, and culminated in the passage in 1536, during the reign of Henry VIII, of the Statute of Uses. The nominal reason assigned for the measure was that this pernicious instrument of uses (today we would call them trusts) had made titles very insecure. But the truth slipped into one clause of the preamble, as follows: "by reason whereof . . . the lords have lost tbeir wards, marriages, reliefs, harriots, escheats, aids pur fair fitz chivalier & pur file marier." The statute provided in effect that he who acquired the use or beneficial interest in lands, acquired also, by operation of law, the legal title.

In short, the pressure of taxation had created profound changes and complications in property law, first, through the devices invented to minimize or evade taxes, and second in retalitory legislation aimed at the protection of public revenue.

And this tendency exists today. In reading the tax cases which have been decided by the U. S. Supreme Court in recent years, the impression is inescapable that the estates and property structures which are litigated there bear out about the same relationship to ordinary, simple, conventional property rights that a tentful of circus freaks does to ordinary human beings. Here is an estate stumping along on only one power of appointment. Again, here is a complex trust, flying through the air with the greatest of ease, in defiance both of the law of gravity and the rule against perpetuities. Do the loopholes in the tax legislation take the shape of a keyhole? Then all these crippled, deformed, wizened and grotesque estates will take that same shape. Property interests are butchered, carpentered, squeezed and tortured into whatever shape promises the least tax liability. If title were the determining considera-

tion, taxation would be very like a shell game, in which Congress would designate the shell to be taxed, and the problem would be whether or not the pea was under that shell.

Congress today taxes the pea, not the shell. I understand now why we refer to mankind as the "human race". The race is between the man who has something, and the tax collector who is trying to get it away from him. The man with any property is curiously like a chicken with a morsel of food, looking only for privacy where he can eat it undisturbed by the rest of the flock.

The result was inescapable. Inheritance taxes simply do not rest upon the title structure. They rest upon control, use, enjoyment. In effect, cases of the last 20 years set up, by judicial construction resting upon a solid foundation of Congressional action, a new statute of uses, which controls property interests for the purpose of taxation. In one sense it does not affect the existing property structure, but in another, it is of itself a new body of property law defining property rights in terms which seem new and unfamiliar, but are actually very old. We have been accustomed to thinking of the legal title and of the equitable title. A third must take its place—the tax title. It will complicate our work enormously, it will be very like playing chess upon a board having three dimensions, but it represents the task ahead of us. Perhaps the time has come when the filling in of blanks on a written form *is* practicing law whether officially so regarded or not.

Had you asked a man in mediaeval England whether he owned a piece of property, probably he would not have understood clearly what you meant. If you were speaking of land, he could define his estate in it; and he would undoubtedly claim the seisin—a possessory concept. And in the field of personal property, the common law was concerned far more with the protection of possession than it was with the protection of title. Witness the actions of trespass, replevin, trover, detinue. In the field of crimes against property, the common law developed first and furthermost the crime against possession—larceny, rather than such offenses as embezzlement or obtaining money under false pretenses, involving a trespass against title rather than possession. And today our tax legislation is carrying us back to the early concept wherein possession, and its concomitant rights—use the possession —are of greater importance than the state of the title.

And just as the equitable title was cognizable only in chancery, so the tax title is cognizable only when federal tax questions are presented. The common law courts tried at first to ignore the encroachments of equity, and had at one time lost a large share of their business to the equity courts. Had they not retained sufficient adaptability to fashion the much needed action of ejectment out of the most preposterous series of fictions and nonsense ever derived, the common law might have suffered a permanent eclipse at the hands of equity. No more can we afford to ignore the effects of federal tax policy.

Reference has been made to the motives which prompt human beings to mess up their own titles. From the point of view of Congress, as indicated in Fernandez v. Wiener and in the Congressional committee report referred to therein, it is plain that community property is looked upon primarily as a tax dodging device. See 40 Illinois Law Review 136 (1945). It is this conviction which has led to the present legislation with which we are confronted. And a major share of the responsibility for the existence of that viewpoint

must be attributed to California. In all Supreme Court cases arising from any State but California, the court, after examining the local law, has always concluded that the wife's interest was vested:

Warburton v. White, 176 US 484, 44 L ed 555, 20 S Ct 404 (1900, Washington)

Arnett v. Reade, 220 US 311, 55 L ed 477, 31 S Ct 425, 36 LRA (NS) 1040 (1911, New Mexico).

Consequently, it is not surprising that in 1930, the Supreme Court was willing to find that community income could be divided for income tax purposes in at least four states:

Poe v. Seaborn, 283 US 101, 75 L ed 239, 51 S Ct 58 (Wash. 1930)

Goodell v. Koch, 282 US 118, 75 L ed 247, 51 S Ct 62 (Ariz. 1930)

Hopkins v. Bacon, 282 US 122, L ed 249, 51 S Ct 62 (Tex. 1930)

Bender v. Pfaff, 282 US 127, 75 L ed 252, 51 S Ct 54 (La. 1930)

despite the fact that the court had already held that income from California communities could not be so divided.

United States v. Robbins, 269 US 315, 70 L ed 285, 46 S Ct 148 (1926)

This holding rests squarely upon California law to the effect that the interest of the wife is not a vested one. The case cites Moffitt v. Kelly, 218 US 400, 54 L ed 1086, 21 S Ct 79, 30 L R A (NS) 1179 (1910) which involved precisely the same state of facts as our own Kohny v. Dunbar (21 Idaho 258). The California court, however, held that the wife had to pay inheritance tax upon the entire community estate, upon the death of the husband, her prior interest not being vested, and the U. S. Supreme Court held that there was no constitutional objection. The opinion in the Robbins case refers to the then recent California case of Roberts v. Wehmeyer, 218 Pac. 22 (Calif. 1923), wherein it was observed that it had been settled for more than sixty years that the California wife did not have a vested interest in community property.

Consequently, in 1927, the California legislature, by statute (section 161a, Civil Code) provided the wife with a vested interest, and following that, the United States Supreme Court decided that California couples, too, could divide their income for tax purposes.

United States v. Malcolm, 282 US 792, 75 L ed 714, 51 S Ct 184 (1931)

Is it any wonder that the Supreme Court of the United States in U. S. v. Harmon, 323 US 44, L ed 60, 65 S Ct 103 (1944), holding the Oklahoma community property statute inapplicable to tax problems because the community rests upon consent rather than positive law, made the following sarcastic footnote reference: "Apparently some of the states were merely one jump ahead of the decisions of this Court in providing the wife with a "vested interest in the community."?"

Could an effective objection be urged to the statute upon the ground that it operates retroactively upon community interests already vested at the time the tax act was passed? Fernandez v. Wiener discusses something similar to this upon page 186 of the Supreme Court reports. However, in view of the existing state of the law, our chances on this issue do not look bright.

With regard to trusts, it has been held that they are not taxable where the sequence of events follows this order:

The donor establishes the trust

The donor relinquishes effective control of the trust.

A statute is passed which would operate to tax the transfer.

The donor dies.

Nichols v. Coolidge, 274 US 531, 71 L ed 1184, 47 S Ct 710 52 ALR 1081 (1927)

Coolidge v. Long, 282 US 582, 75 L ed 562, 51 S Ct 306 (1931)

But where the surrender of substantial control comes after rather than before the passage of the taxing statute, the trust is taxable, even though it was initially created prior to the tax statute.

Saltonstall v. Saltonstall, 275 US 260, 72 L ed 565, 48 S Ct 225 (1928)

Reinecke v. Northern Trust Co., 278 US 339, 73 L ed 410, 49 S Ct 123, 66 ALR 397 (1929)

As to joint interests created before the existence of any statute taxing them upon death, the court first held (upon a question of statutory construction rather than upon constitutional grounds) that the tax statute was inapplicable:

Knox v. McElligott, 258 US 546 S Ct 396, 66 L ed 760 (1922)

Subsequently this view seems to have been quietly forgotten, and the view was adopted that half of the estate is taxable where the following sequence of events exists:

The joint estate is created

The taxing statute is passed

One of the joint owners dies.

Griswold v. Helvering, 290 US 56, 78 L ed 166, 54 S Ct 5 (1933)

Gwinn v. Commissioner, 287 US 222, 77 L ed 270, 53 S Ct 157 (1932)

But today, under the same state of facts, the courts will tax the entire estate:

United States v. Jacobs, 306 US 263, 83 L ed 763, 59 S Ct 551 (1939)

Dimock v. Corwin, 306 US 363, 83 L ed 763, 59 S Ct 551 (1939)

The case which undoubtedly offered us our best argument in the Weiner appeal (and it is cited in the opinion) is Hoeper v. Tax Commission, 284 US 206, 76 L ed 248, 52 S Ct 120, 78 ALR 346, decided in 1931. Here the State of Wisconsin had enacted an income tax law requiring the income of husband and wife to be lumped together for income tax purposes. The wife in this case had substantial income from her own salary, dividends from her separate estate, and also profits from a partnership with which the husband was not identified. Held that the statute was unconstitutional—that it violated due process in measuring one person's tax liability by the property of another. However, there are certain weaknesses in the case. Possibly the most important is the dissent by Justices Holmes, Brandeis and Stone. The voice of experience teaches us that a dissent by this trio is more persuasive with the

Supreme Court today than the majority opinion. Then this statute required a joinder of the separate income of the two spouses, while the Wiener case involves only a joinder of the community property. It is apparent that the latter represents an intrinsically more intimate identification of property right. And the argument in the Holmes dissent about the economic unity of the family has been echoed in the later cases referred to herein.

We might sum up the situation in about these words:

1. As property law, Fernandez v. Wiener in very bad.
2. As tax law, Fernandez v. Wiener is undoubtedly good, even if we don't like it.
3. The tax law controls in event of conflict between the two.

To put it in another way, suppose we were to win our point. Suppose the Supreme Court should say in effect that local property law and contract arrangement governs what is or may be made subject to tax, and any law to the contrary is unconstitutional. It would be a Pyrrhic victory, because we would have destroyed the taxing power of the United States. If there were such a constitutional limitation, the canny taxpayer would not be confined to splitting up his income and estate into two portions—he could keep subdividing it until the tax were infinitesmal. The force of the practical considerations which are arrayed against us is apparent.

It appears as if Fernandez v. Wiener is a fixed monument in the legal landscape. Out attitude should perhaps be like that of a physician toward an allergy patient—we may not be able to cure the allergy, but we may be able to do something to make the patient more comfortable. Or, to put it in the military vernacular, we can write him out a slip which entitles him to see the chaplain.

Should we consider a complete surrender of our community property system? To this there are several significant objections:

(1) This would involve incalculable confusion respecting property rights in general. It is not a matter lightly to be considered. It would be much like burning down the house to get roast pig. Even if circumstances should make it advisable to entertain this suggestion, we have not yet exhausted the preferable alternatives.

(2) Most of the people of the State are not in the tax brackets where they would benefit by any change. Any modification requiring any considerable amount of domestic bookkeeping will not work with the great majority of people.

(3) It would put us morally in the wrong. We would in effect be accepting the cynical hypothesis from the outside that community property is only a tax-dodging device, as against our belief that it represents an improved method of governing property rights between husband and wife.

(4) There is still reason to hope that we may be able to secure amendments which will make our tax liability comparable with that of other states, although we cannot hope to be restored to the same tax position we had before the statute.

(5) A surrender of our community property law would deprive us of

the right which we yet enjoy to divide income for income tax purposes.

It is rather apparent that once we surrendered our community tradition, we could never hope to regain the right to make separate returns. The Oklahoma State income tax law was effectively demolished by the Supreme Court in Commissioner of Internal Revenue v. Harmon, 323 US 44, 89 L ed 60, 65 S Ct 103 (1944) in which the court said that the creation of a "community" by written instrument created a "consensual community" rather than a legal one, and the result approximated an anticipatory assignment of income, which the court has definitely refused to honor.

Lucas v. Earl, 281 US 111, 74 L ed 731, 50 S Ct 241 (1930) (premarital agreement)

Helvering v. Eubank, 311 US 122, 85 L ed 81, 61 S Ct 149 (1940) (Assignment to corporation of renewal income by life insurance agent)

Helvering v. Horst, 311 US 112, 61 S Ct 144, 85 L ed 75 (1940) (Gift of interest coupon before maturity).

The Court in the Harmon case referred also to the "tradition of Spanish law" from which the community property theory was derived.

Following the rule against anticipatory assignments, the court has generally taxed income of a trust over which the creator retains substantial control against the creator, regarding the trust as an anticipatory assignment of income unless he parts with control over the corpus as well as the income.

Reinecke v. Smith, 289 US 172, 77 L ed 1109, 53 S Ct 570 (1933)

Helvering v. Clifford, 309 US 331, 84 L ed 188, 60 S Ct (1940)

Corliss v. Bowers, 281 US 376, 74 L ed 916, 50 S St 336 (1930)

It must be admitted, however, that any advantage we may at present enjoy with reference to income tax is becoming slippery. In view of the authority cited above relating to property rights within the family circle, it is quite probable that Congress could constitutionally elect to treat the family as an economic unit for income tax purposes. To this, however, two objections could be raised, the first political, and the second legal. Such a statute would probably require that a single joint return include the separate income of both husband and wife as well as any community income, and this would adversely affect families with large interests situated everywhere. Consequently a move in this direction would at once encounter effective opposition from influential quarters other than the community property states.

Also, it is apparent from Poe v. Seaborn, 282 US 101, 75 L ed 239, 51 S Ct 58 (1930) that when the income tax statute taxes the income "of every individual" the word "of" denotes ownership, and hence income tax is tied much more closely to conventional property law than are the estate and related taxes. About the only significant exceptions to this observation are (1) the rule against anticipatory assignments of income, which simply are not honored, and (2) income from trusts. In the latter case, the court first determines the title to the corpus of the trust in accordance with the rules ordinarily applicable in estate cases (that is, management, possession, enjoyment are controlling factors) and then taxes the income against the owner of the trust as so determined.

However, an article by Harrop A. Freeman and Virginia Schwartz Mueller, in Vol. 34, California Law Review 398 (1946) refers to a book by Erwin T. Griswold "Cases and Materials ....on Federal Taxation" (1940) in which he suggests instead that husband and wife in all states be permitted to make separate income tax returns. This would deprive us of any advantage we might presently enjoy in such matters, and at the same time offer us no very secure ground for objection. Consequently, it appears very likely that this represents the course which such legislation will ultimately take. The July 15th, 1946 issue of Newsweek Magazine indicates (page 20) that this last suggestion is now being studied by the Treasury Department, and may be submitted to the next Congress.

Further, we are entitled to some legislative relief from Congress regarding the existing tax structure, and we should not hesitate to make our objections heard. We cannot, of course, expect to regain the same position we enjoyed before 811 (e) (2) was enacted, but we should not be compelled to assume a greater tax burden than the citizens of other states under comparable facts. In the usual and ordinary case, where the husband dies first, there is no discrimination, because here as elsewhere a tax would be required upon the entire estate. Statistically this is the usual case. The World's Almanac shows that at age 50 a white woman in the United States has a life expectancy of 24 years, while a white man has but 21.7 years. And practically all the reported tax cases involve the prior death of the husband. It appears as if taxes have an adverse effect upon life expectancy.

But where the wife does die first, in the common law states, the husband pays nothing, because the estate represents his property. However, 811 (e) (2) excludes from the tax base that portion of the estate derived from the personal services of the surviving spouse (which in the assumed case where the husband was the breadwinner would be the entire estate) but then limits the exclusion by providing that at least part of the community estate subject to testamentary disposition by the deceased spouse should be included. This means in effect that the husband of a community property estate has to pay a tax upon half the estate where the resident elsewhere pays nothing. And since the Congressional committee report expresses the differential in tables, here is a statement of the differential which is now levied against us:

FEDERAL ESTATE TAXES OWING BY A HUSBAND IN A COMMUNITY PROPERTY STATE UPON THE DEATH OF HIS WIFE
(Based upon premise that the Husband is the Family Breadwinner).

Net Value Community Estate Before Exemptions	Basic Estate Tax		Additional Estate Tax		TOTAL TAX
	Tax Base	Tax	Tax Base	Tax	
$ 50,000	$	$	$	$	$ None
100,000					None
150,000			15,000	1,050	1,050
200,000			40,000	4,800	4,800
300,000	50,000	500	90,000	17,900	18,400
400,000	100,000	1,500	140,000	32,700	33,200
2,000,000	900,000	41,500	940,000	303,500	344,500
5,000,000	2,400,000	173,500	2,440,000	968,800	1,142,300

In the other 40 States, the husband pays *nothing* under those circumstances. The California Law Review Article cited suggests that the clause: "in no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition" be modified either by omitting the provision altogether, or making it apply only when double taxation would not result. The present limitation is wholly inequitable when applied to transfers between husband and wife, although it may be quite legitimate in the case of a testamentary provision by the wife in favor of a child. In event Congress fails to make equitable adjustment of this clause, the article suggests that the states might reach the same result by depriving the wife of any power of testamentary disposition as to her share of the community property. This already appears to be the situation in Nevada and New Mexico. But when this one kink is ironed out in one way or the other, we will have achieved a substantial tax parity with the other states of the Union, and we cannot properly hope for anything further or better from Congress.

And finally we may inquire whether it would be practicable to divide the community property during coverture, and thus minimize the eventual tax burden. The Treasury Department says no. Treasury Regulations No. 108, Section 86.2 (quoted in 34 Cal. L. Rev. p. 412) provides as follows:

> "The rule stated in the preceding paragraph applies alike to a transfer by way of gift of community property to a third party or third parties, to a division of such community property between husband and wife into the separate property of each, and to a transfer by the husband and wife of any part of such community property into the separate property either of the husband or of the wife, or into a joint estate or tenancy by the entirety of both spouses. In all of such cases the value of the property so transferred or so divided, as the case may be, is a gift by the husband to the extent that it exceeds the aggregate amount of the value of that portion which is shown to be economically attributable to the wife . . . and of the value of the husband's interest in such property after such transfer or transfers."

This regulation rests upon the following language from 26 USCA No. 812 (b) (5), passed June 6, 1932:

> For the purpose of this subchapter, a relinquishment or promised delinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration "in money or money's worth."

If this statute is applicable to community interest, and is held constitutional, there is nothing that could be done to tinker with or subdivide a community estate during coverture. In view of the cases cited regarding the concept of the family as an economic unit, the chances favor the statute's being constitutional in a community property application.

But does the statute apply to community interests? Apparently there are but two cases in point, and they fail to settle the question for us. The first is Horst v. Commissioner, 150 F2d 1, cert. den. 66 S Ct 141 (CCA 9, California). In 1925 E. Clemons Horst transferred to his wife 2026 shares of the capital stock of the E. Clemons Company, the same being community property, in consideration of her transferring to him, the same day, of an equal number of shares, also community property, in the same corporation. In 1940 he died, and the circuit court refused to recognize the validity of this transaction, and taxed all of the stock against his estate. However, the case rests upon two assumptions which would not affect us: (1) California did not recognize that the wife had a vested interest in community property prior to 1927, and this transaction took place in 1925, and (2) Even had it taken place later, California has always followed the rule in Melvin V. Carl, 4 P2d 954 (Calif. 1931):

> "Amendments whereby it was sought to lessen, enlarge, or change in any manner the rights of the respective spouses in community property will not be given retroactive effect so as to effect the respective rights of the parties in community property acquired prior to the enactment of such amendments."

This doctrine has meant that California community property practice always lagged at least two jumps behind the current theory. Since the wife had no vested interest in 1925, the transfer to her was a gift, there being no "consideration in money or money's worth." Consequently, it was taxable in the same fashion as if it had been part of his estate. It is submitted that the same course of reasoning could not be followed in Idaho. The result is that the case, instead of deciding the larger question which interests us, actually turns upon the local law of California.

In Riggle v. Rogan, 128 F2d 118 (1946 CAA 9, California), husband and wife made a property settlement in anticipation of divorce which, after a later modification, entitled her to $500.00 per month for life. The parties had been resident in California, but she secured a Nevada divorce. Upon his death in 1935 she filed a claim against his estate for the capitalized value of alimony or settlement installments yet due, and settled her claim for $63,000.00. The case ultimately turned upon matters of evidence. The court said that there was no evidence showing what the wife relinquished in return for the agreement of the husband to pay this sum; and consequently the $63,000 could not be excluded from his gross estate for tax purposes.

These two are apparently the only community property cases construing this statute. One wonders why a more comprehensive answer to the question was not attempted in either case. Obviously the Circuit Court does not wish to commit itself any further than is necessary.

In Merrill v. Fahs, 324 US 208, S Ct 655, 89 L ed 963, reh den. 65 S Ct 863 (1945) Merrill, an elderly Florida resident worth more than five million dollars wished to marry for the third time, and his prospective bride was quite impecunious. He entered into a pre-marital agreement with her, whereby she relinquished all prospective dower rights in his estate in consideration for his agreement to set up three trusts of $300,000 each. They were married, he set up the first trust, and the collector of internal revenue virtually accompanied them on the honeymoon. A gift tax of $99,000 was upheld. The consideration was inadequate under 812 (b) (5).

Another variation on the same tune. In Commissioner of Internal Revenue v. Wemyss, 324 US 303, 65 S Ct 652, 89 L ed 958, a widower proposed to a widow with one child. The widow was reluctant to relinquish the trust income left by her former husband, which would terminate upon her remarriage. He

set up a trust of $149,000 to compensate her for this loss, and they were married. Held that although there was consideration from her point of view in that she relinquished something valuable, there was none from his point of view because he received nothing valuable, and the court makes it plain that love, affection and similar intangibles are not recognized by the internal revenue bureau.

Sheets v. Commissioner, 95 F2d 727 (CCA 1938, Minnesota) involved a wife who sued her husband for divorce, and in the course of the property settlement, she relinquished her dower rights, and he transferred some $50,000 in securities assigned to the husband and wife as joint tenants, to a trustee. The husband reserved the income from the securities during his lifetime. This case involved, however, not only a consideration of 26 USCA No. 812 (b) (5), but also the further complication of a joint tenancy. Held that there was no consideration for the wife's joint tenancy, and the entire trust was taxable.

An interesting object lesson is to be derived from McCrady v. Heiner, 19 F Supp 575 (DC Pa. 1937). This involved a joint estate and hence was governed by 811 (e) (1), which has some language not now in 811 (e) (2), but which may eventually find its way there. The properties in question were derived ultimately from the gift of the husband to the wife, but in one case title was taken directly in the name of the wife upon purchase, and in the other the husband conveyed the property to her. She held both tracts for many years, and then established an estate by the entirety between her husband and herself. Upon his death, held that there should be included in his gross estate all of the joint estate to which he had once had title, but none of that which he never owned in his own name.

In several cases it has been held that a property settlement followed by divorce does not come within the purview of 812 (b) (5) because such an award rests upon a court decree, a judgment, rather than upon contract; hence it is not necessary to spell out consideration, and hence the adequacy of the consideration under the Federal rule is not an issue.

Commissioner of Internal Revenue v. State Street Trust Co., 128 F2d 618 (CAA 1, Mass. 1942)

Yoke v. Fleming, 145 F2d 472 (CCA 4, W. Virginia 1944)

Commissioner v. State Street Trust Co., 128 F2d 618 (CCA Ill. 1942), cert. den. 63 S Ct 78, 317 US 671, 87 L ed 538, reh den. 63 S Ct 200, 317 US 709, 87 L ed 565

although there is substantiall authority the other way.

Helvering v. U. S. Trust Co., 111 F2d 576 (CCA 1940), cert. den. 61 Ct. 35, 311 US 678, 85 L ed 437

Meyer's Estate v. Commissioner, 110 F2d 367 (CCA 1940) cert. den. 310 US 651, 60 S Ct 1103, 84 L ed 1416.

We can conclude then that we should take any necessary steps to faciliate the following types of transactions:

(1) It should be possible for husband and wife to purchase property with community funds, and to take title by a deed reciting that it shall be the sole and separate property of the spouse named, and the deed shall, in the absence of fraud upon the other spouse, have exactly that effect. Presumptions may not help, because Federal law may disregard a state presumption,

but if any presumption is established, it should be a presumption of consideration moving to the spouse not acquiring any interest. A presumption of gift would defeat our purpose. This, of course, would require legislation.

(2) It should be possible for husband and wife to own property as tenants in common. A joint tenancy will do us no good, because the federal act in 1916 (26 USCA 811 (e) (1) tied up joint interests in the same knot in which community interests are today entangled. However, if a statute is presented, it might serve a usefud purpose as camouflage if joint tenancies are included, and we have one ready made in Section 161 of the Civil Code of California, as follows: "May be joint tenants, etc. A husband and wife may hold property as joint tenants, tenants in common, or as community property."

(3) Husbands and wives should have broad powers to contract with each other, so that community property may be converted into separate property, which they may hold either as tenants in common, or in separate parcels. I assume that the 1943 amendment (Ch. 23) of Section 31-907 has finally settled the validity of deeds of gift from wife to husband. However, it is absolutely indispensible that deeds between the spouses expressing a consideration shall, if the intention is clear, nevertheless render the property the separate property of the grantee spouse.

There appear to be three cases touching upon this problem. In Oylear v. Oylear, 35 Idaho 732, 208 Pac. 857, it was held that a stated consideration in a deed from a third party (apparently a "straw man") to the wife left the land community property. There was no proof as to whether there was actual consideration.

Kester v. Helmer, 16 F Supp 260, aff. Kester v. Adams 85 F2d 640, cert. den. 299 US 608, 57 S Ct 234, 81 L ed 448 (DC Idaho 1935) involved a deed to a wife without actual consideration, but with a stated consideration of "One Dollar and love and affection." Held that the property belonged to the wife as against creditors of the husband.

Boise Association of Credit Men v. Glenns Ferry Meat Co., 48 Idaho 600, 283 Pac. 1038 involved a stated consideration for a transfer from husband to wife for $1500 plus the assumption of certain indebtedness. Apparently the $1500 was never paid, although some of the indebtedness was paid. Held that the store in question was the separate property of the wife.

And there has been no difficulty with an agreement between husband and wife to sequestrate community property to the wife's separate benefit, in payment of indebtedness owing from husband to wife.

Wilkerson v. Aven, 26 Idaho 559, 144 Pac. 1105

Bates v. Papesh, 30 Idaho 529, 166 Pac. 270 (1917)

Feltham v. Blunck, 34 Idaho 1, 198 Pac. 763.

And there is the broad pronouncement of our Supreme Court in Beard v. Beard, 53 Idaho 440, 24 P2d 47, regarding the power of husband and wife to contract with each other.

In short there is a sufficient basis established by the 1943 statute and existing case law to enable us to transform community property into separate property if the bench and bar of this state are prepared to be sensible, and to reject obsolete notions no longer responsive to our present needs. No.

criticism is implied as to past expressions of conviction as to the public policy of Idaho as respects the rights of the wife in community property. But such an approach simply will not work today.

It would not take many fools to upset the apple cart, and if that should happen, legislation would be imperative. In a close tax question, our position would be more sound it is appears that our law was not modified to meet the tax problem.

There is no money-back guarantee accompanying the suggestions just made, nor any positive assurance that they will accomplish our purpose. The fact that the title—Internal Revenue—had 45 key numbers in the Fourth Decennial, and that it has about 2500 today indicates what we have to face. Idaho lawyers are going to be making some efforts to minimize the taxes of their clients, even against odds, and it is in order that they be given such assistance as we can extend. Any wholesale destruction of our present property structure appears unthinkable. In the first place, it would lead to widespread confusion. If it actually solved our local tax problem, new and tighter revenue laws would be passed, and let us not deceive ourselves, they would be held constitutional. We would have sold our heritage for a mess of pottage, and believe me, gentlemen, the time would come when we would regret it. We have been forced to retreat, and we may be fighting a war of limited liability, but let us nevertheless deploy our forces.

History tells us that in the late days of the Roman Empire, the sorely taxed peasants living in the provinces eventually became more afraid of the tax collector than they were of the barbarians, and many of them fled their homes, to seek refuge of the barbarians. It is too early for us to strike our colors. I propose that the Idaho bar prepare to do battle with both the barbarians and the tax collector.

PRES. Thank you, Mr. Schimke.

On the program we have arranged for two or three short topics. The question is "Would a lawyer Advise Probate is Not Necessary," in the first case, by use of simultaneous deeds between spouses? The Honorable John H. Norris of Payette will speak on this topic.

JOHN H. NORRIS. Mr. Chairman, members of our Idaho State Bar.

The question which has been submitted to me for discussion, "Would a lawyer advise probate is not necessary by use of simultaneous deeds between spouses?" is a mooted one.

Recent legislation and judicial determination by our Supreme Court would seemingly indicate a trend toward an answer in the affirmative.

Section 31-907 Idaho Code Annotated, as amended by chapter 23 Session Laws of 1943, now provides in part as follows:

> "Real property conveyed by one spouse to the other shall be presumed to be the sole and separate estate of the grantee and only the grantor spouse need execute and acknowledge the deed or other instrument of conveyance notwithstanding the provisions of Section 31-913, Idaho Code annotated."

Section 31-913, Idaho Code Annotated, provides in effect that the wife

must join the husband in executing and acknowledging any instrument whereby community real estate is sold, conveyed or encumbered.

Thus it appears by Legislative enactment that either spouse may deed all his or her interest in any real property to the other spouse and thereupon the property so deeded to the other will be presumed to be the sole and separate property of the grantee spouse named in the deed.

The effect of the 1943 amendment of Section 31-907 (in the absence of express words in the deed to the contrary) seemingly would be to make the grantee of each of such simultaneous deeds the immediate owner of whatever interest the other spouse had in the community real estate. Such transfer would change the interest conveyed, if it were community property, from a community interest into the sole and separate property of the grantee. To my mind this would only amount to a cross-transfer of whatever interest was owned in the property by the respective grantors of such deeds, and after the death of the first spouse, that spouse would have died owning an interest in the real property so conveyed to him or her by the deed made and executed by the surviving spouse.

Similarly, should the real property conveyed by such simultaneous deeds originally have been the sole and separate property of the respective granors, the grantees would also have become the immediate owners of sole and separate property and the necessity of probating the estates of the spouses would still be present.

We, as lawyers, are confronted with the fact that before a grant of real property can be effected, there must be an actual or constructive delivery of the deed of conveyance to the grantee. Johnson vs. Brown, 144 Pac. 2d 198 (Idaho 1934). Immediately the question arises as to what would constitute a sufficient delivery of the deeds and at the same time not defeat the interest of the surviving spouse or raise the necessity of probating the deceased spouse's estate. If there is no delivery of the deeds, either actual or constructive, under the rule as laid down in Johnson vs. Brown, neither of the deeds would be effective to pass title. Can it be said that simply to place the deeds in a lock box to which either or both of the spouses have access, would constitute a sufficient delivery? I doubt very much if anyone would seriously contend that it would for the reason that each spouse would seemingly have the right to repossess the deed which had been executed by him or her. In other words, there would have been no irrevocable delivery of either of the deeds.

However, under the case of Cell vs. Drake, 61 Idaho 299, 100 P. 2d 949 (1940) it was held that a deed made, executed and placed in the hands of a depositary or escrow holder for delivery to the grantee after the grantor's death, constitutes a present passage of title with a reservation of a life estate in the grantor if the grantor delivers such deed to such depositary or escrow holder with intention to part with possession and control of the deed and still retain possession of the realty, and that the grantor cannot later change the legal aspect of the transaction by recovering possession of the deed from the depositary, even though the depositary returns the deed to the grantor on demand. This had only to do with one deed and not with simultaneous deeds.

Now let us endeavor to apply this rule to the problem of simultaneous deeds. Let us assume that a husband makes a deed to his wife and the wife

make a deed to the husband. The husband delivers his deed, in favor of the wife, into the hands of an escrow holder with instructions to deliver the deed to his wife upon his death. The wife delivers her deed to the same escrow holder and with like instructions. Neither of them give up possession of the property, and each of them intends to part with possession and control of the deed executed by them respectively, and that each of them meet all of the requirements as laid down in the case of Cell vs. Drake, so that neither of them can later change the legal aspect of the transaction by recovering possession of the deed from the depositary even though the depositary should, upon demand, return the deeds. Then let us suppose, for the purpose of argument, that the husband should predecease the wife.

Both deeds, upon having been so placed in escrow, would have conveyed all of the interest which the respective grantors had in the property, to the grantees named in the respective deeds, subject to life estates reserved in the grantors by reason of their continuance to remain in possession of the property. Upon the death of the husband, the wife would own the title to the land which had been conveyed to her by her husband and at his death her title would be freed of the life estate therein which had been reserved by her husband, but the husband would have died vested with title to the lands which had been conveyed to him by his wife's simultaneous deed and hence the necessity of probate would still be present.

The question then immediately arises as to how, upon the prior death of the husband under the above supposition, can the interest which the wife had conveyed to her husband, be terminated upon the death of the husband so that he will not have died owning an interest in the real property so conveyed to him by his wife's deed and thus make probate unnecessary.

Can our object be attained by the inclusion of any language in the deeds themselves? There is a possibility that probate might be avoided by the use of simultaneous deeds if incorporated within such deeds was a provision that a fee should pass but that if the grantee therein named should predecease the grantor, such fee conveyed thereby should absolutely determine and revest automatically in the grantor. In such a way, whichever spouse should die first, such death seemingly would determine the fee of that particular spouse and the surviving spouse would be vested with title to all of the real property. As far as I have been able to ascertain this has not been passed upon by the Idaho Supreme Court and, as the result would only be conjectural, the execution of simultaneous deeds between spouses conveying determinable or base fees should not be advised until the matter has been passed by our Supreme Court.

However, let us suppose that the question of delivery of simultaneous deeds and the question of determinable fees is hereafter established by legislative enactment or judicial determination so that upon the death of the first spouse all of the title to the property involved is vested in the survivor; the legislature or the Supreme Court will still be faced with the problem of protecting the creditors of the deceased spouse.

It would be my thought that the legislature might, by law, require the surviving spouse to give notice to creditors; that the creditors should have reasonable time within which to file their claims with the Probate Court, and that the surviving spouse be given a definite period within which to pay such creditors; and that upon proof being made to the satisfaction of the Court that such notice had been duly given and that all creditors had

been paid within the time specified, a decree could thereupon be forthwit made and entered to the effect that the surviving spouse was owner in fee o the entire estate or lands described in the simultaneous deeds.

PRES. Thank you, Mr. Norris. Our next presentation, "Would a lawye advice probate is not necessary by bonds or deposits of spouses payabl either/or," is to be given by Thomas Harold Lee of Rigby, Idaho.

THOMAS HAROLD LEE: Mr. President and members of the Stat Bar: I would like to discuss this in two phases. First of all I would like to tak the deposits of spouses payable to either/or.

We are all aware of the fact that a deposit in the bank creates a debto creditor relationship. All of the law that I can find on the subject of suc deposits states that the mere fact that a deposit is made in the bank i either/or is not in and of itself sufficient to entitle the survivor to that accoun without more. In other words, the rights of the respective parties ar determined by the contract and the type of contract that was entered int

For instance, in the California case of Denigan vs Hibernia Savings Loan Society, 59 Pac. 389, there was a passbook and account in the nam of the husband or the wife. Suit was brought for the account, and it wa held that the surviving spouse was not entitled to the money, because th wife had done nothing more than to put the account in that name and tha there had been no intention to part with title to the money. There had bee no delivery of the pass book to the husband, and therefore it constituted part of her estate and her separate property.

It is sufficient to say, that the rule has been laid down that almos anything can happen with respect to an account in either one spouse or th other or the survivor. There is all kinds of law, depending upon the facts which hold for instance, that if it is construed a gift given during the life time, it belongs to the survivor. There are just as many other cases wit other sets of facts which hold that there was no gift, and it becomes a par of the estate. There have been other rulings that a voluntary trust wa created. So in discussing this particular phase of bank deposits, we woul have to presume, in the first place, that there is no question as to the right t the money. If it was a valid gift in its inception, the problem becomes moo

On the other hand, let us assume an ideal situation where the accoun is in the name of either spouse and there is no question about the fact tha the bank will give the money to the survivor. In that case, although I am no able to quote you any authority with respect to it, I think it would be con sidered a part of the estate of the deceased spouse, and, at least with respec to the half community interest, would be inventoried and an estate inherit ance tax would be due on it.

By far the more interesting phases are the questions about bonds. The have become more interesting by reason of the recent case of Succession o Tanner, 24 So. 2nd 642. This was an estate of husband and wife that wa made up largely of United States War Bonds in the amount of somethin over $50,000.00. Part of the bonds were the separate property of the husband which we will not be concerned with nor was the decision concerned with. Th remainder of the estate and the bonds were the community property of th husband and the wife and were payable to the husband or the wife. O the death of the husband the question arose as to whether or not ther

would be inheritance and transfer tax due. The ruling of the probate court was that there was no inheritance tax due. Upon appeal to the district court, it held there was an inheritance tax due. But finally the Supreme Court of the State of Louisiana said that upon the death of the husband, the surviving wife became the sole and separate owner of the savings bonds. It held that those bonds formed no part of the deceased husband's estate or of the community estate, and they also held that they were not subject to state inheritance tax and that the rights of the survivor arose solely from the contract between the United States and the purchasers, which could not be burdened or impeded by any attempted action on the part of the state to collect inheritance or transfer tax. They merely stated that and quit in the majority opinion.

By far the more interesting is the dissenting opinion in the case.

I would like to go back, for just a moment, to the majority opinion. This was on the basis that Congress has, under Article 1 of Section 8, Clause 2, of the Constitution of the United States, the right to borrow money on credit of the United States, and also, under Article 6, Clause 2, the right to make any rules or regulations with respect to these bonds that they care to make, and the state cannot interfere or impede such action on the part of Congress.

Now, the dissenting opinion stated that the writer didn't believe that it was the intent of Congress to do this in the act provided under the regulations of the Treasury Department with respect to the bonds. He said the intent was merely to facilitate the payment of the proceeds to a registered holder of the bonds as a full release and cancellation in so far as the United States Government was concerned, that it was not intended to go into the question of determining whether or not such survivor was legally entitled to the proceeds as the owner. He said that if Congress did intend to do that, these Treasury regulations fixing property rights in the proceeds are not a condition of the bond and therefore that Congress had transcended their own powers.

Then he went on to say that the rights of a state to impose tax on an inheritance based on its laws of ownership and upon the devolution of property cannot be impaired by any federal regulation regardless of how instituted—whether it was Congress or a Treasury regulations—if it was a result of an act of Congress. In the minority and dissenting opinion, he made a reference to what he thought the law ought to be in a case that was decided in the State of Washington, Decker vs Fowler, 92 Pac. 2nd 254, and also recorded with annotations in 131 ALR 961. In this case the decedent had United States Saving Bonds payable to himself or, in the event of his death, to Mrs. Decker. The administrator brought suit for the proceeds of these bonds as against Mrs. Decker who had received the payment. The amount involved was only $1,100.00, but it constituted the entire amount of the estate of the deceased. In that case they held that the administrator was entitled to the bonds, and they became part and parcel of the estate of the deceased. It stated that an administrator of an estate of one owning United States Savings Bonds payable to a designated beneficiary upon his death is, such designation being insufficient to constitute a gift of the proceeds of the bonds, entitled to a judgment requiring the beneficiary to collect the bonds from the federal government and turn the proceeds over to the administrator as part of the assets of the estate. Otherwise you are denying the creditors of the estate their just dues and rights.

In my humble opinion, the minority decision and the dissenting decision represent by far tbe better law. I think the State of Washington adopted the true and correct rule in the case of Decker vs Fowler. We in Idaho, when we have the question "would a lawyer advise probate is not necessary of bonds payable either/or" presented, will probably have to choose our own course based upon what we think the law is until such time as a judicial determination has been made of the matter.

FRANK L. SOULE: I have a question. I believe that it is a rather common interpretation of these agencies from which you buy government savings bond of E series that if the bond reads "payable to Mary Doe and Richard Doe, husband or wife or otherwise" that the conjunctive "and" ties the bond up so that probate is necessary. But if the bonds read "payable to Mary Doe or Richard Doe, husband and wife or otherwise" with the alternative "or", that obviates the necessity of probate. Did you pass on that in the study of your question?

THOMAS HAROLD LEE: In the Succession of Tanner the question was squarely presented as you stated it last. It was Tanner or Tanner. The rule was, of course, laid down, and it is binding only upon the citizens of Louisiana, that that was the rule in that state—that there would be no inheritance tax due. It didn't say "either/or". It said just straight "or".

FRANK L. SOULE: I spoke not with regard to the matter of inheritance taxes but of the necessity of probate.

THOMAS HAROLD LEE: In regard to the ownership, there was no question about who could collect. It is whether it became a part of the estate. It is the same way in the case of a bank deposit. There is no question about the fact that you can probably go down to the bank and have it in the name of "either/or" of the surviving spouse and you can get the money. It is a question as to whether or not it should be included in the probate. Suppose you had an estate of $20,000.00 or $30,000.00 and the only thing there was was a bank account payable either to the husband or the wife. There is no question but that you can go down to get the money all right. The banks are doing it every day, if it is set up properly.

PRES: Thank you, Mr. Lee. We hope to be able to have some time for further discussion on all these topics this afternoon, and if you have questions and wish to discuss them, you will want to get ready for them, because we are going to try and arrange that before we adjourn.

R. D. Merrill of Pocatello is going to discuss our next topic, "Would a lawyer advise probate is not necessary by joint tenancy of spouses?"

R. D. MERRILL: Mr. President and members of the bar:

An estate in joint tenancy is an estate held by two or more persons jointly so that during the lives of all they are equally entitled to the enjoyment of the land, or its equivalent in rents and profits, but on the death of one, his share vests in the survivor or survivors until there be but one survivor, then the estate becomes one in severalty in him and descends to his heirs upon his death.

Thompson on Real property, Vol. 4, Sec. 1775.

It will be noted that the principal incident of a joint tenancy is the right of survivorship by force of which upon the death of one joint tenant the

joint estate remains unimpaired with the survivor instead of passing to the heirs of the deceased tenant.

A joint tenant can not devise his interest, nor is it subject to his debts or probate proceedings in case of his death, but it can be conveyed by him to a stranger and thus terminated, in which case the right of survivorship is cut off.

By the common law an estate acquired in any way except by inheritance by two or more persons, not husband and wife, creates a joint tenancy in them, but, by reason of the doctrine of survivorship this rule has been changed in most of the States, some doing away with joint tenancy entirely and others merely requiring that the intention to create such tenancy must be clearly expressed and thus prevent their creation by implication.

Idaho seems to be one of the States that has abrogated the common law rule and by statute provides:

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

Section 54-508 Idaho Code Annotated, also provides:

> "Every interest in real estate created or devised to two or more persons other than executors or trustees as such constitute a tenancy in common, unless expressly declared in the grant or devise to be otherwise."

These statutes do not forbid joint tenancy, they merely abrogate the common law rule and provide that to create a joint tenancy one must expressly declare in the instrument creating it that it is to be a joint tenancy and not a tenancy in common.

The question then arises can there be a joint tenancy in Idaho between husband and wife of property which otherwise would be community property? If there can then probate proceedings are unnecessary because there isn't anything to probate, the property goes to the survivor by right of survivorship and not by descent.

If on the other hand there can be under our statutes, a joint tenancy between husband and wife of property which would otherwise be community property, then probate proceedings would be necessary because the property would be community property and statutes pertaining to probate proceedings would prevail.

Neither section above quoted pertaining to joint tenancy forbids a joint tenancy between husband and wife. I presume therefore a husband and wife could hold separate property in joint tenancy like anyone else if the joint tenancy was properly created. But when we come to property which otherwise would be community property our question is not so easily solved.

Section 31-905 ICA defines what is separate property of the wife and section 31-906 ICA, defines what is separate property of the husband, and Section 31-907 ICA provides that all other property acquired after marriage by either husband or wife is community property. Neither can dispose of his

or her interest in community real estate to a third person without both joining in executing and acknowledging the deed or other instrument of conveyance.

Section 31-907 ICA., as amended by Chapter 23, 1943 Session laws provides either may convey his or her interest to the other and thus dissolve the community property. It will thus be seen that title to property acquired by deed whether separate or community is determined not from the form of the deed, but from the manner of its acquisition, Powers vs. Munson (Wash.) 133 Pac. 453. The presumption being that property acquired by husband and wife during coverture is community property.

Jacobson vs. Bunker Hill Min. Co., 3 Ida. 126; 28 Pac. 396;

McMillan vs. U. S. Fire Ins. Company 48 Ida. 163; 280 Pac. 220.

A deed is usually signed by the grantor alone. A grantor by placing in a deed a recital it is to be the separate property of one of the spouses, or to be held in joint tenancy by husband and wife does not make it separate property or property held in joint tenancy. Neither spouse can be deprived of his interest in the community by this recital, unless, of course, he or she consented to it.

The spouses, may contract with each other concerning the interest of either in the community. The husband can convey his interest to the wife, or the wife her interest to the husband. This being true there is no reason why they may not agree between themselves that it may be conveyed to them in the first instance and held in joint tenancy. This is the position taken by the Arizona Supreme Court in the case of in re Baldwin estate, 71 Pac. (2) 793.

The Arizona Statutes both as to joint tenancy and community property are almost identical to ours and in discussing this question in the in re Baldwin estate, the Arizona court said:

> "As between husband and wife a joint tenancy is an exception to the community property rule of this state and in derogation of the general policy of that system of holding property, and this being true a clause in a deed creating a joint tenancy between them should be effective only where it clearly appears that both spouses have agreed that the property should be taken in that way. A deed is generally signed by the grantor only, hence, before a joint tenancy clause may be held binding on the grantees and the community property law thereby defeated, we think it necessary not merely that the deed contain language creating such an estate but that it further appear that the deed was accepted by the spouse whose property it is sought to bring within its terms, knowing that it contained that provision. If the deed itself contains nothing showing this fact, such, for instance, as an acceptance of the terms thereof in the handwriting of the grantees, or an endorsement by the recorder that it was placed of record at the request of the deceased spouse, it might be established by any proper extrinsic evidence."

The Arizona case is the only case I have been able to find where the statutes are the same or nearly the same as ours. California cases do not help because it has a statute permitting joint tenancy between husband and wife as to property which otherwise would be community property.

The Arizona theory was approved by a later Arizona case, Henderson vs. Henderson, 121 Pac. (2) 437, although the court seems to doubt the correctness of its holding, saying:

> "Whether the holding in that case (in re Baldwin estate) was correct is, the court now feels rather doubtful. However, even though convinced that to hold a husband and wife may take property in Arizona as joint tenants with the right of survivorship is wrong, the question is nevertheless stare decisis in this jurisdiction and in view of the fact that titles have been acquired relying upon the construction of the statute in the Baldwin case, it would undoubtedly work an injustice upon some persons to hold now that it was wrong."

The Baldwin case was also followed by the Ninth Circuit Court of Appeals, in Greenwood vs. Commissioner of Internal Revenue, 134 Fed. (2) 915. The court in that case extended the theory to personal property, holding:

> "While joint tenancy originally confined to estates in realty such tenancy can exist in personality, and generally, unless a state statute specifically prohibits establishment of joint tenancy they will be recognized."

I haven't been able to find where the Idaho Supreme Court has passed on the subject, nor would I predict how our court would hold if the question were presented; all one can say is, if it followed the Arizona case and the Ninth Circuit Court of Appeals then a joint tenancy between husband and wife as to property both real and personal, which otherwise would be community property can be created, but in creating it, the husband and wife must agree that the property is to be held in joint tenancy, the mere recital in the deed that it is, is not sufficient to create it. In doing this it would be safer if attached to and recorded with the deed was a concise agreement signed and acknowledged by husband and wife that they agree to hold the property as joint tenants with right of survivorship and not as community property; otherwise it may be hard to prove such an agreement, especially if one of the spouses were dead.

On the other hand, the court may very well take the position that joint tenancy between husband and wife is against the general policy of this state and refuse to follow the Arizona case. It would seem, however, that the question is one for the Legislature. It should pass a clear, concise statute either allowing or disallowing a joint tenancy between husband and wife as to property which otherwise would be community property.

In most all cases the property involved was real estate, but the theory applies equally to personal property. We have many instances of joint bank accounts, joint bonds, joint safety deposit boxes and joint ownership of corporate shares.

Section 25-1014 ICA as amended by Chapter 30 of the 1943 Session Laws allows withdrawal of joint bank accounts by either joint owner or the survivor. Federal regulations permit United States Bonds to be held by the spouses, or others jointly, and either, or the survivor has the right to cash them in, but these statutes, rules and regulations, notwithstanding the decision in the case of succession of Tanner (La) 24 So (2) 642, which is positively wrong, are mere regulations as to methods of withdrawal of deposits and cashing bonds, protecting the Bank and Government, in case

the deposit is withdrawn or the bond cashed by both, either / or the survivor. They do not decide to whom the money or the bonds belong or in what capacity it was held whether community property, or in joint tenancy.

I agree entirely with the previous speaker as to the dissent in the Succession of Tanner case. The dissenting opinion states what the law ought to be and not the majority opinion. In the majority opinion the Court entirely overlooked that the state statute should be looked to as the law of descent and not some mere regulation of the Treasury Department or some other government bureau.

The question of bank accounts was somewhat discussed by the previous speaker. In my opinion, bank accounts can be held in joint tenancy if both the husband and the wife sign the agreement or the bank withdrawal slips so that there can be no doubt but what they have agreed to hold that bank account in joint tenancy. If the bank account is merely put in the bank in A or B, husband or wife, and there is nothing else, then there is nothing to indicate it is a joint tenancy. On the other hand, if the husband and wife sign these deposit slips which say in effect that the husband and wife agree to hold that bank account as joint tenants with right of survivorship, both of them signing, then I can't see why that can't be held in joint tenancy, and the bank account would go to the survivor. Provided, however, that we agree with the Arizona case that community property could be held in joint tenancy.

The same thing would apply to safety deposit boxes or to stocks in corporations or to any joint holdings.

Coming back to our original question, "Would a Lawyer advise that probate is not necessary by joint tenancy of spouses?" I would say if one is willing to follow the Arizona cases and one is sure the spouses have agreed to hold the property in joint tenancy such agreement being in writing, signed and acknowledged by the spouses, then one may advise that probate is not necessary.

On the other hand, if one will not follow the Arizona theory, then property which otherwise would be community property can not be held in joint tenancy by husband and wife and probate proceedings would be necessary in case of death of either spouse.

It must be remembered however, if one adopts the theory that there can be a joint tenancy, then some procedure must be adopted for establishing the fact of death; and, of course, there must be a determination as to whether or not there is an inheritance or transfer tax due on the transfer, the whole being taxable rather than just one-half, as in the case of community property.

PRES.: Thank you, Mr. Merrill. The next ten-minute topic is to cover "Corporate shares without voting power?", and Jess Hawley of Boise is going to speak to us about it.

JESS HAWLEY: Section 4, Article 11 of the Idaho Constitution provides:

> "Shares of stock—How voted.—The legislature shall provide by law that in all elections for directors or managers of incorporated companies, every stockholder shall have the right to vote in person or by proxy for the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares and give one candidate as many votes as the

number of directors multiplied by the number of shares of stock, shall equal, or to distribute them on the same principle among as many candidates as he shall think fit, and such directors shall not be elected in any other manner."

This definitely gives to every stockholder the right to vote the number of shares owned by him for directors and cumulate the shares. This also definitely provides that directors shall not be elected in any other way.

Whether this provision is self-executing is a question not necessary for discussion, but in passing, I am of the opinion that it is, and this is borne out by the fact that when the legislature has acted on the subject matter it has quoted verbatim from the constitution, supplying neither different language or conditions.

The present law is found in Sec. 29-133, sub-section 2, and is no more than a restatement of the constitutional provisions.

In 1929 in the Business Corporation Act, the provision is contained in Sec. 24, sub-paragraph 2, page 565 of Chapter 262.

In the 1919 Idaho Compiled Statutes, Sec. 4713 is again found, as a statute, the repetition of the constitutional provisions.

In 1913 Session Laws page 4, Sec. 2730 of the Revised Codes as amended, again contains the same language.

In 1907 Session Laws page 541, amending Sec. 2594 Revised Statutes, is the first legislative act on this subject and it also only repeats the language of the constitution.

Revised Statutes of 1887, Sec. 2594 provided that each stockholder is entitled to one vote for each share at all elections.

I emphasize again that the closing language of the constitutional provisions and the closing language of the statutes which I have cited, contain the provision "and such directors shall not be elected in any other manner."

The constitution and the statutes being clear and unambiguous, outside references are unnecessary.

It is interesting, however, to go over the proceedings and debates of the Idaho Constitutional Convention of 1889 and read the discussion preceding the adoption of Sec. 4 of Art. 11 which begins at page 814 and continues through page 821, when the amendment which provides for cumulative voting was carried by an unrecorded vote.

The argument was that a majority interest could prevent the minority from having a director on the Board. The famous lawyer, Weldon B. Heyburn, afterwards U. S. Senator, thought that the amendment was invading the provisions of the by-laws of the corporation and stated, "I do not know why the constitution should be making laws for the government of the private corporation."

The favoring argument of Judge Maybew prevailed and that, boiled down, was the protection of the minority stockholders.

Attorney George Ainslee also spoke on the subject favoring the amendment.

Reference was made to similar constitutional provisions, Sec. 4, Art. 15 of the 1889 Montana Constitution; Secs. 7 and 8, Art. III of the 1870 Illinois Constitution; Art. 12, Sec. 12 of the 1887 California Constitution, which contained identical or practically identical provisions.

The language of the debate supports my notion that the amendment which added cumulative voting was intended to be self-executing.

In Wright vs. Company (Cal.) 8 Pac. 70, was interpreted the identical provisions of the California Constitution in a case decided in 1885 and under the adoption rule became the law of the State of Idaho.

This case was a proceeding to set aside an election for directors after the minority stockholders had claimed and had been denied the right to cumulate votes under the California constitutional provision. The court said that this was the way in which ". . . minority of the stockholders would be enabled to secure representation upon the Board of Directors by electing one or more of the directors. Such doubtless was the object of the provisions; and the rule was considered of sufficient importance as to make it part of the organic law. Under this rule a corporation holding an election for directors is bound to follow the constitutional mode. It has no power by resolution or otherwise to adopt any other." The judgment of the lower court setting aside the election was sustained.

In Missouri in 1905 under a similar constitutional provision the Supreme Court of that state decided in State vs. Swanger, 89 S. W. 872, an action against the Secretary of State to compel him to issue a certificate of incorporation where the voting power was exclusively in the common stock and the preferred stock had no voting power. The court took the viewpoint that the arrangement for cumulative voting concerned only the classes of stockholders and not the public; that it was a good policy to prohibit the voting upon preferred stock in certain cases.

An Ohio decision based upon a constitutional provision giving a shareholder the right to cast votes according to the number of his shares was quoted as authority for the proposition that a prohibition of the voting by the preferred stockholders was merely an agreement between the parties and did not violate any rule of public policy.

The conclusion was "* * * we hold then that the evident purpose of Section 6, Art. 12 of our constitution was a guarantee to stockholders having the right to vote of cumulating their votes and has no reference to the contractural rights of stockholders inter sese of providing that preferred stockholders shall, or shall not, have the right to vote such stock, and to hold it, has taken away this well recognized common right, would be to distort its obvious purpose."

The court by unanimous decision refused the Writ of Mandate.

The Missouri constitution did not contain the language of our constitution, particularly did not provide "* * * the directors shall not be elected in any other manner."

It is my personal view that this is good common sense and might afford an out to corporations organized in Idaho which have disregarded the plain language of our constitution; but in the face of our provision, I cannot see how any attorney with any corporation practice can justify organizing a

corporation in Idaho directly contrary to the constitutional provisions until our Supreme Court has adopted the Missouri rule.

The Illinois constitution has a similar provision to ours and in 1922 the case of People ex rel. vs. Emmerson, 134 N. E. 707, 21 A. L. R. 636, held even without the closing sentence which we find in the Idaho constitution, "that no director shall be elected in any other manner," in a petition for mandamus praying that the Secretary of State be commanded to issue a certificate to a corporation which provided that the preferred stockholders had no voting rights, that the natural meaning of the words of the constitutional provision required that preferred stockholders be given the right to vote in the charter or articles of incorporation.

Then it criticises the Missouri decision above cited and said the Missouri constitutional provision was "* * * quite markedly different on this question than that of our own" and that this case is not considered of "great weight or that it would control here." It cites with approval a Delaware case which I will hereafter discuss.

While it is true that statutes in derogation of common law should be construed strictly, the Illinois court held this did not apply, saying "But there can seldom be either propriety or safety in applying this maxim to constitutions * * *. It will sometimes he easy to defeat a provision as the courts are at liberty to say they will presume against any intention to alter the common law further than is expressly declared. A reasonable construction is what such an instrument demands and should receive, and the real question is what the people meant and not how meaningless their words can be made by the application of arbitrary rules." The above quotation is from the Delaware case.

The debates in the constitutional convention of Illinois apparently swung against this interpretation but the court holding the language of the constitution "clear and unambiguous * * * the debates can have little or no bearing upon the effect of their construction."

The final holding of the court was that the owners of preferred stock could not be deprived of their right to vote for directors or managers and the Secretary of State rightly refused to file the amendment to the articles of incorporation depriving a preferred stockholder of a right to vote.

In the case of Hamlin vs. Toledo, etc., 26 L. R. A. 826, 78 Fed. 671, a Circuit court said of such a provision "They (the preferred stockholders) agreed to take and did take the relation of stockholders toward the new company, they surrendered the privilege of voting. That was perhaps a valid agreement between stockholders, though of doubtful public policy." This is the general rule where no constitutional provision exists, such as we find in Idaho.

The Delaware case of Brooks vs. State, was decided in 1911, 79 Atl. 790. The Constitutional provision there was quite similar to the Missouri provision and different from the Idaho constitution, which vividly, pointedly and finally prohibits the deprivation of any stockholder of his right to vote for directors or managers.

In the Delaware case information in the nature of a Writ of quo Warranto was filed by the attorney general. The articles were filed in Delaware and at an election the preferred stockholders were denied the right to vote. While the case was on trial the Writ was filed to show cause why the Quo

Warranto Writ should not issue because the corporation was in its natu a public purpose corporation and a Quo Warranto was a proper remedy.

The claim was made that the voting power referred only to stock "havin the right to vote" and that stockholders who accepted preferred stock strippe of this right waived it, thus bringing the question down to whether the votin power was a personal privilege that could be waived. If he was the holde of an interest in the property it conferred on him the right to control an regulate that property, the holder of a share of stock had a personal privileg which he could reject if he chose, and therefore waive the provisions of la intended for his benefit, but the court said:

> "Being the owner of a share of stock, with a voting power given by the constitution, he was by the possession of the share possesse of a privilege, but he could not by any act of his change th character of the stock that gave him the privilege or roh it of th voting power conferred upon it by the constitution, so that in h hands or in the hands of any successive holder it did not carry th power conferred upon it at its birth by the law that authorized i existence."

The facts showed that the directors concerned had received enoug votes, counting preferred stock and common stock, of everybody entitled t vote, to give him a majority vote and he was therefore elected a leg director under the law as it existed so the writ was denied.

I understand Delaware has since amended its constitution and it n longer requires a vote for each share of each class of stock.

In the case of Commonwealth Corp. vs. Jordan (Cal.) 246 Pac. 796, Delaware corporation offered to file copies of its articles of incorporatio and the Secretary of State denied it because there was a difference betwee the values of preferred stock and of class B common stock, under which th common stock having no par value was given equal rights to vote with th preferred and common stock with par value.

A learned discussion about commity between the states brought out tha the laws of the various states were quite different and that even with thos differences, including divergent voting power, a foreign corporation coul still be admitted to enter another state and transact business under the doc trine of commity "in the absence of express constitutional or statutory inh bitions on the part of those states which such foreign corporations thus see to enter."

The California case found no express inhibitions against the admissio of foreign corporations, even though their frame work, especially as to th quality of the stock structure would not have permitted them to organize a domestic corporations.

Very important here is Sec. 15 of Article 12 of the California constitu tion which is found as Sec. 10, Art. 11 of our constitution—evidently adopte from California, which provides a foreign corporation from exercising an greater rights or privileges than a domestic corporation. This the Californi court said was not an inhibition against the entry of this foreign corporatio into California.

> "It was contended (Miles vs. Woodward, 46 Pac. 1076) that the ac was unconstitutional because it operated only upon domestic corpora

tions, (where a stockholder undertook to recover liquidated damages for director's failure to report) and thus enabled foreign corporations to transact business in this state under more favorable conditions than domestic corporations might under the requirements and penalties of said act; but this court held that the said act related merely to the internal affairs of a corporation and not to its outside dealings * * *".

The court again repeated that the dual stock structure was a matter of internal organization of the corporation and notwithstanding the inequality of voting power, had nothing whatever to do with the transaction of the business of the corporation as between itself and the outside world.

> "The Constitution was not designed to limit the powers of the Legislature when dealing with the organization and government of corporations which are created by its own will and act. Over such corporations it has and may exercise full powers of control. Over the organization and internal government of foreign corporations it has no such powers. The laws of the state do not have extra-territorial force. It would be meaningless for this state to try to legislate upon the internal affairs of such foreign corporations, and it has not attempted to do so."

The California court then applied the principle of this decision and held that the Delaware corporation was entitled to file its articles and receive a certificate of incorporation from California. It did say that such corporations are subject to the same liabilities as stockholders of domestic corporations and left open how this liability was to be established and enforced, by saying:

> "* * * but we do not think it is presentable upon the threshold of the proposed entry of such foreign corporations for the purpose of transacting business in this state, nor that it is involved in the present inquiry."

The Montana case of Uihelin vs. Caplice Commission Company, 102 Fed. 564, decided in 1909 considered this same provision which prohibited a foreign corporation having any greater privileges and rights than a domestic corporation, and the court said on page 56:

> "The mere fact that a burden is placed upon domestic corporation, from which foreign corporations are exempt, does not operate to bring foreign corporations within the provisions of a law intended to apply solely to domestic corporations"

and quotes favorable from a Ninth Circuit Court opinion, Butte vs. Widenback, 97 Fed. 896, which holds that it is impossible to provide exactly the same system of laws for foreign as domestic corporations and that the constitutional provisions contemplate no such thing and there is merely an inhibition against the powers and purposes of foreign corporations that are not granted to or cannot be enjoyed by domestic corporations under like conditions.

In the case of Film Producers vs. Jordan, 154 Pac. 605, the California court held that common shares at $1.00 a share and preferred shares at $20.00 a share did not have equal voting rights per share but that the fundamental right to vote was based upon ownership of capital stock as distinguished from shares and "not merely upon shares which are but representation of value."

Fletcher, Vol. 2, page 741-42 paragraph 5301 states that non-voting of preferred stock is a matter of agreement between the two classes of stockholders and does not affect the public. "According to the weight of authority such a provision is not in confliflict with a constitutional or statutory provision to the effect that each stockholder shall be entitled to one vote for each share of stock held by him, although there is authority to the contrary."

Montana has held in Allen vs. Montana, 277 Pac. 588, that non-voting preferred stock can be issued by a foreign corporation.

Many cases hold that non-voting stock can be issued because it does not violate a rule of public policy but an examination of those decisions discloses that they are based upon statutes and not upon constitutional provisions similar to those in Idaho, which are discussed here.

I conclude that non-voting stock is prohibited in Idaho—that is, in a domestic corporation set-up and that no stockholder can contract away the voting right, inherent by our constitution, in stock—that the public policy of Idaho has been created by our constitution and therefore any attempt to contract away that right would be against public policy.

There is no doubt that our provision is antiquated, awkward and militates against both promotion of corporations and the carrying on of their business but the remedy lies in changing our constitution—not in distorting or avoiding it.

I do not believe that our Supreme Court will ever hold that the constitutional provision refers only to stock that has been, by the corporate charter, given the right to vote—all stock has that right whether or not given to it by the domestic corporation's charter, and the Secretary of State of Idaho is not, and never was, justified in accepting articles of a domestic corporation which pretend to deny any class of stock the right to vote for directors or managers. Undoubtedly the Secretary of State has accepted articles of incorporation and issued certificates of incorporation to companies that have the illegal provision that some classes of stock may not vote.

This is unfortunate and the fact that there may be some such corporations, and that rights have grown up in connection with them, may be awkward and result in litigation—but so far this has not resulted—but the failure of the Idaho Secretary of State that may have occurred in the past does not modify or amend the constitution of the State of Idaho in its very plain inhibitions against depriving any stockholder of the right to vote for managers or directors.

There may be some cases between individuals where the doctrines of waiver and estoppel may prevent the plaintiff from questioning the denial of his right to vote his shares but no such cases have arisen and I will not speculate upon this possibility.

There is much more authority and reasoning upon this subject upon both sides but I think I have covered the main points and have already drawn out this paper beyond the scope of a ten-minute discussion, which was the limit of time the program committee thought the subject deserved.

I acknowledge with thanks the views of Mr. Oscar Worthwine of Boise, made available by him in my study of the question here discussed.

PRES.: Thank you, Mr. Hawley. At this time Mr. Frank Rettig of

Jerome is going to speak to us on "Non-profit cooperative association engaging in business for profit."

FRANK RETTIG: Mr. Chairman and members of the bar—When Mr. Smith first asked me to give a talk on the question "Can a non-profit cooperative association engage in business for profit," I thought he was kidding. I couldn't quite conceive of the idea of a non-profit organization engaging in business for a profit. However, a little digging convinced me otherwise, and I came to the conclusion that non-profit corporations organized under chapter 10, title 29, can do just about anything within the scope of their articles of incorporation, and can make a profit on any transaction so long as that profit does not inure to the benefit of the members of the corporation.

Section 1 of that chapter provides that it shall be lawful for five or more persons to form a cooperative association for any purpose where pecuniary profit is not their object. "Their" certainly refers to the "five or more persons" incorporating, and not to the association; therefore, it seems the prohibition against pecuniary profit is directed against the members and not the corporation.

Section 2 provides that every such association shall be governed by the laws of Idaho relating to private corporations, except such as are inconsistent with chapter 10.

Section 29-101 provides that the word "corporation" shall be held and construed to include all associations and joint stock companies having or exercising any powers or privileges of corporations not exercised by individuals or partnerships. Section 29-160 of the Business Corporation Act provides that all corporations shall be subject to the provisions of the Business Corporation Act, but that when special provisions have been made in laws existing prior to its passage (June, 1929) relative to incorporation, organization, powers, right, conduct, duration, dissolution or government of any designated class of special corporations, including non-profit cooperative corporations or associations, the business act shall not apply when inconsistent with such special provisions, but that such special provisions shall govern.

Thus, except as specifically otherwise provided, non-profit cooperative associations are governed by the Business Corporation Act, and may engage in any type of business permitted by law and the Business Corporation Act. As above indicated, five or more persons can form such an association for ANY purpose where pecuniary profit to the members is not the object or purpose of the corporation.

The principal features of a non-profit association distinguishing it from a business corporation are that non-profit associations must provide for equality of rights and interests of members, and no member can have or acquire a greater interest than any other member. Such an association shall not issue any capital stock, but shall issue membership certificates, which certificates cannot be assigned so that the transferee thereof can by such transfer become a member of the association, except by resolution of the board of directors, and under such regulations as the by-laws may provide.

Under the provisions of section 29-160, the fact that a corporation is organized with and composed of members instead of shareholders does not take such corporation out of the provisions of the Business Corporation Act, it specifically providing that the business act shall be applicable so far as consistent with the special provisions and, except where inconsistent, shareholders, as used in the business act shall be held to include memberships and certificates of stock shall be held to include certificates of membership.

Bearing in mind that, except where otherwise specially provided, the provisions of the Business Corporation Act apply to non-profit associations, it seems clear that there are no limitations expressed in chapter 10 on the scope of activities of associations formed thereunder, nor any restrictions on profit making other than that such profits must not inure to the benefit of the members of the association. Such an association would have the right to engage in any type of business permissible by law and within the scope of its articles of incorporation.

Section 29-1003 provides that corporations, associations and co-partnerships, as well as persons may become incorporators and members of cooperative associations, provided such corporation is not organized or conducted for the purpose, directly or indirectly, of fixing the price, or regulating the production of any article of commerce, or of produce of the soil, or of consumption by the people. This latter section is apparently intended to bring such corporations within section 18 of article 2 of the constitution directed aaginst combinations in restraint of trade.

The question that I thought was probably more vital than any other in connection with the subject assigned, was whether or not such corporations are subject to Federal and State income tax. Our state statute, section 61-2402, as amended hy chapter 159 of the laws of 1933, provides that the term "corporation" includes associations of whatever kind organized or conducted for pecuniary profit, unless otherwise provided. Section 61-2425, as amended by chapter 159 laws of 1933 and chapter 30 Extraordinary Session, Laws of 1935, provides that a tax shall be levied, assessed, collected and paid upon all corporations, except as otherwise expressly provided, for the privilege of carrying on and doing business within the state, and that the amount of tax levied shall be according to and measured by the net income of such corporations from all sources.

Section 61-2426, I. C. A., provides for an exemption of different types of corporations, all of which could be formed under chapter 10. Some of these are:

Business leagues, chambers of commerce or boards of trade not organized for profit, and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Civic leagues or organizations not organized for profit, but operated exclusively for the promotion of social welfare, or local associations of employees, the memhership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational or recreational purposes.

Clubs organized and operated exclusively for pleasure, recreation and other non-profitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder.

Corporations organized for the exclusive purpose of holding title to property, collecting income therefrom and turning over the entire amount thereof, less expenses, to an organization which itself is exempted from the tax imposed by this chapter.

And, of course, you are familiar with farmers and fruit growers co-

operative marketing associations, which are not intended to be within the scope of this subject.

It will be noted that in all of the above provisions for exemption, no part of the net earnings of the corporation can inure to the benefit of any shareholder.

The above provisions for exemption are taken verbatim from the Internal Revenue Code of the United States. I have run across no Idaho cases construing our tax exemption statutes, but there are several federal cases construing these exemption provisions, and there seems to be two distinct lines of thought developed in the Federal Courts on exemption from income tax of these corporations. The Second Circuit Court of Appeals in the case of West Side Tennis Club vs. Commissioner of Internal Revenue, 111 Fed. 2nd 6, 130 A.L.R. 103, denied exemption to a tennis club which was formed for recreational purposes because of the fact that it entered into a contract with the United States Lawn Tennis Association to provide facilities for holding national tennis matches, to which the public was admitted on paid admission, and the net income derived from these matches was in excess of half of the club's gross income. The Court stated "while the tax payer was undeniably organized exclusively for pleasure, recreation and other non-profitable purposes, it cannot be said that it was so operated. The major tournaments were not exclusively for the pleasure or recreation of the members. It was not, and cannot be shown that no part of the net earnings inured to the benefit of any private shareholder * * * *. In the present case a substantial and profitable business was conducted, though for a limited time each year, which had only an indirect relation to the recreational objects of the club. An important, if not primary reason for holding the major tennis operations was the benefit of the members for they would have had to pay larger dues, or restrict club operations uncomfortably unless profits had been realized for the club from outsiders who were willing to purchase tickets for the great annual tennis matches."

The Court then referred to Jockey Club vs Helvering, 76 Fed. 2nd 597, which held that to secure exemption for a club "the returns from transactions with outsiders taken by and large shall be no more than a reimbursement of the cost to the cluh; shall not be a source of income. It is easy to see why congress limited the exemption of clubs to those organized and operated exclusively for pleasure, etc., because otherwise it would have been a simple matter to tack a profitable business on to a club that was having difficulties in carrying as large and luxurious plant as the members might like without the payment of burdensome dues." The Court did hold, however, that isolated transactions could be engaged in where profit was made without depriving the corporation of exemption.

The other and extremely opposite view on this subject was taken by the Fifth Circuit Court in Koon Kreek Klub vs Thomas, 108 Fed 2nd 616, in which a fishing and hunting club had been organized, under a law similar to our chapter 10, for recreational purposes, and bought some seven thousand acres of land in Georgia. All of the land was not needed for recreational purposes, and the club amended its articles so that it could engage in raising and marketing produce and lease its lands. Thereafter, it began raising produce on said land and marketing that produce on the open market for profit. It entered into oil leases and leased its land on a per acre basis, as well as a royalty basis, deriving substantial income from these sources. The association was heavily indebted and had mortgaged its property, and used the income from the sources mentioned to retire its mortgage indebtedness, as well as to make improvements in its club properties and facilities. On a proceeding to determine whether or not the club was liable to tax because of the profit made on these transactions, the Internal Revenue Department contended that in paying off the mortgage on club property the shareholders interests were enhanced since a reduction in dues necessarily resulted. The Court refuted this contention saying "the obvious answer is that the exemption applies to profits so long as they are retained by the organization or used to further the purposes which are made the basis of the exemption, and are not otherwise used for the benefit of any private shareholder. The express grant of authority (amendment to articles of incorporation authorizing club to engage in raising live stock and produce) must be construed in the light of the admitted purpose and operation of the club and its needs to accomplish its ends, and not abstractly to draw it within the terms of the statute without regard to its purposes and intentions as a matter of fact."

There are cases varying all the way between the two points of view expressed in the above cases. Most of these cases pertain to clubs organized for recreation and pleasure. Chapter 10 is probably used more for that purpose than for any other purpose in the State of Idaho. My own personal conviction is that the view expressed by the Court in the Koon Kreek Klub case is the better reasoned, and follows closer the theory and purpose of non-profit corporations than the tennis club case; that so long as such corporations use the income derived from commercial ventures for furthering and promoting the fundamental objects of the corporation and deny the right of any member to participate in such earnings, they should be exempt.

If a recreational club, however, goes completely outside the scope of its charter and engages in business, say grocery, hardware or service station, and sells and retails to the general public, these activities probably would have no legitimate connection with the functions of the recreational purposes of the club, and if these activities resulted in a major portion of its income, undoubtedly the corporation would be subject to income tax, even though the Circuit Court of the Fifth Circuit held that as long as the funds were not distributed to the members but were retained in the corporation and applied to its fundamental purposes, the outside activities would not cause it to lose its exemption. The purpose for which the corporation, if otherwise exempt, engages in the transaction, is the test.

The Supreme Court of the United States, in Trinidad vs Sagrada Orden, 263 U. S. 578, 68 Law Edition 458, in construing the exemption statutes as they pertain to a corporation sole, stated that it is not the source of income but its destination that determines whether or not such a corporaion is exempt from income tax.

The fact that on final dissolution of such a corporation there might be a division of any surplus then existing among its members has been held too remote a contingency to destroy privilege of exemption, if otherwise the corporation is exempt. Kansas City Hay Dealer's Ass'n vs Crooks, 28 Fed 2nd 909.

I didn't have time to go into other phases of this question such as whether or not a non-profit corporation engaged in business is subject to payment of annual license fees, whether tbey are subject to the Fair Trade Practice Act, and whether or not quo warranto might be used against such corporations

if they go beyond the scope of their legitimate activities. These are all interesting questions and should bear investigation.

PRES: Thank you, Mr. Rettig. We have E. V. Boughton of Coeur d'Alene upon "Finality of Probate Decrees."

E. V. BOUGHTON: Mr. President, Members of the Idaho State Bar, and Guests:

In discussing the question as to how much faith and credit should be given decrees of distribution, orders of sale, and orders settling final account, I realize that there is a woeful lack of harmony, particularly among the attorneys of our section, as to how far we should go in examinination of titles in overlooking flagrant irregularities in probate proceedings. My attention has recently been called to conflicting opinions of attorneys in connection with the examination of titles involving such irregularities. Some illustrations of the problems with which we are confronted might be pertinent. For example:

(1) "A" died leaving no direct descendants, but leaving cousin "B" and several heirs of another cousin who had been absent and not heard from for a period of seven years. Administrator filed a final account and petition for order settling final account and for an order distributing the estate to the living cousin and the heirs of the cousin who had not been heard from for seven years. Notice of hearing on this petition was posted, but within a day or two administrator filed an amended petition for authority to distribute the whole of the estate to the surviving cousin. No notice was posted of the hearing of this amended petition. Decree was finally entered upon the amended petition settling the account and ordering distribution to the one cousin. There was no finding that the missing cousin was presumed to be dead by reason of his absence for more than seven years.

The abstract was examined by three attorneys, one of them condemned the title absolutely, the other two approved it.

(2) A sale was confirmed based upon the following probate proceedings. Two descriptions of property were involved, one of which was sold at private sale for less than 90% of the appraised value, but the combined sales aggregated the 90%. A petition was filed for authority to sell at private sale on the ground that there were no funds with which to meet expense of administration. Notice of sale was posted at a certain date, but not published. Some time later another application for authority to sell was made and notice of sale was published but not posted.

This title was condemned because of the irregularities in the proceedings by one of our leading attorneys. Upon further examination by the second attorney, the title was approved and the attention of the first examiner called to the authorities upon which the second examiner relied. Whereupon the first examining attorney wrote a second opinion in which he states:

> "I have considered the opinion given by....., a prominent and capable attorney of this city, to....., in which he states that he finds the record title to said lots to be marketable on the ground that the order confirming the sale made by the Probate Court of Kootenai County on March 14, 1939, cured the irregularities in the probate proceedings pointed out in my opinion which he states were 'irregular in every respect suggested in that opinion.' "

And further states:

> "After considering his opinion carefully and the cases cited in support of his contention that the order confirming the sale is final and binding and is not subject to collateral attack, I am inclined to concur with his view as a strict matter of law. I concede that the order would probably be sustained at the end of a lawsuit; but this does not preclude the possibility of a lawsuit.
> "As I stated in my letter to you accompanying the opinion, 'The ownership of the property will probably never be questioned, but I am quite certain that you would have trouble passing the title to a buyer.' I adhere to this view. As a practical matter, a title is not marketable at this time unless it will be acceptable to a prudent purchaser. This is not the legal test of marketability, but it is highly important, and I always consider it in reaching my conclusion whenever important defects in the title are disclosed by the abstract.
> "In view of the fact that the proceedings for the sale were not conducted in substantial compliance with the requirements of the statutes in force at the time the sale was made, I am not willing to assume the responsibility of giving an opinion that the title is marketable."

There was no question of fraud in either and no question as to the original jurisdiction of the court in either of the illustrations heretofore mentioned.

Tbe question immediately presents itself as to the duty of an attorney and whether or not he should condemn the title or approve it. We all appreciate, I think, that in handling estates the statutory proceeding should be strictly followed. However, if an attorney is of the opinion that irregularities are disclosed but that such irregularities may have been entirely cured by subsequent and final proceedings, what course then should the examining attorney follow? Should he condemn the title, or should he approve it and in approving it should he point out the irregularities in the proceedings and state that in his opinion they are cured by either the order of distribution, tbe order confirming sale or the order or decree settling final account.

Laymen call upon an examining attorney because they have confidence in his ability to examine the title, and if the attorney renders an opinion by which he absolutely condemns, the prospective purchaser is justified in relying upon his opinion. But the question is, can titles be upset, disrupted and condemned because the examiner feels that someone in the future might raise the question although he feels that any suit challenging the title would be futile.

Idaho has passed upon these various questions in so many cases that it seems unnecessary to quote from the many decisions, but through a very long line of decisions, beginning with Clark v. Rossier, 10 Idaho 348, the court has definitely held that probate courts are courts of original and general jurisdiction in probate matters, and

> "These principles are settled as to the courts of record which have original, general jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction. They are not inferior courts in the technical sense of the term, because an appeal lies from their decision. A court of general jurisdiction is one whose judgment is *conclusive*, until modified or reversed on direct attack. * * * The probate court of this state, as far as its jurisdiction

in regard to probate and guardian matters is concerned, is such a court."

In the Clark case the Court approved the followig:

> "Titles acquired under the proceedings of courts of competent jurisdiction must be deemed inviolable in collateral action, or none can know what is his own; and there are no judicial sales around which greater sanctity ought to be placed than those made of the estates of decedents by order of these courts to whom the laws of the state confide full jurisdiction over the subjects."

The Clark case involved the sale of mining claims and in which it was contended that the sale was made without proper notice and in the absence of proper proceedings to give the court jurisdiction.

The case of Walker Bank & Trust Co. v. Steely, 34 P. (2d) 56, involved the execution of a mortgage by the executrix, and stated:

> "When the jurisdiction of the probate court once attaches to the estate of a deceased person, then it continues until the property belonging to the estate is distributed and the estate is closed according to law."

And held that the court had jurisdiction to authorize and approve a mortgage.

Short v. Thompson et al, 55 P. (2d) 163. Question of settlement of final account. The court said (page 166):

> "Its order settling final account of an executor, administrator, or guardian, is a judgment in rem, final and conclusive against all the world after the time for appeal has expired." Citing Connolly v. Probate Court, 25 Idaho 35; Walker Bank & Trust Co. v. Steely, supra.

The court went on further to say:

> "And, in probate matters, the same verity attaches to the judgments, record, and proceedings of the probate court, as attaches to the same matters in other courts of record."

See also Penn Mutual Life Ins. Co. v. Beauchamp, 66 P. (2n) 1020.

Van Gilder et al. vs. Warfield's Unknown Heirs and Devisees, 120 P. (2d) 243, involved sale. The court said:

> "The order of confirmation would be subject to impeachment only in case respondents be found guilty of fraud." Citing Harkness v. Hartwick, 49 Idaho 794, in which it was held to be fundamental that a probate sale will not be set aside for fraud without allegations and proof that the purchaser at such sale was a party to the fraud.

The case of Horn et al. v. Cornwall et al. 139 P. (2d) 757, involved the final account, and the court said (page 759):

> "If the probate court erred * * *, the answer is that a remedy was available to appellants to have the judgment reviewed and the error corrected both by timely motion in the court where entered and by appeal."

It is useless to cite numerous other cases of the Supreme Court of this state, but it would seem that from the foregoing it would appear that when a probate court has acquired jurisdiction of the parties and of the subject matter, and there is no question of fraud involved, that a decree of distribution, an order confirming sale, or any order settling final account is conclusive as to all the world unless proceedings are instituted under section 5-905 to modify or change such order or decree, or an appeal is taken within a time allowed by law, and that title to property involved in such orders or decrees cannot be disrupted by any collateral attack.

PRES: Thank you, Mr. Boughton. Next we are going to hear from Earl Morgon of Lewiston on "Attempt of Third Party to Convey for Consideration to Spouse as Separate Property."

EARLE W. MORGAN: The effect of an attempt of a third party to convey real property for a consideration to a spouse as separate property is not easy to accurately state.

I approach this question with fear and apprehension. I know before I start that there is a divergence of opinion on this subject. I am going to make this statement as brief as possible, say it as quickly as I can put it into understandable language—and then duck.

It is probably advisable to state what is not being considered. It will not be treated from the standpoint of determining the rights of the spouses as between themselves, or between one of them and the heirs of the other. This, for the reason that in such cases all facts and circumstances would be gone into. Presumptions are rebuttable. Recitals may not be binding. The question will be treated from the viewpoint of an attorney examining an abstract of title where he comes upon a previous conveyance containing such recitals.

I.C.A. 31-903 provides that all property owned by a wife before her marriage, and that acquired afterward by gift, bequest, devise or descent, or that which she shall acquire with the proceeds of her separate property, shall remain her sole and separate property. This statute was amended by Chapter 62 of the 1941 Session Laws, making its provisions applicable either to husband or wife.

I.C.A. 31-907 provides that all other property acquired after marriage, including the rents and profits of the separate property, is community property. This section was amended by Chapter 23 of the 1943 Session Laws, in which it is provided that rents and profits shall mean income only, and also in which the legislature cleared up the question of a conveyance from husband to wife to get around the objection of I.C.A. 31-913, where it provided that both husband and wife must join in the conveyance.

THE STATUTE

I want to read 31-907 I.C.A. and call attention to its peculiar wording. It provides:

> "All other property acquired after marriage by either husband or wife, including the rents and profits of the separate property of the husband and wife, is community property, * * *"

This far, the statement in the statute is very clear. Everything is community property, except the property acquired as provided in I.C.A. 31-903,

as amended by the 1941 Session Laws, Chapter 62. Then follows this wording:

> "* * * unless by the instrument by which any such property is acquired by the wife it is provided that the rents and profits thereof be applied to her sole and separate use; * * *"

Stopping at this point, some doubt is created. If the instrument by which the property is acquired provides that the rents and profits be applied to her sole and separate use, does the statute mean that the *rents and profits of community property belong to the wife*, or does it mean that the *whole property is the separate property of the wife?* The section then continues:

> "* * * in which case the management and the disposal of such rents and profits belong to the wife, and they are not liable for the debts of the husband."

It is difficult to construe this statutory phraseology as meaning that the whole property is separate. It does not say so. It uses the words, "they are not liable for the debts of the husband." It talks only about the rents and profits. Probably as far as it is safe to go is to say that this wording of the statute, when used in a deed, makes the rents and profits the separate property of the wife. At least as to transactions after April, 1943, the amendment, Chapter 23 of the 1943 Session Laws, sheds further light. It added the clause, immediately following that above quoted:

> "Rents and profits as used in this chapter shall mean income only."

It may be that this added clause was attempting to distinguish between rents and profits on the one hand and proceeds on the other. Even if so, it places added weight to the construction that it was the income and not the property which was being designated as the separate property of the wife.

If the statute doesn't make the whole property separate by the use of such wording, then what follows when the conveyance includes two things, namely, states a consideration, and that the property itself is separate property. These would be found in the recitals in the deed.

RECITALS NOT CONCLUSIVE

Recitals in the deed are not necessarily binding. (11 Am. Jur. 203-1 de Funiak 142). Ample reason exists why they should not be binding, and this is perhaps best illustrated by the Washington case of In Re. Murphy's Estate, 90 Pac. 916, where the husband, without the knowledge or consent of his wife, caused the deed to contain the following recital:

> "It is hereby declared that the above described property is purchased by the said Patrick Murphy, with money belonging to him, as his separate property, and not as community property."

In his will the said Murphy states:

> "I declare that I own said described real estate in my own separate right and that the money by which said lots were purchased was received by me as an inheritance from my brother, John Murpby, who died in San Francisco, California, and that my wife, Mary Murphy, has no community interest whatever in said described lots."

Murphy died, the court construed the deed and will, and held:

> "The recitals in the deed were unknown to the respondent at all times prior to the death of Patrick Murphy and did not destroy the community character of the property conveyed, which had been purchased with community funds."

We may have these questions presented to us increasingly. A number of properties were purchased by wives while their husbands were in service. To avoid complications many wives took title in their own names, and as their separate property, purchasing with community funds. This is only one illustration of the various situations that have arisen and can and will arise.

NOTICE

Can a purchaser buy in good faith when the deed contains these two recitals, consideration, and that it is separate?

Any consideration paid by a married person is presumed to be from community funds. (Aker vs. Aker, 52 Idaho, 713, 718). Property purchased with community funds is community property. A recital in a deed that the property is the separate property of the spouse is prima facie evidence only, of the fact that it is separate property. (31 C.J. 65; 11 Am. Jur 203-11). Thus you have a presumption that the property is community property, because a consideration is stated, versus prima facie evidence that the property is the separate property of the wife, because of the recital. Which will prevail?

Recitals and affidavits aren't any too good at best, but we use them for lack of a better, and, when there is nothing in conflict, generally rely on them.

But here there *is* a conflict. Can such a purchaser be a B.F.P. In the early case of Ramsdell vs. Fuller, (1865) 28 Cal. 38, 44, 45, the court used some language that would appear to fit well here:

> "Upon the best view for plaintiff, the deed upon its face was equivocal. But it afforded to all persons seeking to acquire title under it a clue to the title, which they were bound to pursue, or suffer the consequences of their laches."
>
> "If the plaintiff did not avail himself of the means afforded by the record to ascertain the true state of the title, it is his own fault, and he cannot claim to be an innocent purchaser."

STATUTE OF LIMITATIONS AND ESTOPPEL

As the conveyance is not signed by the grantee, nor his or her spouse, and as any facts that might constitute an estoppel, or start the running of the statute, would have to be saparately inquired into in each transaction, these features are not discussed.

* * * * * *

Based on the foregoing, these conclusions can be drawn:

First: Section 31-907 states that rents and profits of separate property are community property, unless the instrument by which the wife acquires

separate property states that the rents and profits thereof are her separate property. This section does not appear to affect the title to the property.

Second: With the conflicting recitals of consideration and separate property, the purchaser is put on notice, and he probably cannot be an innocent purchaser until he has made investigation, and he then proceeds at his peril.

PRES: Thank you, Mr. Morgan. The next topic, "Recording Mortgage Before Conveyance to Mortgagor," is to be taken up by Robert M. Kerr, Jr., of Blackfoot.

ROBERT M. KERR, JR: As is already very apparent during the proceedings this year we are devoting a great deal of our time, as we have in previous years, to the discussion of questions about titles. It seems that attorneys have more differences of opinion in regard to titles than in regard to any other matters. We have been trying to reach agreements, but in the last analysis, even if we want to pass a title, we are worried about the next attorney turning it down and having the whole thing kick back on us.

Perhaps this particular problem assigned to me for discussion has worried you, too. It has other members of the bar.

An application is made for a loan. Perhaps from a veteran such as I am, trying to find some kind of a roof to put over my head for not less than two and a half times what I received for my old house when I went into the service. We will assume he finally located a house. (Many don't). The sellers want all their money while the price is good, and the purchaser places an application for a loan which is approved. The mortgage papers are executed and recorded and then the money is forwarded to the local agent for closing, which means paying for the property and receiving and recording the deed to the mortgagor. Sounds like a simple operation, but it doesn't entirely fit with the theory of our recording statutes and some of the decided cases.

There are really two problems involved; the effect of the mortgage on the after-acquired title, and the operation of the recording statutes.

In the first place, at common law a mortgage placed on property to be acquired in the future was absolutely void. (36 Am. Jur. 707). But a different rule has prevailed in equity and it has been recognized in many cases that a mortgagor may be estopped from setting up, as against the mortgage, an outstanding title subsequently acquired. This estoppel may arise by virtue of express covenants of warranty, statutory enactments passing an after-acquired title by operation of law, or implying covenants as a matter of law, or from express recitals or averments or language in the conveyance clearly indicating that it was the intention and contemplation of the parties thereto to transfer some particular interest or an estate of particular quality. We have statutes which would support such estoppels, but Section 44-807 settles the matter expressly as to mortgages in Idaho, by providing that "Title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security for the debt in like manner as if acquired before the execution."

We now come to a consideration of the inurement as against third parties, and presently almost find ourselves in the endless circle of the old law school paradox. If Able takes a mortgage without recording it, Baker takes a mortgage with actual notice of Able's mortgage and records his mortgage, and Charley takes a third mortgage and records it with constructive notice of Baker's mortgage, who has the prior lien? Able has priority over Baker who has priority over Charley, who has priority over Able's unrecorded mortgage.

There are two well-defined rules on this question; one, that title inures to the prior mortgagee even as against a subsequent purchaser without knowledge of the prior grant, and the other, that the title does not inure as against a subsequent purchaser.

The Courts of Delaware, Illinois, Moine, New York, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Michigan, Massachusetts, and Ohio are listed in an annotation in 25 A.L.R. 84 as directly supporting the first rule along with cases from California, Georgia, Iowa, Kentucky, Missouri, Texas, Arkansas, New Hampshire, Oklahoma, and Pennsylvania as indirectly supporting the rule. In the California case, Christ vs. Dana, 34 Cal. 548, there is no discussion of the fact that the claimant was a subsequent grantee and the facts do not appear as to notice. The general theory of these cases is that the estoppel arising from the previous grant binds not only the mortgagor, but also his grantee and successors. The estoppel adheres to the land and is transmitted with the estate, whether the same passes by descent or purchase, and becomes and forever after remains a muniment of the title so acquired.

In this view of the case our registry system can have no control of the question. A typical case is that of Bernardy vs. Colonial & United States Mortgage Co. (S.D.) 98 N.W. 166. While it involved a prior deed rather than a mortgage, the ruling would have undoubtedly been the same. An entryman Wilkes conveyed the property in 1891 to defendant by a deed purporting to grant a fee simple title and the deed was recorded. A mortgage was given by Wilkes in 1893, foreclosed, and the title thereunder, if any, became vested in the plaintiff through mesne conveyances. Patent was not secured and recorded until 1895. South Dakota statutes regarding transfers and acquisition of subsequent title were also taken from California as ours were, and the recording statutes are substantially the same with one exception. After finding that the after acquired title passed by "operation of law" to the defendant, the court proceeded to find that the plaintiff had constructive notice of this deed as against the contention that the plaintiff was not required to examine the record for any conveyances prior to the patent. The Court said, "The rule contended for by the respondent, that he was not required to look back of Wilkes' patent, prevailing in some states where the common law is still in force, in which after-acquired titles do not pass to the grantee, has no application under the registry law of this state and the law providing that after-acquired titles shall pass to the grantee . . . The only party who can acquire a title superior to that evidenced by the record is one whose title 'in good faith and for a valuable consideration' has been first duly recorded. No exception is made of conveyance prior to the acquiring of the legal title. Plaintiff had constructive notice and is presumed to have had knowledge of the law providing that the subsequent legal title passed to the defendant by operation of law. The theory that the plaintiff was not bound by constructive notice of the deed is entirely inconsistent with our registration act, and our law as to passing subsequently acquired titles. It, in effect, strikes from our Code the provisions above quoted in relation to after-acquired titles, for if a party is not required to look beyond the legal

title, or is not charged with constructive notice of any conveyance prior to the acquisition of the legal title by the party under whom he claims, the provisions of the Code as to after-acquired titles can have but very little, if any, effect. In this state, therefore, a purchaser of property is necessarily charged with notice of all conveyances or mortgages made by the party under whom he claims. Both claim under the same party so no question is presented as to notice of any record of conveyance lying outside of the plaintiff's chain of title."

The South Dakota view of the registration laws is strengthened by the provisions of their code which require a tract or numerical index showing all the conveyances made of the property, regardless of the parties involved. The prior conveyance could easily have been discovered. The court's decision appears to be well-reasoned and to reach a sound conclusion. But an equally strong dissent is written in favor of the other rule that the recording laws prevent the after-acquired title from inuring to the benefit of the grantee who took a conveyance from one who had no title at the time of the conveyance. The dissenting justice contended that it subverts the purpose of the registration law and is utterly absurd to require the search beyond the patent. He quotes at length from 2 Pom. Eq. Jur. 658, to the effect that the purchaser "is not bound to inquire farther back, and to ascertain whether the vendor has done acts which may impair his title prior to the time at which it was vested in him, as indicated by the records. This view is supported by many decisions—it seems, by the weight of authority—which hold that a purchaser need not prosecute a search for deeds or mortgages made by his own vendor further back than the time at which the title is shown by the record to have been vested in such vendor, or, in other words, a purchaser is not bound by the registry of deeds or mortgages from his vendor made prior to that time."

Other cases supporting this view are from Connecticut, Missouri, New Jersey and South Carolina. As said by the Connecticut court in Wheeler vs. Young, 55 Atl. 670: "It may be said that such estoppel by deed is not an equitable doctrine, but is a rule of the common law based upon the recitals or covenants of the deed. We reply that, as a rule of law, it has been so far modified by the registry laws as to be no longer applicable to cases where its enforcement would work such an injustice as to give priority to the title of one who negligently failed to examine the records before purchasing of a grantor having no title, or who purchased at the risk that his grantor might thereafter acquire title, over that of a subsequent purchaser in good faitb, and in reliance upon tbe title as it appeared of record."

According to Patton on titles, page 196, "It is further the general rule that a purchaser need not search the records for deeds or mortgages given by the owner prior to the date of the conveyance by which the latter obtained title. The rule is otherwise in a few jurisdictions. While it is generally true that if a grantor has given a conveyance with covenants of title or warranty prior to acquiring title, it will inure, as aaginst him, and his heirs, to his covenantee, this is not true under the majority rule just stated when there intervenes an innocent purchaser from him. There being nothing to afford constructive notice to the purchaser which was recorded subsequent to the date from which it is his duty to search, his title will prevail over and bar that of the covenantee. In states therefore, which follow the majority rule, one whose title depends upon the doctrine of inurement, should re-record his conveyance, or otherwise place evidence of his title of record, after the record of the conveyance to his grantor. (Pocket part changed "record" to "date").

It is perhaps proper to call your attention at this point to the holding of Higgins vs. Dennis, Iowa, 74 N.W. 9, and other cases, requiring the subsequent purchaser to examine back to the *date* of the deed to his grantor, and not merely to the date on which it was recorded. This has led to the common practice of dating deeds back before placing them of record.

I should also call attention to the special position of purchase money mortgages. Even in jurisdictions adhering to the general rule that title passes to the former mortgagee or grantee as against the second, the title does not inure as aaginst the holder of the purchase money mortgage. The New Jersey Court in Daly vs. New York and G. L. R., 38 Atl. 202, goes so far as to say that the holder of a mortgage on after acquired property takes such property subject to all liens upon it between the parties.

We thus come to the $64.00 question. Which rule applies in Idaho? Our court bas never spoken directly. We use the name index officially, though most abstracters and many counties also maintain a tract index showing all instruments relating to the property. California has at least said that "the after acquired title became subject to a mortgage given previously, but not as against intervening incumbrancers." They appear to have actually been the holders of a purchase money mortgage. Tolman v. Smith (Cal.) 24 Pac. 743, 745, but the case has never been cited on the point, so far as I have been able to find.

There are three Idaho cases which have been discussed in connection with this problem. Harris v. Reed, 21 Idaho 364, 121 Pac. 780; Jackson v. Lee, 47 Idaho 589, 277 Pac. 548; and Maxwell v. Twin Falls Canal Co., 49 Idaho 806, 292 Pac. 232. They are not in point here, however, because tbey involved recorded instruments by parties who were total strangers to the record and the rule, generally adopted by all courts, that instruments by strangers are not constructive notice was properly applied. In the Harris case, by way of dictum, the court stated that even actual notice of tbe record by a stronger would not put the purchaser upon inquiry. In the Jackson case, the mortgagors had conveyed prior to giving the mortgage. In the Maxwell case the court caused confusion when it added as a remark, that "It is therefore thought documents executed by strangers to the title are not instruments as contemplated by the law, and *are not* entitled to record because not authorized by any statute to be so recorded." Of course, if such is the law, the mortgagee relying on after acquired title cannot lawfully record his mortgage until the title is acquired and made a matter of record, and we are discussing a moot question.

As a matter of practice, perhaps the question is a moot one. I bave been unable to find any cases in point in Idaho or California, though I am sure that many such mortgages have been made, recorded, and foreclosed against subsequent purchasers of the property. The legislature in 1941 amended Section 54-811 to provide:

"Every conveyance of real property acknowledged or proved, and certified, and recorded as prescribed by law, and which is executed by one who thereafter acquired an interest in said real property by a conveyance which is constructive notice as aforesaid, is, from the time such latter conveyance is filed with the Recorder for record, constructive notice of the contents thereof to subsequent purchasers and mortgagees."

This amendment has the effect of placing Idaho in line with the South

Dakota interpretation and confirm the present practice of many lending institutions. We are actually only concerned about such mortgages made before the amendment because I do not think that the amendment can be given a retroactive affect and change the relative rights of parties as they existed prior to the amendment. 45 Am. Jur. 436. Inferentially the amendment indicates that the law must have been otherwise prior to the amendment.

The present practice of abstractors who show every instrument regardless of whether or not it is in the chain of title may be one of the reasons why the question has never arisen. In spite of the dictum in the Harris case, the courts throughout the United States generally have held that actual notice of a recorded instrument, even though not entitled to record, is as chargeable to the party as knowledge of the original instrument. As said by Patton on titles, at page 223, "By reason of examination of an abstract or of a title report a purchaser may have actual notice of all records affecting the property involved, and the question of whether they are sufficient to charge him with constructive notice is frequently immaterial." California held thus in Parkside Realty Co. v. MacDonald, 137 Pac. 21.

Also, the subsequent purchaser is chargeable with the recitals in any deeds or other instruments in his chain of title, (Glover v. Brown, 32 Ida. 426, 184 Pac. 649) and it is generally the practice for grantors to protect themselves by making their deeds subject to such mortgages as may be outstanding, requiring the purchasers to assume them, or at least advising them of their existence.

Since there seems to be nothing to indicate conclusively which line of authorities our court would follow if the question were presented, the only safe course we can adopt in regard to transactions prior to the amendment is to say that the status of the mortgage as a first lien which can be enforced against subsequent purchasers without actual notice is doubtful, and at the same time advise subsequent purchasers that any such mortgage may be enforceable as a lien.

PRES: Thank you, Mr. Kerr. Z. Reed Millar of Boise will now take up the topic "Joining Surviving Spouse in Probate Deed."

Z. REED MILLAR: The question involved appears to be exclusively connected with the community property law and also as to the estate of a deceased husband where the executor or administrator is other than the surviving spouse.

It is well known that no administration of the estate of the wife is necessary if she dies intestate except as provided in Section 14-114 I.C.A. Under this provision the surviving husband or any other person having derived title to the community property through or under the surviving husband may file the verified petition and have the matter of succession by the surviving husband determined. Thus apparently the Probate Court would have no jurisdiction under this statute with reference to the wife's estate for any purpose except the determining of succession and inheritance tax. See Kohny vs. Dunbar, 21 Idaho 258, and Ewald vs. Hufton, 31 Idaho 373.

On the question of the jurisdiction of the Probate Court over the estate of a deceased husband since the entire community property is subject to community debts, there appears to be no question but that the Probate Court has full jurisdiction over "the entire community estate for the purpose of satisfying the community debts which makes it necessary for the Probate Court to assume jurisdiction over and administers both moities of the community fund." See Swinehart vs. Turner, 44 Idaho 461.

It appears, however, that jurisdiction over the wife's estate under these conditions is restricted exclusively for debt settlement purposes and the question arises in the case of sale of community real estate belonging to both spouses which may be in excess of an amount necessary for settlement of community debts as to whether or not there must be a joinder by the surviving wife in the instrument of sale. On this question Bancroft Probate Practices, page 1006, has the following to say:

> "Where on the death of the husband the statutes expressly provide that the community property is subject to his debts and the expenses of administration of his estate, sale of such property as an incident to administration upon his estate for the purposes named may be made and such sale passes the wife's title as well as that of the deceased husband. * * * The Idaho Court, however, has intimated that in that state under the doctrine that the wife's interest in the community property is not as heir, and is not in any way dependent upon administration of the husband's estate for transmission, and attempted sale of the community property without consent of the wife would be wholly void as an attempt to sell property of a living person."

Supporting the above expression is cited the case of Swinehart vs. Turner, 38 Idaho 602. In this case a stranger to the community was appointed administrator and a sale was had by the administrator in probate proceedings and the wife did not join in the conveyance. The court upon a challenge of the conveyance said, "It is a general rule that Probate Courts have no jurisdiction except over the estates of deceased persons and they cannot administer the estate of a living person. * * * If the Probate proceedings ordering a sale of this entire property could be considered one strictly in rem, such sale might result in depriving the survivor of a marital community of a vested interest in real estate, without notice of such proceeding, which would be in violation of the due process clause of the constitution."

The court in this case does not pass upon the question of the jurisdiction of the Probate Court to order the sale of her vested interest in this property, but infers that the court has no such jurisdiction. Upon the subsequent appeal of this case as decided in 44 Idaho 461, the court expressly held that an innocent purchaser for value from the purchaser at the Probate Sale was protected under such a conveyance and upon the basis of there being a bona fide purchaser, the sale was upheld but the court did not reverse the implication raised in the previous case. I am, therefore, of the opinion that until the holding of this case has either been reversed or new legislation enacted, a separate conveyance from the surviving wife is necessary under these conditions.

PRES: Thank you, Mr. Millar. The next speaker this afternoon is going to speak on "Delivery of Deeds in Idaho," Ralph R. Breshears of Boise.

RALPH R. BRESHEARS: The very fine paper delivered this morning by Mr. Norris illustrates some of the problems, I think, that are met in the practice with respect to the delivery of deeds. I don't think there is anyone in the practice who has not occasionally had a husband or wife or both come

into his office and ask advice as to whether or not they could execute simultaneous deeds and put them in a safe or each hold his own deed and thus do away with the necessity of probating the estate. That is only one of the possibilities that we are confronted with when we attempt to give advice as to what constitutes the delivery of a deed.

If you contemplate suicide, or if there is any possibility that you may at any time in the future be moved to take your own life, you should not leave any executed deeds among your private papers unless you have made up your mind that the grantee is to have the property thereby conveyed.

In short, our Supreme Court has declared it to be the law of this jurisdiction that if a person who has executed a deed and secretly filed it with his private papers, commits suicide, thus preventing such person, the grantor, who up to the time of death has retained complete dominion and control over the deed, from thereafter revoking it, there has been such constructive delivery of the conveyance inter vivos as will pass title.

The case which announces this radical departure from long established rules, Johnson vs. Brown, 144 Pac. 2d 198, is, I submit, against the great weight of authority, is contrary to the rule as the Bench and Bar of Idaho understood it prior to the decision, and most certainly is contrary to the authorities referred to and quoted in the opinion.

While the case of Gonzaga University vs. Masini, 42 Idaho 660, is distinguishable upon the facts in that the deed there involved contained the provisions:

> "This deed is given and of no effect until after my death, and is not to be recorded until after my death."

the court in its opinion quoted with approval from 8 R. C. L. 985, as follows:

> "And while the rule that the grantor must part with all dominion and control over his deed does not mean that he must put it out of his physical power to procure repossession of it, nevertheless, if the deed remains within the grantor's control and liable to be recalled, there is, according to almost unanimous authority, no delivery, notwithstanding that he has parted with its immediate possession. He must retain no right to reclaim or recall it. * * *"

and, in the opinion, the court unequivocally announces the rule to be:

> "While the authorities, including this court, have quite generally held that whether or not there has been a delivery of a deed, where its delivery is controverted, is a question to be determined upon the facts and circumstances of each particular case, the text-writers and the adjudicated cases, without exception so far as our research discloses, agree upon the rule that in order to be an effectual delivery, the deed must be placed beyond the dominion and control of the grantor; that there can be no delivery where it appears that the grantor has retained a right to repossess the instrument. * * *"

To put it in the language of Justice Ailshie in the case of Cell vs. Drake, 61 Ida. 299:

> "To my mind, the test to be applied to this case is: Did the grantor reserve any right to recall the deed from the possession of the depository? If she did, there was no delivery and the conveyance failed. If she did not reserve the right to reclaim it, the title passed, subject to grantor's life estate therein. This question cannot be answered by what she thereafter did in reclaiming the deed but it must rather be answered by ascertaining what she had a legal right to do."

The uncontroverted facts in the Johnson case established by witnesses on behalf of the grantee named in the deed are as follows:

The deed in question was dated November 15, 1940, and was acknowledged on the afternoon of March 27, 1941. About three quarters of an hour after the acknowledgment of the deed by the grantor, she committed suicide as the Sheriff of the county was entering her home. After her death, her sister-in-law found the deed inclosed in an envelope addressed to the grantee, and deposited in a box belonging to the deceased grantor. The sister-in-law did not know that the deed was in the envelope, or the box, and had no instructions to deliver it to the grantee. The deed was delivered to the grantee after the death of the grantor, by her sister-in-law, and no one knew of its whereabouts prior to her death, or had any instructions to deliver it to the grantee. The grantee himself knew nothing about the deed until it was found among the private papers of the grantor after her death.

The opinion of the court states that the above are the facts, and in commenting upon them, makes the following pertinent statement:

> "While there may have been other influences actuating her, the inference is at least legitimate that it was not until the day the deed was acknowledged that she had definitely and finally decided upon the transfer."

The court concedes that the grantor's self-destruction was, in all probability, impelled by fear, fear that she was about to be arrested for embezzlement, for the reason that the Sheriff was entering her house just as she fired the fatal shot, but peremptorally disposes of the rule that constructive delivery cannot be found unless the grantor has, with intent to irrevocably consummate delivery, placed the instrument beyond her dominion and control before death, with the statement that her self-destruction had the affect of preventing her from thereafter revoking the deed.

When a deed is found in the possession of the grantor at the time of death, the presumption of law is that it was not delivered:

> Lawn vs. Donovan, 42 Pac. 744
> Orris vs. Whipple, 129 A.L.R. 1

and I do not understand it to be the law that the grantor's sudden self-destruction brought about by fear for the consequences of a criminal act, can because of the fact that death prevents the future exercise of control over the instrument, be considered as controlling or even significant in determining whether or not the intent to deliver was ever formed prior to death.

Dominion has been defined as "independent right of possession, use and control." Control has been defined as "power or authority to control," and if a grantor executes a deed and secretly deposits it with private papers where it is found after death, it would seem that there has been no delivery, either actual or constructive, for the dead hand delivers nothing and intent cannot be presumed.

PRES: Thank you, Mr. Breashears. At this time we will throw the meeting open for discussion from the floor in order that all may have an opportunity to express their opinions. There have been three or four controversial topics that have been discussed during the course of this convention, and no doubt there are those who hold other views than those expressed, and at this time we are going to give you an opportunity to be heard.

PHILLIP J. EVANS: Fellow members of the Idaho State Bar: While the time allotted will not permit me to go at length into some of the pursuasive and compelling reasons against adopting the suggestions for rendering justice to the Judges of Idaho, I think that some point should be presented at this time contrary to the ideas already presented. I must frankly confess that I was shocked at the suggestions made that we need to make our Judges into a special, privileged group over which the people of the State of Idaho would bave no control. To select Judges by the method suggested by the distinguished ex-Judges—whose bosoms apparently were rankling with the thought that the position of Judge didn't give them an equal opportunity with the rest of the citizens of the state to become rich, and therefore the people ought to see that they get some special privileges and occupy their positions for life—would have the effect, in my opinion, not of making the Judges independent but would make them irresponsible. It is contrary to every principle of our government.

The idea of responsibility of public officers, including Judges, is one of the most fundamental principles of our American system. I can see no reason why the Judges should not be responsible to the people for whom the government exists.

I was shocked at the statement of one of the speakers that there are only two countries in the world which elect their judges to office—the United States and Switzerland. To me, that was something strongly in favor of our present system, a system that has worked successfully in our country and that is being followed by the most progressive government in the world outside of our own government. It is no argument, to me at least, that because Mexico and China and India and every autocratic and dictatorial form of government on the face of God's green earth appoints their Judges for life and prevent the people from having any opportunity in passing any opinion as to the manner in which they are performing their duties, that we should inaugurate those systems when the two most progressive countries in the world, these United States of America and Switzerland, have seen fit to adopt our present system. And I think we should stay with that system instead of going back to the old reactionary system from which we departed when this government was established.

I cannot understand the reason why intelligent men, and certainly the members of the Idaho State Bar are as intelligent as any men in the country, are anxious to create and elect Judges into an institution in which they will be irresponsible masters of the state dispensing justice according to their own sweet will.

It reminds me of the story in Aesop's Fables of the frogs who sent a petition to Jupiter asking him to give them a king to rule over them. Jupiter sent them a king—a log which lay in the pond where the frogs made their homes. The log exercised no jurisdiction over them, and they felt that it

was too inactive, that it didn't have enough power, intelligence and will. So they sent another delegation to Jupiter asking him to give them another king, and he sent them a stork. The stork immediately commenced devouring the frog population and decimated them until they begged Jupiter to again grant them relief.

What fatal delusion possesses the members of the Idaho Bar that they want to make their Judges rulers over them and place them in a position where they can exercise their arbitrary will and reduce, as you have seen them reduce, attorneys practicing in their courts to a condition of quivering impotence because of some sarcastic or sneering remark made by the Judges. What superstition, if you please, possess us that makes us want to give them more power. They have too much power already.

I think the greatest safeguard of our institutions is to keep the Judges responsible to the people and let them know that they have got to submit themselves as candidates and make an account of their actions on the bench periodically in order to keep a decent sense of responsibility in their minds.

PRES: Who wishes to be next? We will be glad to hear from anyone on that particular matter or some other matter. We don't want to limit anyone, and we will take all the time necessary.

E. V. BOUGHTON: In the case of an action to quiet title where the deed has been executed and placed in escrow and the action is instituted in the name of the grantee, the deed not having been recorded, is he entitled to judgment?

RALPH R. BRESHEARS: I think our Supreme Court has held that an action to quiet title cannot be commenced by anyone other than those holding title to the property.

PRES: We have with us today Judge Dana E. Brinck, a former resident of this state, and we want to give him an opportunity to make any comments be may wish.

JUDGE DANA E. BRINCK: After listening to George Donart make a suggestion to the bar, I did want to say something. I have asked if anything constructive was being done by the bar along the lines suggested by Senator Donart, or along any other lines, to meet the same problems. As far as I have learned nothing is being done, and I just want to say that it is probably up to the Idaho State Bar to get a working committee on our title problems here, or it may be taken out of your hands.

I have in mind some titles in Washington. The last legislature nearly passed an amendment to the statute in which the first deed transferred on any property would automatically bring the title under registration. The law was very poorly drawn. It would be impractical and would have brought about confusion. This proposed amendment took away certain of the exceptions to the certificate of registration that are now provided by the present statute that would have resulted in interminable litigation. It was a dangerous thing.

There is a great deal of pressure by farmers' organizations. They see the problems that are here, but they don't know what the remedy is. There is pressure all over the United States by farmers' organizations to get something of that kind through. I think it is up to the bar to get a com-

mittee working on developing remedies for what you have talked about here during the last few days.

We use, of course, all kinds of title evidence up there. We use the abstracts. We use Torrens certificates when they are supported by a title insurance policy, because there is no guarantee fund back of the Torrens System in our state, and we use the title insurance very satisfactorily. Title insurance by the state would, in my opinion, be the ideal system, because it would provide permanent funds and would assure solvency. But I think it is quite foolish to even hope for that. Title insurance with state supervision over rates is something I really think the bar should investigate thoroughly. Some solution for the situation must be developed.

PRES: Thank you, Judge. We also have with us this afternoon T. J. Jones, Jr., of Boise, who is back from New York where he has attended the Practicing Law Institute of the American Bar Association.

T. J. JONES, Jr.: Some of the members asked me about this school. It is conducted by the legal section of the American Bar Association, and you men are all receiving literature from the Practicing Law Institute. This was their fifth session, and the large law firms in New York Ctiy, in connection with the Carnegie Foundation, have contributed about $300,000.00 to establish this school. It is a refresher course with experts in their respective subjects giving a series of lectures. You can go from one week up to seven weeks. The lectures are held in New York City. They have the foremost text writers and men available, and most of the men are contributing their time and effort. The school is definitely for practicing attorneys, and they deal with questions that arise in the practice. There are some 36 or 37 subjects covered throughout the course. From time to time you will get literature from the Practicing Law Institute in regard to the program and the correspondence courses that they are conducting. For a very nominal fee you can enroll in their correspondence course, and they will answer the questions or the papers after you send them in.

There is one thing they did key-note in these lectures, and that is that the attorneys are missing the boat in regard to taxation and taxation litigation and procedure which they predict will become voluminous, and it is highly profitable.

I might say as a side note that after hearing these lectures today and yesterday, I am more than ever proud to be a member of the Idaho Bar and am allowed to associate with you men who are members of the Idaho Bar. I feel that when you go up against a lawyer in Idaho, at least he is a lawyer, and he is a pretty well qualified man all around. You are not members of a law mill. It would be difficult for you to conceive some of those law mills back there that have a total membership of more men than are in this room, and where maybe your duties would be annotating one section of a statute day after day, and that is what some of those men do, and they call that practicing law. I am glad to be back in Idaho.

PRES: Thank you, Mr. Jones. We have one paper that was to have been given yesterday, but Mr. Racine was not able to attend. I understand that he took this matter up with Mr. Ennis of the Boise Bar.

PAUL B. ENNIS: I should explain that Mr. Racine was unable to be here for reasons that are beyond his control. His prepared paper on the

subject of "Additional Standards of Examination of Abstracts of Title" has not been received. This morning I was asked to make a few remarks about the subject matter. I do not have a prepared paper, and in view of the limited time for preparation, I hope you will be patient with me and bear with me.

This does seem to be an important subject. I am sorry that I could not have spent a great deal of time preparing it. For many years this group has given consideration to general standards of title examination. Those of you who attended the 1942 annual meeting will recall Mr. George H. Van de Steeg's excellent presentation on that subject. At that time he submitted his committee's recommended standards. Again in 1944, at our annual meeting, Mr. Van de Steeg submitted his committee's recommendations with respect to additional standards. Standards numbered 1 through 13, submitted in 1942, were adopted at the 1944 annual meeting, and by resolution, the additional standards numbered 14 through 16, proposed at the 1944 meeting were submitted to the local bar associations for consideration. I am informed that no objections against these additional standards have been lodged in Mr. Griffin's office by any of the local bar associations. It is therefore to be assumed that it is now in order to propose formal adoption of standards numbered 14 through 16. I understand that the Resolutions Committee will propose a resolution with respect to these additional standards.

As Mr. Van de Steeg pointed out, certain standards which might have been recommended were not for the reason that his committee considered them to be more appropriately the subject matter of legislation. With this in mind, I would like to call your attention to a provision of the Michigan law which is Public Act of Michigan, No. 200. The Act provides:

"An Act to define a marketable record title to an interest in land; to require the filing of notices of claim of interest in such land in certain cases within a definite period of time and to require the recording thereof; to make invalid and of no force or effect all claims with respect to the land affected thereby where no such notices of claim of interest are filed within the required period; to provide for certain penalties for filing slanderous notices of claim of interest, and to provide certain exceptions to the applicability and operation thereof.

"Section 1. Any person, having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for 40 years, shall at the end of such period be deemed to have a marketable record title to such interest, subject only to such claims thereto and defects of title are not extinguished or barred by application of the provisions of succeeding sections of this act and subject also to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed and which have been recorded during said 40 year period: Provided, however, that no one shall be deemed to have such a marketable record title by reason of the terms of this act, if the land in which such interest exists is in the hostile possession of another.

"Section 2. A person shall be deemed to have the unbroken chain of title to an interest in land as such terms are used in the preceding section when the official public records disclose:

"(a) A conveyance or other title transaction not less than 40 years in the past, wbich said conveyance or other title transaction purports to create

such interest in such person, with nothing appearing of record purporting to divest such person of such purported interest; or,

"(b) A conveyance or other title transaction not less than 40 years in the past, which said conveyance or other title transaction purports to create such interest in some other person and other conveyances or title transactions of record by which such purported interest has become vested in the person first referred to in this section, with nothing appearing of record purporting to divest the person first referred to in this section of such purported interest.

"Section 3. Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all interests, claims, and charges whatsoever the existence of which depends in whole or in part upon any act, transaction, event, or omission that occurred prior to such 40 year period, and all such interest, claims, and charges are hereby declared to be null and void and of no effect whatever at law or in equity: Provided, however, that any such interest, claim, or charge may be preserved and kept effective by filing for record during such 40 year period, a notice in writing, duly verified by oath, setting forth the nature of the claims. No disability or lack of knowledge of any kind on the part of anyone shall suspend the running of said 40 year period. For the purpose of recording notices of claim for homestead interests the date from which the 40 year period shall run shall be the date of recording of the instrument, nonjoinder in which is the basis for such claim. Such notice may be filed for record by the claimant or by any other person acting on behalf of any claimant who is:

"(a) Under a disability,

"(h) Unable to assert a claim on his own behalf,

"(c) One of a class but whose identity cannot he established or is uncertain at the time of filing such notice of claim for record.

"Section 4. This Act shall not be applied to bar any lessor or his successor as reversioner of his right to possession on the expiration of any lease, by reason of failure to file the notice herein required. Nor shall this act be deemed to affect any right, title or interest in land owned by the United States.

"Section 5. To be effective and to be entitled to record the notice above referred to shall contain an accurate and full description of all the land affected hy such notice which description shall be set forth in particular terms and not by general inclusion. Such notice shall be filed for record in the register of deeds office of the county or counties where the land described therein is situated. The register of deeds of each county shall accept all such notices presented to him which describe land located in the county in which he serves and shall enter and record full copies thereof in the same way that deeds and other instruments are recorded and each register shall be entitled to charge the same fees for the recording thereof as are charged for recording deeds. In indexing such notices in his office each register shall enter such notices under the grantee indexes of deeds under the names of the claimants appearing in such notices.

"Section 6. This act shall he construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons dealing with the record title owner, as defined herein, to rely on the record title covering a period of not more than 40 years prior to the date of such

dealing and to that end to extinguish all claims that affect or may affect the interest thus dealt with, the existence of which claims arises out of or depends upon any act, transaction, event or omission antedating such 40 year peiod, unless within such 40 year period a notice of claim as provided in Section 3 hereof shall have been duly filed for record. The claims hereby extinguished shall mean any and all interests of any nature whatever, however denominated, and whether such claims are asserted by a person sui juris or under disability, whether such person is within or without the state, and whether such person is natural or corporate, or private or governmental.

"Section 7. Nothing contained in this act shall be construed to extend the periods for the bringing of an action or for the doing of any other required act under any existing statutes of limitation nor to affect the operation of any existing acts governing the effect of the recording or of the failure to record any instruments affecting land nor to affect the operation of certain Acts, the numbers of which I will not refer to.

"Section 8. No person shall use the privilege of filing notices hereunder for the purpose of slandering the title to land, and in any action brought for the purpose of quieting title to land, if the court shall find that any person has filed a claim for that reason only, he shall award the plaintiff all the costs of such action, including such attorney fees as the court may allow to the plaintiff, and in addition, shall decree that the defendant asserting such claim shall pay to plaintiff all damages that plaintiff may have sustained as the result of such notice of claim having been so filed for record.

"Section 9. No interest, claim or charge shall be barred by the provisions of Section 3 of this Act until the lapse of 1 year from its effective date, and any interest, claim or charge that would otherwise be barred by said Section 3 may be preserved and kept effective by the filing of a notice of claim as required by this Act during the said 1 year period."

Undoubtedly Mr. Van de Steeg had reference to some legislative provisions similar to the ones I have just read. I am not prepared to defend any particular provision of the Michigan Act. The 40 year period, I suppose, was decided upon in the discretion of the Michigan legislature. There might not be any particular length of time.

To carry on the good work of all those who have served on the committee on real estate titles, I would like to suggest that that committee investigate the desirability of legislation which would simplify land title transactions and render them less expensive through the employment of a hasic device to make it unnecessary, in the normal case, for the title examiner to pay any attention to matters in the chain of title that ccurred prior to a fixed time in the past regarded as reasonable.

I do not have any additional standards to recommend. I don't believe the committee has adopted any additional ones. I think that the next step, possibly, is along the lines I have mentionad towards legislation.

A. T. FREDRICKS: I have a comment to make. We have heard about the Torrens system. We have heard about these certificates to be issued by the state under state authority and with state backing. We know of the extreme cost of title insurance. For three years I had the supervision of land title clearance for the millions of acres that were acquired by the Resettlement Administration in Washington. I learned enough of the difficulty of handling long and drawn out abstracts. I learned enough of the difficulty of relying

on Torrens system certificates, and I learned enough of the difficulty of having to have repetitious title insurance issued that I am going to make a suggestion that I think might be taken by the committee, if one be appointed for the purpose of going into this suggestion that Mr. Donart has made to this group. That suggestion would be this: Even though I recently descended from the ranks of the so called bureaucrats, I, for one, would not be in favor of turning over to the state for administration or backing an endeavor of this kind if it can be handled by private enterprize. I know of no indemnity companies in the United States which have indulged in the type of activity suggested. I believe that if one or more reliable companies were contacted with the idea of having them issue these certificates as suggested by Mr. Donart, after due review of the titles and not subject to being reissued every time the title changed hands, they might be interested. In other words, let there be title insurance on a voluntary basis for anyone who wishes to apply for it but which certificate will carry over the liability for subsepuent purchasers of that tract of land or that piece of real estate. In that way we would avoid the expense of continuous and repetitious title insurance. We would avoid having continuous abstracts, and we would avoid the defect that we have all heard voice here against the Torrens system.

PRES.: Thank you, Mr. Fredricks. Are there any other remarks?

GEORGE L. AMBROSE: Mr. President: I was not able to hear Mr. Donart's discussion, but I think we passed, in the last session of the legislature, a title insurance act. There was considerable discussion on the point Mr. Fredricks raised on title insurance going to subsequent grantees. My experience in three or four sessions and several special sessions of the legislature has been that when it comes to suggestions from the Idaho State Bar on these controversial questions, that the legislature welcomes these suggestions. They know they have been discussed and studied. I think you might be happy to know that. The point I want to make as a member of the legislature—I will not be a member next session—I will suggest that the bar committee make some specific recommendations to the next legislature along this line. I think Judge Brinck's idea ought to be followed out.

PRES: Is there any more discussion to be had? If there is nothing further right now, we will proceed with the report of the Resolutions Committee.

HARRY J. BENOIT: Mr. President and members of the Idaho State Bar: Your Committee worked practically all night on this report—until 6:30 this morning. So the Committee does feel that the least we can ask is that these proposed resolutions be unanimously adopted without any argument.

I. BE IT RESOLVED That this convention hereby extends its unanimous vote of appreciation to the Bar of the Third Judicial District of the State of Idaho for acting as host to the 1946 State Bar Convention and for the entertainment of its members and the wives of its members.

II. BE IT RESOLVED That this convention give a unanimous vote of appreciation to each person who has contributed to the success of the convention by presenting papers or otherwise and particularly to those who have come from other states.

III. BE IT RESOLVED That the President appoint a committee of the Bar made up of judges of the District Courts to study the matter of pre-trial instruction and education of jurors, and if found feasible, to put a plan therefor into effect.

IV. BE IT RESOLVED That the Supreme Court give careful consideration to the present statutory provisions which may be adequate for the formation of a Judicial Council for Idaho, or a body exercising similar functions, and if found practicable that the Supreme Court proceed to the formation of such Council body.

V. BE IT RESOLVED That the Idaho State Bar favor the establishment of a legislative council with adequate appropriation for the proper functioning thereof on a continuing basis similar to that proposed by Senate Bill 53 enacted by the 28th session and vetoed.

VI. WHEREAS, At the 1935 Annual Meeting Justice Ailshie presented a paper in substance to the effect that the Supreme Court had inherent power to promulgate rules of procedure; at the 1936 meeting Justice Ailshie recommended that to remove all question the legislature be requested to confirm the power of the Court so to do; at the 1938 meeting a resolution was adopted by this Bar that the legislature pass such an Act; at the 1939 meeting the subject was again considered and it appeared to be the view that with such legislative enactment there would be no question as to the constitutional power of the court; and at the 1940 meeting similar judgment was expressed; in 1941 the Bar sponsored and secured passage of such an Act; thereafter the Supreme Court appointed a Committee on Rules of procedure for all lower courts which Committee submitted proposed rules governing procedure in the District Courts in October, 1941; and since then no appropriation, if needed, has to the knowledge of the Bar been requested by the Court, and no action has so far as known been taken to promulgate rules; and

WHEREAS, A new code for Idaho is essential and should contain Rules of Procedure if any are to be promulgated in time for inclusion therein,

RESOLVED, That the Bar requests the Supreme Court to give speedy consideration to promulgation of Rules of Procedure for District Courts, Probate Courts and Justices Court.

VII. WHEREAS, It appears to the Idaho State Bar Association that the present nonpartisan judiciary law, while accomplishing the admirable purpose of removing the judiciary from political influence and pressure, has imposed upon judicial candidates the heavy burden of personal campaign and such burden, coupled with the short and uncertain tenure of office, inadequate salaries and the absence of provision for compensation upon retirement after a period of long and faithful service, renders the judiciary unattractive to many qualified lawyers; and

WHEREAS Matters affecting the judiciary are of concern to all people in the State:

NOW, THEREFORE BE IT RESOLVED That the legislative committee of the Idaho State Bar be, and it is hereby, directed to invite representatives of other organizations interested in promoting the welfare of the residents of the state to conference with a view of agreeing

upon plans for the improvement of the laws of this state relating to the judiciary and to use its best efforts to bring about the enactment of such legislation as may be agreed upon.

VIII. RESOLVED, That the Legislature be requested to enact an act creating a code commission to be known as "1947" Idaho Code Commission", such Commission to be composed of three persons who are actively engaged in the practice of law, these Commissioners to be appointed by the Governor from 7 persons so recommended for such position by the Commissioners of the Idaho State Bar, the act to likewise provide, among other things,

(1) for authority of the Commission to contract with a reputable law book publishing company which is located within or without the State of Idaho,

(2) that the publishing company to whom the contract is given must be actively engaged in the publishing of law books and be so equipped as to maintain year in and year out a supplemental annotation service,

(3) provision for an adequate appropriation to the end that a code can be published with provision for pocket supplements and subsequent annotations, such appropriation also to provide for requisite clerical and supervisory services,

(4) that there shall be no restrictions as to procuring the codification, printing, binding without the State of Idaho
(5) that the Bar Commission appoint a Committee of three members of the Bar to draft such proposed enactment.

IX. RESOLVED That the Bar Commission appoint a committee to give careful study to the papers presented at this meeting relating to Title Insurance, Abstracts of Title, and the Simplified Plan of Land Title Registration and Abstracts of Title, and to submit a report containing definite recommendations at the next meeting of the Bar.

X. RESOLVED That in the absence of a duly constituted legislative council in the State of Idaho, that the Bar Commission appoint a committee of three members of the Bar to give study and consideration to a paper presented at this meeting relating to the drafting of legislative enactments, and if deemed advisable, to promulgate uniform suggestions for distribution to the members of this Bar relating to suggested improvement in drafting of proposed legislative enactments.

XI. RESOLVED The Standards of Examination of Abstracts of Title heretofore presented to meetings of the Idaho State Bar and to be found in the 1942 and 1944 Proceedings of the Idaho State Bar be considered as adopted by this Bar and that the same be distributed by the Bar Commission to members of this bar.

Whereupon Resolutions No. 1 and No. 2 were read, and upon motion, adopted.

Whereupon Resolution No. 3 was read, and upon motion, adopted.

Whereupon Resolution No. 4 was read, and upon motion, adopted.

Whereupon Resolution No. 5 was read.

FRED M. TAYLOR: May I take a moment to clarify this? I was a member of the last legislature. We did pass this legislative counsel bill last session. It is taken after the California act, which has been in effect since 1917. It passed by a good majority in both houses, and for reasons probably known better to the Governor than to us, it was vetoed. The bill, in essence, is this; that the legislature, by concurrent resolutions, appoint a legislative counsel. His duties or functions will be to advise legislators, advise the legislative committees and draft bills for them in the interim. He will act as counsel for commissions set up by the legislature. And incidentally, he would act on the committee for compiling or codifying of laws. In other words, he would become an expert in the drafting of legislation.

California maintains three officers for the benefit of the legislature and the Governor or any departments of the government that might have bills coming before the legislature. The purpose is to give the legislature expert help in drafting legislation.

I was like most of you and most of the lay public in my first term. The legislature is blamed for faulty laws, and no doubt they are responsible to a great extent for some. But a lot of the fault in the laws is in the drafting. Most of the legislators, as you know, are not lawyers. They don't know about those things. If they can have the benefit of an expert to help them, at least to work out the mechanics of the law, then they could confine their efforts to getting the law through, and that is about all they can do. There are usually not more than 4 or 5 lawyers in each house, and it is humanly impossible for them to go over all these bills, and, I might add, a great many of the laws that come to the legislature and to the Judiciary committee, and even laws coming from the bar and from the bar committees, have to be redrafted. They are not properly drawn. I am not criticizing those who draw them, but they are just not familiar with the rules.

That is the purpose of the legislative counsel. I drafted the bill myself. It was introduced by the judiciary committee of the Senate and passed, and it was approved by the judiciary committee of the House and passed, and it was later vetoed by the Governor. I believe it is worth while legislation. I believe it would get to the roots of the trouble in a lot of our bad law.

F. M. BISTLINE: At the 1940 meeting of the bar association here in Boise I presented a paper on legislative counsel and particularly stressed the Kansas plan which is a legislative research counsel or legislative research bureau. As I understand it, this particular bureau merely calls for the appointment of one attorney. Is that right?

FRED M. TAYLOR: Yes, but he can have assistants.

F. M. BISTLINE: After the research I did in that connection in 1940, it struck me that a research bureau, rather than an individual attorney, would be a far better system, and in the 1941 session, I drafted and presented to the house a bill, and we passed it through the house. Now, I think we are on the right track in this proposition, but I do dislike to see the resolution held down to one particular form by specifying Senate Bill No. 58. I would much rather see a study made on that, because I feel that the Kansas plan has probably worked better than the Californa plan.

Even if the legislative counsel acted between sessions, the legislators don't take office until the first of the year, and how are we going to present

him bills, as members of the legislature, to have him draft them before we take office.

I do think we are going in the right direction. That is another reason I suggested a split session, because if we are going into the scientific handling of these bills, we ought to arrange our sessions so that we can make use of these by splitting a session such as Kansas, California and other states do. I don't think it requires a constitutional amendment.

But I arise here primarily to object to this resolution—that we do not make it conform to Senate Bill 58 but leave it open for further study, because I believe there are better ways of setting it up than under Senate Bill 58.

I do not know why the Governor rejected it. But one objection that I see is that we have a legal staff in the State House over here that are drawing $4,000 a year. And as I recall it, this set up one for $5,000.00. I think we should have an equalization in salaries on things of that kind before we go too far with it.

PHILLIP J. EVANS: I think this resolution is objectionable for another reason. We are a small state. This bill proposes a multiplication of agencies that already exist. The Attorney General's office is the legal advisor of the state departments, and, by the constitution, also of the legislature. If the members of the legislature desire any assistance in the preparation of bills, they are not confirmed to the house attorney or the senate attorney that the two houses appoint. They have a right, under existing law, to go to the Attorney General's office and secure what assistance they need in the preparation and drafting of bills. I know personally that no member of the legislature has gone to the Attorney General's office and failed to get assistance in the drafting of bills. I know I have drawn several bills myself at the request of various members of the legislature, and I don't think there is any necessity of creating an additional office for this purpose when we already have the office of the Attorney General, and the constitution has made him the legal advisor of the various state departments in the state, including the legislature.

If we would make adequate appropriations to provide funds for the Attorney General's office and required him to furnish such assistance as might be necessary during the whole of the biennium in order to assist legislators in drafting these bills and give them a chance to examine existing laws and correlate and coordinate and propose new legislation, I think you would cure all of the defects without creating another agency.

I am frequently amused by some individuals who periodically burst forth into print and on the public platform denouncing the multiplication of state and federal agencies, and then come around with a resolution like this to duplicate an agency that already exists and to pay the person more than you pay the Attorney General for assuming the whole burden of the State of Idaho.

I think the bill is essentially unsound and unnecessary.

JESS HAWLEY: I believe that the approval by the bar of that bill would do it harm instead of good.

Second, waiving the constitutionality of the bill, and I think there is a grave question about it, who is going to call to the attention of this one man power what bills shall be drawn during the vacation?

You say you just want him to draft laws. Now, don't be so naive as to think that is all that will be asked. That man will have a tremendous influence. He will have a great power, and it is not a very wise idea to give any one man that much power if you can avoid it. You have got too much of that sort of thing right now in the hands of this official and that official. I am opposed to the bill for these reasons.

FRED M. TAYLOR: I have heard quite a lot of able discussion here. I have in mind that we have three branches of government, which is constitutional, I believe. One of those is the executive, and another is the legislative. I don't care whether they establish a one man legislative counsel or, as Francis has suggested, a legislative bureau, but I think something should be done about it.

Mr. Evans has suggested that the Attorney General's office is there to help the legislators. That may be true in the present Attorney General's office. But during my two terms experience up there, I haven't seen them doing very much work in the drafting of bills. It is left to the house attorney and the senate attorney. And they are called in there very unjustly and asked to draw bills on very short notice and without having the opportunity to make very much research.

As far as this man having unlimited power and all that sort of thing, as Jess has suggested, this man or bureau is going to be under the supervision of the legislature and under its control. He is not going to be under executive control. He is going to be hired by the legislature. They need that expert help whether it is one man or a bureau or whatever it might be. They need it, and I think those of us who have been in the legislature realize that.

In all deference to the Attorney General's office, I think a file should be kept of the experiences of the other states—a legislative file. They should delve into some of these qustions.

You talk about who is going to bring these matters to their attention to draft. Various departments will have bills to prepare. I have in mind that at the last session there was a bill to create sewer districts outside of incorporated villages and towns. That bill, or a similar bill from Washington, was submitted by the Department of Public Health. It didn't get to the legislature in the proper form to introduce. Where they went to have it drafted, I don't know. But there are various and sundry things of that nature they can do. The Governor, himself, of course, can call upon the Attorney General's office, but I have in mind that this should be an expert, a person who is well versed in the subject. A person who drafts legislation should be able to go into the history of the legislation of other states and get the benefit of their experience.

(A motion that the resolution be tabled was defeated.)

RALPH R. BRESHEARS: Mr. President: The vote on this motion to table indicates that probably the resolution will pass, but I want to say one more word in favor of it myself.

I don't suppose there is a lawyer in this room that has not criticized the legislature in past years for inefficiency in enacting legislation. And I don't know why the members of this bar shouldn't be interested in efficiency in government just as much as anyone else, and because we are a bar association, I don't think we are precluded from taking affirmative action to assist

the legislature in preparing laws that are not ambiguous and are well drafted, unless we are looking at it from a commercial viewpoint—that we want as much litigation over poorly prepared laws as we can have.

Now, the legislature adopted the legislative counsel hill at the last session, and it was vetoed. The legislature wanted that bill. As lawyers, I think we should be interested in seeing that something is done about it. I think we are too retiring many times, because we take the position that it is none of our business when it really is our business. It always has been the business of lawyers to help good government.

I am glad to see that Mr. Evans has taken the position, twice here this afternoon, that bureaucrats and dictators should not be sanctioned or approved by the bar association. I hope he votes the Republican ticket next fall.

FRED M. TAYLOR: I move that the resolution be amended so that it reads, "Be It Resolved that the Idaho State Bar favor the establishment of a legislative council with adequate appropriations for the proper functioning thereof on a continuing basis."

Whereupon the motion carried.

E. V. BOUGHTON: I have had some legislative experience. As a matter of fact, I was chairman of the judiciary committee of the Senate when the bar bill was introduced. That was my second year, and I know from experience, unless conditions have changed substantially, that the less the state bar has to say or the less that is mentioned about lawyers in this kind of a thing, the better off we are.

Now, just a little history that will substantiate that statement. The bar was very strongly in favor of this bar bill but I wonder how many of tbe members here know how that bill was passed. It was introduced by the livestock committee of the Senate. The judiciary committee, I think, with one exception, was very strongly in favor of it. But we knew, as a matter of fact, if we got up and wanted the passage of that bill that we wouldn't get anywhere, so this was the strategy. I, as chairman, took a neutral position. The rest of the members were violently opposed to it as far as their argument was concerned. The legislature conceived the idea that the bar was not particularly interested in that bill, and they passed that bill given them by the livestock committee.

I don't think a resolution from the state bar is going to help any in the legislature.

SAM S. GRIFFIN: I have been Secretary of this body for 23 years, and what Mr. Boughton says about the enactment of that bill is absolutely right. But on the other hand you have just heard from Mr. Ambrose, and I think Mr. Taylor and Mr. Bistline and any other legislator who has been in there in the last 15 years will confirm the fact that practically every measure presented in the past few years to the legislature by the bar has been adopted. Isn't that true George, Fred, Francis?

GEORGE AMBROSE: Yes.

FRED M. TAYLOR: Yes.

F. M. BISTLINE: Yes.

SAM S. GRIFFIN: While this organization had lots of difficulty when it was disorganized—the old voluntary association—the legislature's attitude towards the bar has completely changed since its organization, and I have had many legislators come to me and ask that the bar legislative committee pass upon bills which had been presented by others. In fact you would sometimes almost think that the legislative committee of the bar was a legislative committee for the legislature. Old history doesn't apply now so far as the confidence of the legislature exhibits in the measures presented by the State Bar of Idaho.

PRES: The question is one the original resolution as amended. All those in favor of the resolution please say "Aye."

Whereupon the motion carried.

Whereupon Resolution No. 6 was read, and, upon motion, adopted.

Whereupon Resolution No. 7 was read, and, upon motion, adopted.

Whereupon Resolution No. 8 was read, and, upon motion, adopted.

Whereupon Resolutions Nos. 9 and 10 were read, and, upon motion, adopted.

Whereupon Resolution No. 11 was read.

JUDGE DANA E. BRINCK: When I read the standards that had been presented and adopted at the last meeting, there was one that struck me as rather expensive. We have found that abstractors, in abstracting court proceedings, are getting in the habit of making a copy of the judgment roll and charging by the page for it, and we have tried to get them to give us an abstract of things that are not jurisdictional. One of the standards requires a copy of the complaint in foreclosure actions. Some of those copies are very long and run into many dollars. It is not uncommon for us to have a bill for an abstract continuation, showing merely foreclosure proceedings, costing up to $40.00 or $50.00 because of that copying.

Previous to noticing that in those minutes of the last association meeting, I had taken the matter up with Montana lawyers. Their statutes are very similar to ours, and without exception, the lawyers that I have talked to over there say they don't care to have a copy of the complaint. The complaint is abstracted to show that it states a cause of action. They claim that if it gives the prayer, even in a default case, that is enough to show the complaint states a cause of action, and if there is jurisdiction obtained by proper showing of service of process, it is binding unless appealed from. That has been expressed by the attorneys that have talked to me.

I think that one phase should be given reconsideration by the committee before adoption.

I find it here at the hottom of page 66. "The following instruments should be shown verbatim in District Court proceedings; complaint, any cross-complaint—" and I think tbe words "complaint" and "cross-complaint" should be stricken from the recommendation of the committee.

HARRY J. BENOIT: With the proposed amendment it would read this way: "Resolved that the standard of examination of abstracts of title heretofore presented at the meetings of the Idaho State Bar and found in the 1942 and 1944 proceedings of the Idaho State Bar, except that portion thereof providing that complaint and cross-complaint be shown verbatim in abstracts, be considered as adopted by this bar and that the same be distributed by the Bar Commission to the members of this bar."

Whereupon it was duly moved, seconded and carried that Resolution No. 11 be adopted.

PRES: Is there anything further?

JESS HAWLEY: May I have the privilege, for the ancient and near ancient members of the bar, of expressing respect and admiration for the younger members of the bar, particularly those who have been or are in the service. I think these young men are superior in legal education. I think they have the finest ideas of ethics. They are respectful and considerate of the Courts, the older men of the bar, and the younger men among themselves get along with consideration for each other. I feel that we are fortunate indeed to have as members of the Idaho Bar these men who will raise our standards and are raising our standards. I hope that they succeed, and we wish them all good luck and success.

The District Bars and the Idaho State Bar have been on ice for several years, and I have no criticism of any lack of effort, because the war made it impossible for men to do more than they did. But the war is over, and I trust that the District Bars and the officials of the Idaho State Bar will give some real consideration outside of these meetings to the problems of the bar. I will cite but two. Proper public relationship, which can probably be best had by the appointment of a publicity committee, so that we can get a proper view of our work, our importance and our service to the public. And second, that the officers of the state organization and the district organizations, do some real work in connection with the illegal practice of law. Gentlemen, I feel that the future of our profession is bright. I think we are growing in public esteem and favor. I believe that the public is beginning to get the notion that because of our skill, education, our work and our knowledge, that we are entitled to a good living, which means an increase in compensation over what lawyers are receiving.

PRES: Thank you, Mr. Hawley, for those timely remarks. I am sure that in so far as they deal with the younger members, and especially the service members, of this association, that they are the unanimous sentiments of every member of our association.

I wish to express my personal appreciation to the Secretary and to Mr. Smith of Boise. Both have done yeomen's work with reference to the program planning for this convention. And I also wish to express my personal appreciation to the many active committees and committee members of the Third District Bar and their wives for the splendid entertainment that they have furnished us.

Last evening we introduced to you the new President after the reorganization of the commission, and with these final remarks my duties cease. It has been a privilege to have served as a member of the commission and for the past year to have acted as your President.

Every member of the association can be of material help to the members of the commission, if, during the year, you contact them with reference to any subject or matter that you believe should be taken up or discussed at our annual meeting.

I am now going to—

EDWARD G. ROSENHEIM: We should not adjourn until there goes into the record the appreciation of this association for the fairness and dignity which you, our outgoing President, have shown while presiding over this two day session. I suggest a rising vote of thanks to our outgoing President.

PRES: Thank you very much, Mr. Rosenheim. I now have the pleasure of presenting the gavel to the Vice President for the years 1946-47, Mr. E. B. Smith of Boise, Idaho.

E. B. SMITH: In the absence of our new President, E. T. Knudson, who had to leave on the plane this morning, I accept the gavel.

Whereupon the meeting adjourned sine die.

TOWARD BETTER HANDLING OF THE PLANNING AND DEVELOPMENT OF THE WATER RESOURCES OF A BASIN

By HOWARD R. STINSON

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July 19, 1946

Introduction

I welcome this opportunity to meet the members of the Idaho State Bar and to discuss with you problems that I believe are of interest to you. The problems are ones that are before the United States Bureau of Reclamation, though in discussing them with you I present a personal view, rather than an official one. The problems are these:

1. Procuring a more orderly and better coordinated planning and authorization of projects for the control, development and use of the water resources of the Nation's western drainage basins—and the Columbia River Basin in particular; and

2. Providing a plan for carrying on irrigation developments on a reimbursable basis in those cases where construction costs properly chargeable to irrigation of new projects exceed the amount that the water users can reasonably be expected to repay in a 40-year repayment period.

Discussion of these problems is timely in this area because the development of our water resources has reached the stage where various possible uses may tend, increasingly, to conflict. The conflicts are not insoluble, but they can result in a retarding of development if not resolved now. The imminence of the conflicts and the failure of the Congress heretofore to provide an over-all basis for their resolution through existing governmental agencies has led to several suggestions that are of far reaching consequences. Among these are the proposals embodied in Senator Mitchell's bill, S. 1716. It is not my intention here, however, to discuss these proposals. I have another proposal that merits attention.

These problems, I think, are of especial interest to you as lawyers, both by reason of your general interest in legislation—for any solution of the problems requires legislation—and because many of you have direct interests through your clients such as irrigation districts, canal companies, and municipalities with problems in domestic water supplies.

Basin-wide Planning

There is, in my opinion, great need for a legislative direction to existing federal agencies concerned with development of water resources in the Columbia River Basin in the matter of the planning of these developments. The need is for a directive for the development, jointly by existing agencies, of a basin-wide plan with respect to works for the control and use of the water resources of the basin, the authorization of these works in an orderly manner; and for a formula for determining to which agency falls the responsibility for construction and operation and maintenance.

The Existing Authorities

I will outline later a proposal to meet this need. The better understanding of it requires at least general knowledge of the existing authorities and responsibilities in this field, so far as the Columbia Basin is concerned.

Those Concerning the Bureau of Reclamation

Consider, first, those concerning the Bureau of Reclamation, an agency with which most of you are familiar.

It is authorized to make investigations and reports on projects having the single purpose of providing water for irrigation, and on projects which serve a multiplicity of purposes, such as the development and control of water for irrigation, domestic use, hydroelectric power, prevention of floods, and navigation. It does not have authorization for projects which concern only the prevention of floods or navigation. These authorizations are found scattered through the Federal Reclamation Laws (being the act of June 17, 1902 (32 Stat. 388) and acts amendatory thereof or supplementary thereto), but chiefly in the Reclamation Project Act of 1939 (53 Stat. 1187) and in the authorizations for investigations appearing in the Interior Department's annual appropriation acts under the heading "Bureau of Reclamation."

The authorization of projects investigated and reported on by the Bureau of Reclamation is accomplished in this manner:

> The Reclamation Project Act of 1939 sets up standards by which the economic feasibility of the proposed works are to be judged. If a proposed undertaking meets these standards, the presentation of the report to the Congress results in the technical authorization of the project, but it can be built only after the Congress has made specific appropriations for it. If the project fails to meet the standards set out in the act, its authorization requires specific legislation.

All reports on proposed reclamation projects are required to be cleared with the interested states and with the Secretary of War under the provisions of the 1944 Flood Control Act. (58 Stat. 887).

The reporting and authorization mechanism that I have just described was framed primarily with individual projects in mind. There is at present no basic statutory procedure for the making of basin-wide reports. Such reports have been made by the Bureau of Reclamation, as in the case of the Missouri River Basin (Sen. Doc. No. 247, 78th Cong., 2d sess.), and others in process, including one for the Columbia River Basin. But the authorization of projects on the basis of such reports requires special legislation.

Those Concerning the Corps of Engineers

The existing statutory authorities of the Corps of Engineers in the field concerning us here are not so well known to me as are those with respect to Reclamation. However, I believe my knowledge is sufficient to give at least a broad outline.

The scope of investigations for new projects appears to depend on the appropriation act providing the funds therefor. The making of investigations appears to require special authorization for each project, though these are generally handled in omnibus bills. Of recent years, such bills have confined authorized investigations, in the case of Rivers and Harbors bills, to "improvements of rivers, harbors and other waterways," * and in the case of Flood Control bills, to "flood control and allied purposes . . . except as otherwise provided by Congress. **

Authorization of projects reported on by the Corps of Engineers requires specific action by the Congress, this being done ordinarily by omnibus bills, such as are now pending in the Congress.

There are no standards prescribed by law for determining whether any such projects should be reported or authorized.

As larger projects were being investigated and recommended for authorization by the Bureau of Reclamation and the Corps of Engineers, and it appeared that the water supply of various basins might not be adequate to meet conflicting demands on it, the need for coordination of plans of these projects became evident. Irrigationists in particular became concerned lest the development of larger and larger navigation and flood control projects result in serious detriment to existing irrigation projects and retard or preclude the building of new irrigation projects. The situation came to a head in the Missouri River Basin in connection with the seeming conflicts between the Reclamation plan and the Corps of Engineers plan for the Basin. Compromise plans were evolved and adopted by the Congress, and, as a direct result of this, two important features were written into the 1944 Flood Control Act. First, it was provided that plans by the Corps for flood control and navigation projects affecting waters arising west of the 97th meridian should be reviewed by the interested states and the Secretary of the Interior and that Interior's plans for reclamation projects should be cleared with the Secretary of War, as well as the interested states. Secondly, it was provided expressly that water rights for domestic irrigation and industrial uses were to be recognized as having primacy over use for flood control and navigation.

The stated purposes of the first of these provisions were:

> "of facilitating the coordination of plans for the construction and operation of proposed works with other plans"; and
>
> "to facilitate the consideration of projects on a basis of comprehensive and coordinated development."

These purposes are excellent, and the provisions are a marked advance in the achievement of them.

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* Act of June 20, 1938, 52 Stat. 802, but cf. the act of March 3, 1925, 43 Stat. 1186.
** Act of June 22, 1936, 49 Stat. 1570, and sections 2 and 11 of the 1944 Flood Control Act.

Shortcomings of Existing Provisions

Nevertheless, they fail, in my judgment, to get at the root of the problems we are discussing here. There are two weaknesses. First, they fail to provide a definition—a needed fundamental definition—of the relative spheres of investigational activities of the Bureau of Reclamation and the Corps of Engineers, with the result that investigations continue to overlap. Secondly, there is no directive by the Congress that these two agencies collaborate in the preparation of a master plan for the various western river basins. In lieu of getting at the problems at their sources, the 1944 Flood Control Act provisions attempt to accomplish coordination after each agency has made its investigation and has its plans fully developed. Even with the sincerest desire to coordinate at that stage it would be difficult. It is the more so when the Congress has failed to indicate the relative responsibilities of each agency.

A Suggested Solution

To meet this situation I suggest that serious consideration be given to a restatement of the basic authority, both of the Bureau of Reclamation and of the Corps of Engineers, as to the making of investigations of works for the control and use of waters in western river basins, and as to the responsibilities of each for the construction and operation of such projects. To bring the proposal closer to home, I state it in terms of the Columbia River Basin, though I believe it has application to virtually all western river basins where the problems I have discussed here are to be found.

In the matter of investigations and reporting on new works, I suggest that there be enacted a statute providing substantially as follows:

> "That the Bureau of Reclamation and the Corps of Engineers prepare jointly a report on measures and works to be undertaken for the control, development and use of the water resources of the Columbia River Basin, and that they recommend the order in which the proposed works and other measures be undertaken."

As I see it, such a statute should indicate the general scope of the investigations and the purposes to be served by the works to be proposed, and should direct that the plan give specific attention to irrigation, hydroelectric power, flood control, navigation, and pollution abatement, with incidental consideration to be given to fish and wildlife and recreation problems as these matters would be affected by proposed works for the other major purposes. It would be useful also to have the statute indicate the procedure by which the various proposed works would become authorized.

It will occur to you that such a plan could result in a stalemate unless provision was made for the settlement of major conflicts that could arise in the preparation of such a plan. Thinking in terms of existing agencies, the Bureau of the Budget would seem to me to be the logical one for that important role. Whatever the agency were to be, its responsibility in this regard should be clearly spelled out in the statute.

As a desirable, and I think essential, counterpart of the provisions suggested above with respect to the making of a basin plan would be a basic definition by statute of the several responsibilities of the Bureau of Reclamation and the Corps of Engineers with respect to the construction and operation

of the works that would be recommended for construction in the joint Basin report. The provision on this point might be substantially as follows:

> "That the Corps of Engineers should build and operate all works solely for the control of floods or for the benefit of navigation, and those multiple-purpose works where the sum of the benefits to accrue to those two purposes would exceed those to accrue to the other purposes.
>
> "That the Bureau of Reclamation should build and operate all works devoted solely to irrigation or power, and those multiple-purpose works where the sum of the benefits to accrue to those two purposes would exceed those to accrue to flood control and navigation."

The foregoing proposal has much to commend it for further serious consideration.

First. It would meet the weaknesses of the coordination procedure established by the 1944 Flood Control Act. A jointly developed plan made pursuant to a congressional directive and with predetermined responsibilities for construction and operation of proposed works will present problems, of course, but not nearly so difficult, I suggest, as those inherent in trying to coordinate plans which have been developed by two different agencies without the benefit of any basic definitions of the relative responsibilities of each agency.

Second. The suggestion would be a means of giving legal basis to a unified basin-wide plan with respect to proposed projects in this Basin. There are plans now being prepared by the Corps of Engineers and by the Bureau of Reclamation, but without the benefit of a congressional directive that these plans be unified, and without benefit of knowing what agencies will have the responsibilities for the works being reported on.

Third. Such a directive for a joint basin-wide plan would result in the pooling of a great wealth of technical information and would bring to bear on the development of the plan some of the best experience available in the planning field.

Finally, to provide for the carrying out of such a basin-wide plan by the two agencies mentioned, with specified responsibilities therefor, would be taking advantage of already existing, thoroughly experienced and well-functioning administrative and engineering organizations. Moreover, these organizations would be proceeding with their responsibilities under the provisions of tested and well understood laws, both federal and state.

The difficulty presented in the proposal would be in providing a satisfactory way of resolving possible conflicts between proposals of the Corps of Engineers and of the Bureau of Reclamation. This, however, I think can be solved. And, considering the marked advantages of the proposal over the existing situation, I feel that this possible difficulty is one for which a solution should be sought.

Basin-wide Allocations of Costs

Repayment problems on reclamation projects are, I have no doubt, as familiar to many of you here as they are to those of us who work with them for the Bureau of Reclamation. On projects that are now in the planning stage these problems are more serious than ever. This is so because there

are fewer and fewer areas where arid lands can be developed by irrigation at a cost that can be repaid fully within the 40-year repayment period now provided by law. Yet, these projects are ones that, measured in terms of benefits as against total costs, are desirable.

In the circumstances we need to find a suitable plan whereby such desirable works can be developed under a repayment plan in keeping with the water users' repayment ability.

The Federal Reclamation Laws now require that all costs allocated to irrigation and to power be repaid. Costs allocated to flood control and navigation are treated as nonreimbursable.* Costs allocated to irrigation and which are assigned to be repaid by water users must be repaid in 40 years, exclusive of a development period of not to exceed 10 years. In the case of a multiple-purpose project, which includes a power plant, the law permits the irrigation costs in excess of what the water users can pay to be assigned for return from power revenues. The application of the latter is illustrated in the case of Anderson Ranch Dam and the Columbia Basin Project.

In the case of a new project in which the costs are allocable only to irrigation, the probabilities are that the cost will exceed the repayment ability—that is to say that, even though the project is a desirable one, it is not a feasible undertaking. This would be true also of a multiple-purpose project where the power development is not able to assume the full burden of the excess irrigation costs.

If such projects are to be built, some way must be found to meet this problem. One way might be to seek nonreimbursable appropriations for the excess irrigation costs. Another would be to seek longer repayment periods where needed. The first of these, I think, can be dismissed as unlikely and, in the long run, undesirable. The second has possibilities but its use will be limited.

There is a third possibility—the application of a principle that was specially authorized for use in the Missouri Valley by section 9 of the 1944 Flood Control Act. The plan applied to the Columbia Basin would operate about as follows:

> All construction costs of projected water resource developments would be allocated among these purposes: irrigation, power, flood control, navigation, pollution abatement, recreation, and fish and wildlife protection.
>
> Irrigation and power costs would be reimbursable, but these costs would be thrown into a common account for the entire Basin. Repayment of the reimbursable costs would be effected in this way: The water users of each unit would be required to repay the amount they could reasonably be expected to repay in present repayment periods. Power would be expected to repay costs allocated to power, within a reasonable period from the time each plant went into production, and, in addition, those irrigation costs for the Basin as a whole that are beyond the water users ability to pay.

* Section 9 of the Reclamation Project Act of 1939 (53 Stat. 1187).

The manner of repayment, I suggest, would be as is provided in the pending Robinson bill, H. R. 6574, being different only in that it would be applied to the Basin as a whole rather than to each project separately.

To make this suggestion effective, it would be desirable, though not essential, to have it written into the basic reclamation law. So handled, there would then be no question about the propriety of incorporating the plan in the basin report that would be made under the first suggestion that I have just discussed with you.

The proposal here made is in terms of future projects in the Basin. So long as each unit of the basin plan can pass a test such as is provided by a favorable cost-benefit ratio, I think there can be no objection to assigning excess irrigation costs for repayment from power revenues. This suggests that there be merit to considering a retroactive application of the proposal to projects heretofore authorized, particularly some of the more recently authorized high cost projects. I throw out this latter idea now, however, without full consideration of what might prove to be some knotty problems in its application.

The problems that I have discussed here are really important—more important than I may have been able to make them appear in this sketchy presentation. Whether the suggestions for meeting them merit more serious consideration may be open to debate. I think they do—some of you will have other ideas. The important thing is that the problems be given full, thoughtful attention, for these problems are bound to come up for congressional action in various ways. Whether the solutions reached are sound may depend on the extent to which groups such as yours have given attention to them.

OPERATIONS OF THE VETERANS ADMINISTRATION

By Edwin U. Driscoll

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The genesis of the Veterans Administration is a long and interesting one. It is closely related to and its growth identified with the historical growth and development of the nation for the obvious reason that its work is almost entirely concerned with the casualties and aftermath of war, which we have had to wage in our struggle for independent national life in the larger community of nations. The volume and ever-widening field of our work reflects the cost of war and its by-product of social and economic maladjustments so cruelly evidenced by the mental or physical injuries suffered during times of armed conflict.

The philosophy that it is the duty of the state to care for those members of its society who have suffered physical or mental injuries and economic displacement because of service in its behalf in time of war is not a new or modern one. It is as ancient as the institution of government itself.

While this nation was still in its swaddling clothes of national infancy, that duty was first recognized with the creation of the first pension legislation in 1789. This act did not specify any particular procedure for the payment of pensions other than to provide that pensions granted be continued as the President might direct. Therefore during the early years of the nation, various pension laws were enacted for the relief of distress of those who

served in the armed forces in the struggle to found and maintain the new nation. Each of these laws was apparently enacted independently of the others, and each provided for its own administration, some by the Secretary of War or Navy; others by Congress, or by the United States circuit courts. In 1832 the first of many consolidations took place with the creation of the position of Commissioner of Pensions under the direction of the Secretary of War. With the establishment of the Department of Interior in 1849, a Bureau of Pensions was created and became a part of that department.

Until 1865 no Federal provision had been made for the establishment of national homes for those who had served in the armed forces. Many of the provisions for such homes were then, as now, based upon state laws. But in that year (1865), as a result of the war between the states, a National Asylum for Disabled National Volunteer Soldiers was established by Congress. Later (1873) the name was changed to National *Home* for Disabled Volunteer Soldiers. This agency was also an independent establishment.

With the advent of the first World War in 1914, which imposed extra hazardous risks upon American shipping engaged in cargoing supplies to the belligerents, the Bureau of War Risk Insurance was created as a unit of the Treasury Department for the purpose of insuring American bottoms and their cargoes against the risks of sea warfare. Upon the entry of the United States into the conflict as an actual participant, the responsibilities of War Risk Insurance were broadened to include a form of insurance against the risk of war to persons as well as ships; masters, officers, and the crews of American merchant vessels were so insured. Still later in the same year, 1917, the act was again broadened to provide for the payment of benefit allowances and allotments to the dependents of men in the armed services with provisions for payment of compensation in case of death or disability, and for medical and surgical treatment of disabled ex-servicemen and the writing of insurance against their death or permanent and total disablement.

This new governmental departure into the *insurance* of men in the armed services is closely related to another of the oldest of administrative services of government, the Public Health Service, which had its origin in an act of Congress, July, 1798. Created at a time when American clipper ships were carrying the Stars and Stripes to every corner of the globe, laying the foundation of our National policy of freedom of the seas, its *original* purpose was to establish marine hospitals for the care of American merchant seamen, and for a hundred years it was in fact known as the Marine Hospital Service. Shortly after the Spanish-American War, the name was changed to the Public Health and Marine Hospital Service, and in 1912 the name was again changed to the Public Health Service and placed under the direction of the Surgeon-General. In the meantime it had been delegated broad responsibilities relating to the protection of the public health of the nation generally.

The act which amended the Bureau of War Risk Insurance (1917), to which I have already referred, placed the responsibility of providing medical, surgical, and hospital service and care of ex-servicemen upon the newly created bureau, but made no provisions for the establishment of facilities with which to carry out its duties, therefore, it was necessary for the Bureau of War Risk Insurance to delegate that care to the United States Public Health Service.

The Vocational Rehabilitation Act of 1918 provided for the training and rehabilitation through educational facilities of those men who had been disabled by reason of service and who were unable to afterwards carry on a gainful occupation successfully. The responsibility for the administering of this law was given to a Federal Board for Vocational Education and imposed upon them the responsibility of providing facilities, courses, and instructors necessary to insure proper training and rehabilitation for disabled veterans.

Now in 1921 occurred the first of two principal consolidations of the various bureaus and agencies I have mentional which were charged with the administration of veterans' affairs. This was the creation of the Veterans Bureau as an independent establishment by act of Congress. This act abolished the Bureau of War Risk Insurance and conferred its powers and duties on the Veterans Bureau. It transferred the duties relating to vocational training of veterans to the new agency. Also transferred were the personnel, properties, etc., of the United States Public Health Service pertaining to medical examination, care, and treatment of ex-servicemen.

For the next few years there were numerous amendments to that act and the creation of added duties and responsibilities.

You will observe that all of these various acts and agencies designed for the care and protection of men and women who had served the nation in time of war, in their entirety consist of many overlapping and duplicated spheres of responsibility and authority. As a result of this general hodgepodge of legislation and responsibility, the Veterans Administration, as it is known today, came into being in 1930 for the expressed purpose of administering *all* laws enacted by Congress granting benefits to discharged members of the armed forces of the United States and their dependents. It was and is an all-inclusive act of veterans' affairs. It charges the Administrator with the responsibility for all medical, hospital and domiciliary care; for the rating and payment of compensation and pensions; vocational rehabilitation and training; education; the guarantee of loans for purchase of homes, farms, or for assistance in readjustment into business, insurance, both war risk insurance of World War I and the National Service Life of World War II, and *any other benefits* to which veterans or their dependents may be entitled by law.

A brief word as to the organizational structure of the Veterans Administration as it is today may be of interest and helpful to those among you who may have occasion to contact it upon your own or a client's behalf. The basic authority to administer the law is, of course, lodged in the Administrator of Veterans Affairs, General Omar Bradley, in the Central Office located at Washington, D. C. Prior to 1945 nearly all of the administrative policies and functions of veterans' affairs were centralized and acted upon in Washington; but because of the literally millions of cases which were and are required to be handled as a result of the staggering number of men who engaged in World War II, it was necessary to decentralize the work of the Administration as much as possible. To accomplish this a broad and far-reaching reorganization was effected by the creation of branch offices throughout the United States and the delegation to these branch offices of broad administrative and technical authority and power formerly exercised by the Central Office at Washington alone.

Branch Office No. 11, located at Seattle, has jurisdiction of all veterans' affairs in the States of Montana, Oregon, Washington, Idaho, and the Territory of Alaska, and it is to that Branch Office that our Regional Office here in Boise is now directly responsible. By reason of the delegation of

authority, to which I have referred, and the further delegation of authority to Regional Offices, it is now possible for us to render direct and local service or to secure fast and definite action from the Branch Office at Seattle. You will readily appreciate, I am sure, that this is a very big improvement in the manner of handling cases and problems, and securing expeditious action.

The Regional Office located here in Boise has jurisdiction over all veterans' affairs within the State of Idaho. There are seven principal divisions of activity each of which is concerned with and responsible for the direct administration of laws enacted for the benefit of veterans and their dependents in its delegated sphere of responsibility. For example, the Adjudication Division is responsible for the development of evidence and the preparation and adjudication of all claims for compensation, pension, and other benefits awardable under existing laws; the Vocational Rehabilitation and Education Division is responsible for the supervision of all educational activities and instruction and supervision of all personnel receiving training and for the maintaining of proper standards of accomplishments; the Loan Guarantee Division is responsible for preliminary and final operations incident to and including the actual guarantee of loans for homes, businesses, and farms, under appropriate provision of law; the Insurance Division is responsible for the explanation to the public and to veterans and to their dependents and other claimants the provisions of insurance regarding reinstatement or conversion of insurance policies and in effecting policy adjustments and the collection of premiums; the Medical Division is responsible for the examination of claimants and beneficiaries to determine the nature and extent of disease and injury for adjudication purposes. They are responsible also for determining the need for hospitalization for out-patient treatment and for the rendering of treatment and care to out-patients and hospitalized beneficiaries; the Contact Division, of which there are numerous offices throughout the State, is maintained by representatives engaged in rendering assistance to claimants and beneficiaries and generally, advising with veterans and their dependents with respect to the rights and privileges under the various laws enacted by Congress; and the Legal Division, which is organized under the general supervision of a Solicitor at Washington who, at the present time, is Mr. E. E. Odom, and his Assistant for the area under the jurisdiction of Branch Office No. 11 at Seattle, Mr. John C. Shunk.

The Legal Division, through the Chief Attorney, represents the Solicitor in the field offices, of which the Boise Regional Office is one, and thereby is the legal advisor to the Manager of the office to which he is assigned, and the other field stations of the Veterans Administration located within the area assigned to the Regional Office. That area, insofar as we are here concerned with, is the entire State of Idaho.

Some of the particular things for which the Legal Division is directly responsible are the making of all field examinations or investigations relative to disputed claims for compensation or pensions; the conducting of all investigations involving violations of laws administered by the Veterans Administration which may lead to either civil or criminal action by the Government; to pass upon all contracts and leases; to determine and certify the legality of all appointments of guardians or other fiduciaries responsible for the estate of incompetent veterans or minor children of deceased veterans; render such opinions and interpretations as may be requested by the Manager or by the various division heads regarding any question of law or interpretation of regulations or directives pertaining to internal operations and procedures.

It is not a function of the Chief Attorney's office to attempt to supervise the administration of the laws, but it is very definitely his duty to see that all persons for whose benefit the laws are enacted receive such benefits and are protected in all respects in the application of the law and the regulations

By far the larger part of the work of the office of Chief Attorney is in relation to the payment of benefits to incompetent veterans and their dependents or to minor children of deceased veterans. In order to pay these benefits to them or their dependents, it is necessary that someone be appointed who has the legal capacity to receive such benefits and who will apply them for the maintenance, the use, and care of the ward. It is within this field of work, wherein we are constantly in touch with both the Bench and the Bar, that we most earnestly solicit your closest cooperation and advice and counsel. And in that regard I ask you to bear in mind that our primary and continuing consideration with respect to either the establishment of these guardianships or their continuation is the protection of the dependent veteran ward and the conservation of his estate or the care of his dependents. The same considerations are also always first in our mind with respect to the administration of the estates of minor wards under the care of the person certified as their custodian. Let me repeat that it is no part of the office of the Chief Attorney to in any sense or at any time replace the professional services of the Bar. Rather, it is our duty and our endeavor to enlist your assistance both professional and personal within the community where you reside in order that we may, to the very higher degree, accomplish the worthy end of fulfilling the trust of care and maintenance of these unfortunate casualties of war.

Prior to 1943, the appointment of guardians and supervision of the administration of veterans estates was for the most part governed by the general guardianship laws. At the 1943 session of the legislature, however there was enacted the Uniform Veterans Guardianship Act, which had and has for its principal objective, the providing of uniform procedures and requisites with respect to the appointment of guardians for veterans who are entitled to receive benefits from the Veterans Administration and to, insofar as possible, expedite such appointments with as little difficulty and formality as possible consistent with the protection and conservation of their estates. Most of you are familiar with the general provisions of this Act and I shall not burden you with a resume in detail, but I do believe that it will be helpful to consider briefly a few of its major provisions. First, is the provision that the Administrator of Veterans Affairs is a party in interest in any proceeding for appointment or removal of a guardian whose estate includes assets derived *in whole or in part* from benefits paid by the Veterans Administration. In all such cases, the Veterans Administration must be given fifteen days' notice *regarding any hearing concerned with the* appointment or removal of guardians *or their administration* of the estate.

Except for a corporate guardian or a guardian of blood relation, no person may be a guardian for more than five wards at one time. Evidence of the necessity of guardianship is established upon the allegation that a veteran has been rated incompetent by the Veterans Administration and filing of a certificate by the Administrator to that effect. In the case of infants; the fact that appointment is necessary as a condition precedent to

the payment of moneys due, and certification of infancy as shown by V A records is also prima facie evidence of necessity for such appointment.

Compensation of guardians is fixed at not more than 5% of the moneys received during the period covered by the accounting, except upon evidence of extraordinary services by any guardian, in which case the court may authorize reasonable additional compensation. Investments of surplus funds must be made in such securities or property as authorized under the general laws of the state, but only upon prior order of the court, except that funds may be invested without prior authorization in direct interest bearing obligations of the state, or the United States, or in any obligations unconditionally guaranteed by the United States.

With respect to the maintenance and support of the ward, it is interesting to note in the Act, that no part of the income of the estate shall be used for the support or maintenance of *any person other than the ward, the spouse and the minor children of the ward, except upon petition to and prior order of the court after a hearing.* There are additional and special provisions for petitions and accountings and notices and hearings regarding them, and with respect to all such proceedings in every case, notice must be served upon the Veterans Administration unless it is waived in writing.

There are numerous other provisions, all of which deal in particularity with the problems surrounding the administration of the estates of incompetent veterans or their dependents, such as the method by which a home may be purchased for the ward, a discharge of the guardian and release of sureties and restoration to competency upon certification by the Veterans Administration that he has been examined and found competent.

After the guardianship is established, it then becomes the duty of the Office of Chief Attorney to provide the guardian with information at all times as to the benefits and awards payable, to supply the guardian with accounting forms, and to review and approve of the annual accountings which are rendered. In reviewing and considering the approval of annual accountings, we must in all cases make sure that the bond of the guardian equals or exceeds the value of the estate; that the securities in the hands of the guardian have been exhibited to the bank or other safe depository and their certification attached to the accounting; and, of course, if there are expenditures which have been made for improper purposes or in excessive amounts, it is our obligation to object to them and call the attention of the court to them. This is again with the ultimate and prime objective in mind of preserving and conserving for the ward or his dependents the benefits which are being paid him. It is also the duty of the Chief Attorney to see that the dependents of the incompetent are provided for in apportioned amounts from his basic compensation, and if some of these dependents in turn become incompetent, it is our duty to see that a guardian is appointed for that dependent incompetent to receive the apportioned part of the benefits payable to him or her.

The custodianships to which I have referred as comprising also a very large part of the work in the office of the Chief Attorney, are purely a creation of the Veterans Administration itself under appropriate laws of Congress and the regulations which have been issued to give them effect. Briefly, they are designed to eliminate all of the formal legal steps necessary for the payments of benefits, in cases where a guardianship would otherwise be necessary. They are confined to the payment of benefits such as death

pension, insurance benefits or apportioned amounts of disability compensation to the *minor children* of veterans or to the *wives* of incompetent veterans. By far the larger number of these custodial arrangements arise by reason of the death of the veteran who was either killed in action or died as a result of his service, and has left a widow and minor children. In some cases the mother is also deceased, in which case the custodian may be an aunt, an uncle or a grandparent of the minor children or any other person who has the right of custody. No application or petition to the courts is necessary in these cases, the policy of the Veterans Administration being to make the payments of benefits directly to the person having the legal custody of the claimant in the most direct and simplest manner and method. It is required, however, that annual accountings be made with respect to the use of the funds which are paid for the benefit of the ward, and that any expenditures or investments which are made with such funds be made only upon the approval of the Veterans Administration. A yearly contact or survey is conducted by the office of the Chief Attorney in these cases, not for the purpose of supervising the care and maintenance of the ward but for the purpose of ascertaining whether or not the ward is receiving the benefits of the money which has been appropriated for its care and maintenance.

As in the case of guardians, it is the duty of the Chief Attorney in regard to custodians and their wards, to see that they receive the full benefit of the laws which have been enacted for their care and maintenance; and should it develop that other or additional benefits are due to such ward, that application is made for them, and that in all respects their rights and privileges are fully protected.

Since the custodianship is founded upon the relation of legal custody, it terminates upon the ward reaching the age of majority. At that time, a final accounting is required, and any balance of funds which remain on hand are paid in full to the ward and thereafter payments of the benefits are made directly. In case, however, a ward, for some reason, physical or mental, be considered incompetent to handle such funds for direct payment at the time they reach majority, it is the duty of the Chief Attorney to see that a guardian is appointed in order that the payments may continue to be made to someone responsible for them in their place and stead.

What manner of people are these who have, by reason of injury or death suffered in the service of their country and become dependents of their Government? Who were they? What was their occupation prior to their service or death? How many are there? How much do these awards and benefits amount to and what does it represent in sum totals of moneys actually paid or in estimates of economic loss to the nation? These questions and many others you have no doubt asked yourselves and each other many times. The answers are as many and as varied as the number of cases in the files, but in conclusion I shall try, in general terms, to answer some of them and by illustration suggest the answer to others.

The benefits which are paid depend upon numerous factors: occupation at the time the veteran entered service; whether the injury suffered was service-connected or non-service-connected; the extent and nature of injury; in insurance cases, the amount of the policy and the age of the beneficiary and the choice of option for payment selected. Depending upon some or all of the factors which I have named and others too numerous to detail, the awards and payments may be as little as $4.00 or $5.00 per month and as

much as $150.00 or $300.00 per month in case of total and permanent service-connected disability with loss of limbs or blindness.

Regarding the payment and award of these benefits, let me make one point very clear: It is always our privilege to question the wisdom of or quarrel with Congress, which enacts the law, but our quarrel should remain with the Congress, and when these awards and benefits have become established by the adjudicative process under valid law, whether an award of compensation for service-connected injury or for pension or of insurance benefits, they assume the character and become in *fact* a matter of *right* and not a governmental largesse.

You may make your estimates as to the proportions of this enormous cost. As of July 1, the end of the Fiscal Year 1945-1946, in the Boise Regional Office, which, parenthetically speaking, is one of the smallest of the Regional Offices in concept of numbers of cases, there was a total of more than 400 active guardianships and custodians such as we have been discussing. These fiduciaries had under their care a total of 526 incompetent or minor wards, and of these 526, 416 were dependent children. These figures do not include of course the hundreds and contingent thousands of disahled men and women who receive benefits payable to them directly.

In terms of money there is held in trust by various guardians and custodians accountable to the Boise Regional Office, at the present time in excess of $630,000.00. During the last fiscal year there was paid to fiduciaries for the use of their wards almost $200,000.00. These sums, of course, are constantly increasing as the devastating and disabling effect of World War II continues to show itself.

Some of the guardianships to which I have referred have been in existence since the very earliest days of the Veterans Bureau. Indeed, one such estate was certified in 1919 at a time when a part of our work was still the duty of the Public Health Service. Others are as recent as this morning. In amounts of assets accumulated for the use of the wards and their dependents, individually, they range from the very smallest to as large as $25,000.00. Most of these large estates were accumulated at a time when the law required the continued payment for total disability to a veteran who was confined to a hospital even though he had no dependents, and many of them have had to be confined during all the years since World War I. As the law is now written, the payment of these benefits is only continued in case the veteran has dependents. Otherwise, a small nominal amount is deposited to his credit with the Manager of the Hospital for his personal needs.

The personal histories which are portrayed by the files are as interesting and dramatic as life itself. There is humor in some and tragedy in everyone. There are as many as seven or eight children in a single family, each of which receive a payment every month until they reach majority. These payments provide for necessities, for school, clothes, and food. In some cases the later education of the boy or girl. Some of course provide assistance to the surviving parent or other custodian is able to accumulate the funds for the entire family where economic circumstances require such use.

There have been cases of course, where the custodian or guardian has mis-used the funds, denied their wards the commonest necessities, or permitted them, in the case of children, to become delinquent; in these cases, through the assistance and with the cooperation of tbe Red Cross, Veterans Organization,

or Welfare Agencies and you lawyers we have had to sharply correct the situation. However, thus far in the Boise Office, there has been but one criminal defalcation of guardianship funds.

How long will it be necessary for us to continue these laws and what are the prospects of being able to discontinue the administration of these benefits? I do not know, but in 1906 the Bureau of Pensions paid the last claim to the last dependent survivor of a soldier of the Revolutionary War. Last year, 1945, the Veterans Administration paid the last claim to the last dependent beneficiary of a soldier of the War of 1812. In the Boise office today we are paying benefits to dependent and incompetent children of veterans of the Civil War, Spanish-American War, of World War I, and of World War II.

In conclusion, permit me to express my great appreciation of this opportunity to discuss with you these matters to which I have referred. I hope my remarks have been informative. I *earnestly* hope that they have been provocative of thought regarding the very real and lasting job which the Veterans Administration has before it. That job is worthy of the very highest degree of trust and fidelity and the utmost of our labors. If we who are charged with the responsibility of carrying out the laws of Congress in fulfillment of these obligations are to do our work well and efficiently to the end that the nation's promises be kept, we must have your help and assistance both technical and personal and your encouragement.

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